

# THE HIGH COST OF “MISLEADING ADVERTISING”

The Gambling Commission’s decision to fine one operator £300,000 for breaching marketing and advertising codes should serve as a warning to other operators that the regulator is getting serious about consumer protection, says **Bahar Alaeddini** of Harris Hagan.

On 2 May, 2017 the Gambling Commission (the Commission) published a decision following a review of BGO Entertainment Limited’s (BGO) remote operating licence in relation to breaches of conditions relating to marketing and advertising on its own website and three affiliate websites. BGO was fined £300,000, demonstrating the Commission’s further strengthening of its focus on consumer protection. This is a landmark decision because it is the

first financial penalty imposed by the Commission for advertising failings.

### Marketing checklist

In summary, in relation to all marketing and advertising activities, Commission licensees are required to comply with the following:

- a) the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code), which applies to non-broadcast advertising;

- b) the Television and Radio Advertising Standards Code (the BCAP Code), which applies to broadcast advertising;
- c) the Gambling Industry Code of Socially Responsible Advertising, which applies to all gambling advertising in the UK (the Industry Code); and
- d) the Commission’s own licence conditions and codes of practice (LCCP).

### Summary of LCCP requirements

As part of complying with the LCCP requirements, Commission licensees are required to comply with the following:

LCCP provision	Summarised requirement
Social responsibility code provision 1.1.2	<ul style="list-style-type: none"> <li>• All licensees must take responsibility for third parties (including affiliates) with whom they contract for the provision of any aspect relating to the licensed activities</li> <li>• All licensees must ensure that the terms on which they contract with such third parties:                             <ul style="list-style-type: none"> <li>- require the third party to conduct themselves as if they were bound by the LCCP</li> <li>- oblige the third party to provide information to the licensee as they may reasonably require to comply with their information reporting and other obligations to the Commission</li> <li>- enable the licensee to terminate the third party’s contract promptly if the third party is in breach of contract or has otherwise acted in a manner which is inconsistent with the licensing objectives</li> </ul> </li> </ul>
Ordinary code provision 5.1.6	<ul style="list-style-type: none"> <li>• All licensees (except lottery licensees) must comply with advertising codes (as listed above)</li> <li>• All advertising of gambling must be undertaken in a socially responsible way</li> <li>• Marketing communications must not include a child or young person</li> <li>• No one may behave in an adolescent, juvenile or loutish way</li> <li>• Restrictions regarding the use of 25-year-olds in advertising</li> </ul>
Social responsibility code provision 5.1.7	<ul style="list-style-type: none"> <li>• All licensees must satisfy themselves that all marketing and advertising is not misleading, including in relation to free bets</li> <li>• All marketing incentives must comply with the CAP or BCAP code relating to free bets and bonuses</li> <li>• All marketing incentives must state significant limitations and qualifications</li> <li>• Where the marketing is limited by time or space, as much information about significant conditions must be provided with easy access to all the significant conditions</li> <li>• T&amp;Cs relating to free bets and significant conditions likely to affect a decision to participate should be no more than one click away from the advertisements, otherwise the advertisement will be seen as misleading</li> <li>• T&amp;Cs of each marketing incentive must be made available for the full duration of the promotion</li> </ul>
Ordinary code provision 5.1.8	<ul style="list-style-type: none"> <li>• No advertising or other marketing information (specific or general) should be on any web page/screen or micro site that provides advice or information on responsible gambling</li> </ul>

## BGO review

In July 2015 the Commission first raised concerns with BGO about its advertising. This was following the Commission's call for information in June 2015 relating to compliance with the revised LCCP and (then) new requirements in social responsibility code provision 5.1.7 relating to marketing and advertising, which were introduced in May 2015. The Commission identified that BGO's (and others') advertisements did not include the significant limitations and qualifications relating to promotions and were therefore potentially misleading to consumers:

BGO failed to take prompt and effective action to address the issues identified by the Commission and provided assurances that it understood the requirements and had taken action to ensure they were met. However, the Commission continued to find evidence that advertisements on BGO's own website and third party affiliate websites were potentially misleading by failing to include significant limitations and qualifications of promotions. In May 2016 BGO commissioned a "Copy Advice Audit" of its website from CAP to provide reassurance to the Commission of conformity with the CAP Code. The Copy Advice Audit made several recommendations in relation to what significant limitations and qualifications should be included on BGO's website, which BGO did not initially follow. Following further engagement with the Commission, BGO made the changes recommended in late July 2016. In total 21 advertisements were found to be in breach of social responsibility code provision 5.1.7 (nine on BGO's website and 14 on BGO affiliate websites).

Perhaps of more concern is that the Commission found that BGO acted in a way that cast doubt on its suitability to carry on licensable activities because it failed to:

- take timely and effective action to address the LCCP breaches; and
- provided inaccurate assurances that the problems had been addressed.

BGO was issued with a formal warning under section 117(1)(a) of the Gambling Act

2005 (the Act), which will remain on file if the Commission identifies further regulatory failures, and fined £300,000 under section 121. The findings against BGO emphasise the importance of:

- understanding and applying the rules relating to advertising, as set out in the LCCP, the CAP/BCAP codes and the associated guidance on the rules for gambling advertisements;
- taking responsibility for the actions of third parties such as affiliates, by making sure that the marketing material they use is not misleading;
- always working with the Commission in an open and transparent way; and
- coming forward and making full disclosure of all the relevant facts relating to an investigation, at as early a stage as possible, to achieve compliance without a regulatory review.

## ***"All operators should take heed from the action taken against BGO to avoid being next in the firing line"***

### **Commitment to consumer protection and raising standards**

The BGO case further emphasises the Commission's commitment to consumer protection and raising standards in relation to marketing and advertising. It also signals the Commission's ability to achieve this in any way required using its regulatory powers, including by commencing a review of a licence. In its 2016/2017 business plan, the Commission noted consumer protection and raising standards as "themes providing direction to the Commission's work" and it is unsurprising that the Commission has been working closely with the Advertising Standards Authority to achieve this. When publishing its decision following the review of BGO's licence, the Commission said: "We want to make sure that gambling is conducted fairly and openly. So, we have made it clear to the industry that misleading advertising is a serious issue. We have powers to tackle it, including the power to impose financial penalties such as this."

### **What should operators be doing?**

The simple answer is that operators must comply with all marketing and advertising requirements, including those summarised above. Ultimately, as licence holders, operators are expected to self-regulate their own licensable activities. Not complying with the LCCP and licensing objectives puts a licence at risk. Licensees that demonstrate good governance and a high level of compliance are less likely to present a risk to the licensing objectives and will receive less regulatory supervision. Operators should spend time reviewing and reflecting on:

- their marketing and advertising (including websites) to ensure compliance;
- how they manage their affiliates and ways to improve;
- contractual arrangements with affiliates; and
- internal and/or affiliate training needs.

The Commission recently stated: "We want operators to take note that the issues identified in the [BGO] decision notice are likely to form the basis for future compliance assessments and could lead to enforcement action."

This is a clear warning to operators to ensure their advertising is not falling foul of social responsibility requirements or misleading consumers. All operators should take heed from the action taken against BGO to avoid being next in the firing line.



**Bahar Alaeddini** is a Partner at Harris Hagan and specialises in all aspects of online and land-based gambling law. She advises major B2C and B2B operators, start-up operators, investors and financial institutions. Bahar advises clients on licence applications, investor due diligence, compliance issues, Gambling Commission requirements and investigations, voluntary settlements and Panel reviews. She is a member of the International Association of Gaming Advisors.