Summary

- First, online schemes will normally be capable of being accessed from a number of different jurisdictions and therefore it is important to limit the availability of the scheme to prevent players from outside a known territory from entering. Should access not be limited in this way, regulatory authorities in other countries may judge the scheme as falling within their control and seek to regulate it. This is important because the laws relating to online schemes vary widely between different jurisdictions, with many states banning or heavily restricting such schemes or treating them as a form of illegal or unlicensed gambling. The remainder of this note discusses the English law approach to such schemes.

- Broadly, English law defines three types of gambling activity: betting, gaming and lotteries. It seeks to regulate these activities by obliging commercial operators to be licensed, thereby ensuring that gambling is only offered by those who are fit and proper to undertake such activities and who can provide certain protections for the young and vulnerable. English law does not seek to control contests, games and entertainments that do not have the character of gambling, meaning that there is neither a restriction on the age of participants nor on the prizes offered.

- The objective of a creator of an online contest is therefore to find a mechanism which avoids its characterisation as a form of regulated activity. Particular care needs to be taken in respect of schemes which operate on the periphery of gambling activity. Whilst these often comprise the most attractive forms of scheme, they are also carry with them a greater likelihood of being classified as gambling activity and where, therefore, legal risk arises. Operating unlicensed or illegal gambling carries with it criminal sanctions.

- Finally, note that schemes which involve consumers, although often seen as mere entertainments, are usually in fact consumer contracts and promotions which are regulated by general law.

References:

Gambling Act 2005

GA 2005, ss 33, 252

Unfair Contract Terms Act 1977

Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083

1. Questions of definition

A) The meaning of ‘prize competition’

A ‘prize competition’ is defined in GA 2005 as being any competition or other arrangement where a person may win a prize, but which does not fall within the definition of gambling.

References: GA 2005, s 339

B) The meaning of ‘gambling’

English law distinguishes three broad types of ‘gambling’. These are ‘betting’, ‘gaming’ and ‘lotteries’. The statutory definitions are complex, but can generally be distinguished as follows:

Betting is the making or accepting of a bet on the outcome of a race, competition or other event or process, or the likelihood of anything occurring or not occurring or whether something is true or not (whether in fact the subject matter of the bet is known to one of the parties). In fact, the term ‘bet’ is not actually defined but there are a number of case law decisions which lead one to a classic definition that it involves the hazarding of value on an event of uncertain issue. Betting is also deemed to include the operation of so-called ‘fantasy’ leagues, pool betting and other forms of betting such as spread betting (although this latter category is regulated under financial services law). There is a danger that contests requiring prediction and judgement fall within the definition of betting.

References: GA 2005, ss 3, 9

Gaming is defined as the playing of a game of chance (or of combined skill and chance) for a prize (but does not include a sport). The terms ‘game’ and “sport” are not themselves defined in statute, but there are a number of cases which assist in assessing the boundaries. ‘Game of chance’ includes a game in which skill and chance are mixed. Consequently, games like poker are still categorised as games of chance notwithstanding that, arguably, skill predominates. Games of complete skill, such as chess, can form the subject matter of a contest.

References: GA 2005, ss 10-12

A Lottery is essentially a process where persons are required to pay to participate in an arrangement where a prize is allocated by chance. There are a number of subtleties to the definition, which are discussed below.

References: GA 2005, s 14

Cross-category activities. Rules in GA 2005 determine which regulatory regime will apply to activities which fall into more than one of the above categories.

References: GA 2005, ss 16-18
2. Designing a contest which avoids categorisation as gambling

There are two main approaches to creating a scheme which avoids being categorised as gambling. The first is to operate a scheme which does not require payment in order to enter. The second is to require a significant amount of skill to be exercised by the player, with the intention of avoiding the tests for gaming and lotteries.

A) Payment to enter

Schemes which are inherently designed with a chance-based determination (e.g., spinning of a wheel/drawing from a hat) are likely to be categorised as a lottery unless one removes the need for there to be payment to enter. GA 2005, Sch 2 sets out those circumstances where a ‘payment’ or other quasi-consideration will nonetheless avoid being classed as a ‘requirement to pay’, including the cost of sending a letter by ordinary post, the cost of a normal telephone call, and the costs of a purchase which is a condition of entry provided that the price of the goods has not been artificially increased in a way that accounts for the cost of entry. Other anti-avoidance mechanisms are also set out in Schedule 2.

References: GA 2005, s 14 and Sch 2

There remains a question (often overlooked) as to whether such a scheme can still be a form of gaming, because technically the definition in s 6 does not require the players to be at risk of losing anything in the game—and so removing the requirement to pay does not solve the problem. In fact, the matter is usually addressed or avoided by saying that the scheme lacks the quality of a ‘game’ (a matter that has perplexed the courts on two or three occasions, although none of the decisions apply directly to the current legislation).

References: DPP v Regional Pool Promotions [1964] 1 All ER 65
            Armstrong v DPP [1965] 2 All ER 745
            Adcock v Wilson [1967] 1 All ER 1028

B) Skill

The more common approach for schemes is the introduction of a degree of skill to determine the winner. So far as lotteries are concerned, GA 2005, s14 does not explicitly define the amount of skill that is required in order to avoid categorisation as a lottery, but does provide that one should disregard a level of skill required unless it is sufficient to prevent ‘a significant proportion of persons’ from either entering or from winning the prize. There is no case law to assist on the practical meaning of ‘significant proportion’—the Gambling Commission has issued guidance to operators to the effect that they should retain evidence to demonstrate, if challenged, whether the legal tests can at least arguably be met—for example by showing the number of incorrect answers. However, there is no concrete guidance on an acceptable proportion. It is suggested, however, that if the degree of skill required was such as to prevent more than 50% of the entrants from entering or winning, such an amount would be likely to be considered ‘a significant proportion’.

Again, one faces the question of whether the fact of determination by skill will avoid the definition of gaming. Technically this occurs when the determination of the winner is totally skill-based (as in the game of chess), but the more normal approach is to seek to characterise the scheme as not being in the nature of a game at all.

References: Prize competitions and free draws: The requirements of the Gambling Act 2005 (Gambling Commission)
3. What is ‘skill’?

Whether something is skillful is a matter of fact and degree. A number of types of skill (in the legal sense) can be distinguished, including: knowledge (of a fact), physical skill (painting), or skill in mental acts (eg poetry, slogan-writing, crosswords or judging the likely position of a football in an action photograph from a game). Generally, provided that the activity allows for the possibility of skill, the courts have taken a relatively generous approach. Care needs to be taken on two accounts. First, not requiring a high degree of skill may create a large class of potential winners, with the prize being decided by a name ‘drawn from the hat’. This means that the scheme may be characterised as a lottery because the level of skill required does not satisfy the test described above. Second, certain types of predictive skill can bring the scheme close to betting.

4. Terms in online contests

Assuming that the format of the contest can be cleared from a legal perspective, one still has to consider the contest as a consumer contract. Such contracts are likely to be unilateral offers which are taken up by those who accept the terms of the contest and perform the necessary steps of entry (whether or not they are required to pay to enter). One is reminded of the circumstances of the famous Carbolic Smoke Ball case, in which a member of the public complied with the various instructions of the manufacturer, contracted influenza despite using the medicine, and was contractually entitled to receive £100. So one should not dismiss such contests as being non-binding simply because there is no entry fee or that they are open to all.

Further, as a matter of law, one needs to be mindful that one is contracting with a consumer and on standard terms, so the Unfair Contract Terms Act 1977, Consumer Protection from Unfair Trading Regulations 2008, and the Unfair Contract Terms in Consumer Contracts Regulations 1999 will apply.

Dealing with consumers also gives rise to a greater need to be clear about significant terms, drawing them to the attention of the consumer before the point of entry into the contract. Law and practice comes from a variety of different sources in support of this point. Case law in the gambling field has drawn attention to the need for important contractual terms to be highlighted if they are to be relied upon and the Advertising Standards Authority in their Codes on Advertising Practice set out a series of rules on contest promotions. Although compliance with these rules is not backed by legal sanction, they form a very useful summary guide for those wanting to ensure that such contests are fairly presented, and that important terms relating to prizes and conditions of entry also appear in advertisements for the contest.

Finally, since all such contests require the processing of personal data about the individual contestants, it is worth recalling that not only will contest organisers have to be registered as data controllers under the Data Protection Act 1998, but they will also have to abide by its terms relating to the collection and processing of data (and the exportation of such data outside the EEA). This will normally require a form of consent to process data (particularly where the data may be used for third-party direct marketing). Online contests will normally require a privacy policy and cookie policy to explain the way in which data will be used and collected. Contests that involve the use of premium rate telephony (either as a means of paying or of finding out if a prize has been won) will need to abide by the separate rules promulgated through Ofcom.

References: News of the World v Friend [1973] 1 All ER 422
Hall v Cox [1895-9] All ER Rep Ext 1570

References: UK Code of Broadcast Advertising (BCAP Code), section 8
Spreadex v Cochraine [2012] EWHC 1290 (Comm)

References: Data Protection Act 1998
Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426
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