additional wording reflecting the browser setting reference in Recital 66, thus ‘leaving ICO (or any future regulators) the flexibility to adjust to changes in usage and technology’.

Why this matters

So UK Plc has nailed its colours firmly to the mast of a new cookie regime which on the face of it will not be significantly different in practice to the current position.

Some have said this is not a done deal by any means. First, BIS may change its tune once it sees the consultation responses. Secondly, by simply leaving it to ICO to interpret the directive’s wording, they say, the Government has done a Pontius Pilate and dumped the problem in the lap of ICO, who might well toe the Article 29 express prior opt-in line.

However, all ICO’s public pronouncements on the issue to date have indicated a preference for the BIS line, provided the industry takes a responsible approach, while bodies such as the Internet Advertising Bureau are working at pushing at this open door by building a head of steam behind industry self-regulation and an agreed set of online behavioural advertising standards.

So all looks fair for a pragmatic and workable solution in the UK. The big question, however, is whether the rest of the EU will go the same way. The word is that Denmark is minded to take a leaf out of the UK’s book, but if others do not, who knows where this will leave the Single Online Market.

Stephen Groom,
Head of Marketing and Privacy Law,
Osborne Clarke, London
Stephen.Groom@osborneclarke.com

New official guidance on ‘skill with prizes’ games

Mark Smith

Journal of Direct, Data and Digital Marketing Practice (2011) **12**, 273–276.
[doi:10.1057/dddmp.2011.1](https://doi.org/10.1057/dddmp.2011.1)

Topic: Promotion marketing

Who: Gambling Commission/HM Revenue & Customs (HMRC)

When: July 2010

Where: Great Britain

Law stated as at: 5 October 2010

What happened

The Gambling Commission and HMRC have issued guidance on ‘skill with prizes’ games (‘Guidance’).

Although the Guidance is aimed chiefly at gaming machines, it is also essential reading for marketers conducting prize promotions.

Why?

Section 6 of the Gambling Act 2005 (the 'Act') defines 'gaming' as 'playing a game of chance for a prize'.

This description might on the face of it apply to any number of promotional prize competitions. If it does, then promoters need to be aware that any 'gaming' taking place in the UK which is not governed by a Gambling Commission licence will be contrary to law and leave those responsible exposed to fines and potentially terms of imprisonment.

In addition, as the definition of 'gaming' does not require any stake, bet or other payment, all marketers conducting free-to-enter prize competitions need to know when their mechanic might stray into the area of 'gaming' so that they can steer well clear.

Against this backdrop, any official guidance published in this area will be welcomed by UK marketers.

Gambling commission guidance note

In the Guidance, the Gambling Commission says that it applies a series of questions when deciding whether a particular game is a game of chance or a game of skill. Those manufacturing, supplying, installing, adapting, maintaining or repairing prize machines, making them available for use or considering running a free or pay-to-enter prize competition should therefore take the following questions into account:

1. *Does the outcome of the game depend entirely on chance?* If the answer to this question is 'yes' then depending on the context, without suitable Gambling Commission licensing in place, the machine is an illegal gaming machine or the prize competition is either illegal gaming or, if a payment is required to participate as that concept is defined in the Gambling Act 2005, an illegal lottery. An example of such a game would be roulette.
2. *Does the game contain an element of chance as well as an element of skill?* Subject to question 4, it is the Commission's view that a game in which the outcome or result can be influenced to any appreciable extent by chance is a game of chance for the purposes of the Act and the machine is a gaming machine.
It does not matter which element predominates, nor whether the element of chance can be eliminated by superlative skill. An example of a game containing elements of both chance and skill would be poker.
3. *Is the element of chance involved in the game so small that it can be disregarded?* However, the Commission recognises that in some cases the element of chance involved in a game is so small that it can be disregarded.

An example of a game meeting this criterion would be chess, as the element of chance involved in deciding who will play as white and black is likely to be considered inconsequential.

4. *Is the game presented as involving an element of chance?* In considering whether a game is presented as involving an element of chance the Commission will take into account:

- how the game appears to the player;
- what the game is called and whether it contains language associated with gambling games;
- the livery of the machine and whether it contains symbols or graphics associated with gambling games;
- the appearance of the game itself and whether it contains symbols or graphics associated with gambling games, including (but not limited to) the turn of a wheel, the spin of a coin, the roll of a dice, reel bands or the random selection of numbers;
- whether the game involves the player in actions associated with gambling games including (but not limited to) placing chips or markers on numbers or engaging in prediction; and
- any contextual indications such as advertising signage or marketing material.

Note that this question pre-supposes that the game does not in fact involve an element of chance other than one that would be disregarded under question 3 above.

5. *Does an exemption apply?* Section 235(2) of the Act sets out a number of exemptions. For example, equipment to play bingo would be exempt so long as it was used in accordance with a condition attached to a bingo operating licence.
6. In the event that the answers to the above questions indicate that a prize machine is a ‘gaming’ machine for the purposes of the Act, then a person must hold an appropriate licence to manufacture, supply, install, adapt, maintain or repair the gaming machine, or make it available for use. The same will apply in the context of a prize competition run online for example.

HMRC Guidance

The Gambling Commission guidance note is to be read in conjunction with a recent review paper on Amusement Machine Licence Duty from HMRC. This lists a set of indicators that will suggest that a prize machine/mechanic is not a gaming machine/mechanic, and hence will not give rise to a risk of illegal gambling. The characteristics to look for include the following:

1. The game must be a test of skill such as knowledge, dexterity, visual recognition, logic, memory, reaction, hand-to-eye co-ordination, numerical and lexical ability or a mixture of any of these skills.

2. The game rules and game play instructions must be available to the player prior to starting the game.
3. The game must not pay out a prize without a reasonable amount of player interaction. This will be demonstrated where the likelihood of any prize being paid increases with the level of skill applied. Where a player uses the machine without exercising skill (ie playing with their eyes closed), the likelihood of winning a prize should be significantly and demonstrably reduced.
4. All advertised prizes must be available to win in each game.
5. The level and type of skills required to win (including reaction time) must be reasonable considering the context of the game in question. The guidance gives several indicative examples, for example, the time to react to a visual stimulus should not be less than around 225 milliseconds, and for quiz games there should be sufficient time to read the question and all possible answers (normally at least 5 seconds).
6. The level of difficulty may vary from game to game for the purpose of challenging a player's use of skill provided that it is within reasonable bounds, for example at its hardest setting a player is not required to complete more than three times as many actions as he would be required to do at the game's easiest setting.

Interestingly, the HMRC paper explicitly states that neither current version of the popular quiz games based on the Monopoly and Cluedo board games are considered to be 'gaming'. HMRC is of the view that the random number generator portrayed as a dice in these games does not affect the player's chance of winning, which is actually determined by whether they answer correctly a predetermined number of questions.

Why this matters

The distinction between a game of chance and a game of skill can at times be a difficult one to assess, and the Gambling Commission is frequently asked whether a particular prize machine is a 'gaming' machine for the purposes of the Act. Similar concerns arise often in the context of prize competitions.

Although the interpretation of the Act is ultimately a matter for the courts, the new guidance should be very useful for promotion marketers in ensuring compliance with the Act and avoiding regulatory action.

Mark Smith,
Solicitor, Osborne Clarke, London
Mark.Smith@osborneclarke.com