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Advice note on how to structure a legal free prize draw in the UK

1. INTRODUCTION

- 1.1. ABC Cargo & Courier UK Limited is a company incorporated in England and Wales with company number 14852569 and a registered office at Unit C4 Green Lane, Heathrow Corporate Park, Hounslow, England, TW4 6ER (**ABC Cargo**).
- 1.2. ABC Cargo is seeking advice in order to run a UK prize draw tied to a product promotion (the **Contest**). The Contest is intended to run for 45 days where customers receive one entry coupon for every £100 spent on ABC Cargo services, with no limit on the number of coupons they can earn. The grand prize is a BMW car. The Contest will be promoted via social media, Google Ads, and video content across multiple platforms.
- 1.3. ABC Cargo is seeking advice as to whether or not the Contest would be legal in the UK and if not what it can do to modify its Contest so that it is legal in the UK.

2. EXECUTIVE SUMMARY

- 2.1. Provided that you structure the Contest in a way that takes account of the guidance provided in this advice note, including using well drafted terms (which Harper James is producing) and compliant promotions, it will be deemed a free prize draw which does not involve gambling and is therefore outside of the Gambling Act 2005. Prize draws that are not structured correctly can be deemed an illegal lottery, and under the Gambling Act 2005 it is a criminal offence to operate an illegal lottery.

3. INTRODUCTION TO PRIZE DRAWS AND COMPETITIONS

- 3.1. In order to provide advice on the Contest it is necessary to consider what does, and does not, constitute gambling and what does, and does not, constitute a free prize draw.
- 3.2. There are various pieces of legislation and regulatory codes that are relevant to gambling (including lotteries), prize draws and prize competitions. The main ones are:
 - 3.2.1. The Gambling Act 2005 (the **GA**);
 - 3.2.2. The Consumer Protection from Unfair Trading Regulations 2008; and
 - 3.2.3. The UK Code of Broadcast Advertising (**BCAP Code**) created by the Advertising Committee of the Advertising Standards Authority (**ASA**); and

3.2.4. The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (**CAP Code**) created by the ASA.

3.3. Additionally, any activity you undertake must be carried out in a way that is compliant with obligations under data protection legislation.

4. THE GAMBLING ACT 2005 AND PRIZE PROMOTIONS

4.1. The GA regulates gaming, betting and lotteries. Prize promotions (such as prize draws and prize competitions) are not regulated by the GA. However, certain types of prize promotions (e.g. prize draws) share many characteristics with lotteries. Lotteries (also known as raffles, tombolas and sweepstakes) for private or commercial gain are illegal in the UK. The GA created eight categories of legal lotteries. Unless an exemption applies, lotteries may only be operated under licence by the Gambling Commission (**GC**).

4.2. The three elements of a simple lottery are (section 14(2) of the GA):

4.2.1. *The requirement to pay to participate;*

4.2.2. *The allocation of prizes; and*

4.2.3. *The determination of winners wholly by chance.*

4.3. The three elements of a complex lottery are (section 14(3) of the GA.):

4.3.1. *The requirement to pay to participate;*

4.3.2. *The allocation of prizes; and*

4.3.3. *The prizes are allocated by a series of processes and the first of those processes relies wholly on chance.*

4.4. To ensure that a prize promotion is not caught by the provisions of the GA, two common methods used by promoters are to run prize promotions are:

4.4.1. To run a free prize draw which removes the requirement to pay to participate; or

4.4.2. To run a prize competition which must involve an element of skill which removes the determination of winners purely by chance.

4.5. This advice note considers only prize draws as it is clear that the Contest will not involve a prize competition as there is no element of skill involved in the Contest.

5. FREE PRIZE DRAWS

5.1. Free prize draws are not regulated by the GA. However, it is necessary to understand what the GA, and the GC considers to be payment in order to ensure that the promotional mechanics of a prize draw do not inadvertently become caught by the GA.

5.2. Schedule 2 of the GA provides that paying includes a reference to:

5.2.1. *Paying money;*

- 5.2.2. *Transferring money's worth; and*
- 5.2.3. *Paying for goods and services at a price or rate which reflects the opportunity to take part in an arrangement under which the participant may win a prize.*
- 5.3. Therefore, in respect of free prize draws, the following costs incurred in order to enter a prize draw would not be considered payment:
- 5.3.1. *The cost of purchasing an item in order to enter, such as buying a promotional can of baked beans, provided that the price of the promotional product is not inflated to cover the prize or the cost of running the promotion;*
- 5.3.2. *Providing personal data in order to enter, such as filling in a survey, provided the request for data was proportionate and not obtained for the promoter to transfer or sell it to third parties; and*
- 5.3.3. *The cost of making a normal rate telephone call or sending an entry form via first or second class postage in order to enter.*
- 5.4. Schedule 2 of the GA also clarifies that it does not matter to whom the payment is made and who receives the benefit of such payment.
- 5.5. **GC guidance on prize draws for product promotions**
- 5.6. The GC sets out the following guidance on how product promotions such as the Contest should be run to make them capable of being free prize draws rather than lotteries:

“4.8... Schedule 2 to the [GA] also makes provision for product promotions. These are permitted where the price of the good or service does not include any element that reflects the opportunity to participate in the promotion (paragraph 2(c) of Schedule 2). Therefore draws tied to product promotions are not to be treated as requiring payment to enter and are not to be regarded as lotteries, so long as entry involves no cost beyond the cost of the product. Whether this is, or is not, so will be a question of fact in individual cases. As a general rule, a good linked to a promotion charged at a price that bears little relation either to its cost of production or to comparable products may mean the promotion will be challenged as an illegal lottery. On the other hand, an increase in price just before or coincident with the introduction of a promotion need not necessarily give rise to difficulty if it can be shown that the price rise is unrelated to the promotion itself, for instance because of higher costs of such things as raw materials or transport.

4.9 The Commission acknowledges that ultimately the costs of any product promotions must be recovered through the revenues obtained from sales. However, the test is whether an identifiable element within the price of the product during the promotion can be said to be a participation fee. Organisers do need to bear in mind that a promotional ‘free draw’ will involve payment, and as a result will be an illegal lottery, if a charge is made to discover whether a prize has been won or to take delivery of that prize...”

- 5.7. **Choice of free entry**
- 5.8. The GA states that an arrangement shall not be treated as requiring a person to pay to participate if:

- 5.8.1. *Entrants have a choice of free or paid entry;*
- 5.8.2. *The choice is publicised in such a way as to be likely to come to the attention of each person who proposes to participate; and*
- 5.8.3. *The system for allocating prizes does not differentiate between those who participate by paying and those who participate through the free entry route.*
- 5.9. For the purposes of administering a prize draw, promoters should note that rule 8.17.2 of the CAP Code requires marketing communications to “*clearly and prominently*” display instructions on how to participate in a sales promotion by using a free-entry route if one is offered, either before purchase or, if no purchase is required, before or at the time of entry or application.
- 5.10. While this may not be directly relevant to the Contest, we have included this guidance in case you wish to offer prize draws in the future to people other than your existing customers, e.g. as another way to generate new business.
- 5.11. **Payment to discover whether a prize has been won or to claim a prize**
- 5.12. Schedule 2 of the GA specifically states that requiring payment to discover whether a prize has been won or to collect a prize is a requirement to pay.
- 5.13. In addition, in the case of *Purely Creative and others v Office of Fair Trading (Case C-428/11)*, the European Court of Justice held that where a consumer is led to believe that he has won or will win a prize, a promoter cannot make him pay any costs whatsoever to discover whether he has won or to claim his prize. In these circumstances, costs include the cost of a postage stamp, the cost of making a call to the promoter and the availability of an alternative free route.
- 5.14. The following practice is considered to be always unfair: “*Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:*
- 5.14.1. *There is no prize or other equivalent benefit; or*
- 5.14.2. *Taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.”¹*

6. ADMINISTRATION OF PRIZE DRAWS AND COMPETITIONS AND THE CAP CODES

- 6.1. In addition to the significant conditions set out in section 8 of the CAP Code that are applicable to all sales promotions, the CAP Code requires promoters of prize promotions to include additional significant conditions in their marketing communications. Promoters must (amongst other things):
- 6.1.1. *Specify the number and nature of prizes or gifts, if applicable. If the exact number cannot be predetermined, a reasonable estimate of the number and a statement of their nature must be made (rule 8.17.6);*

¹ Paragraph 31 of schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008.

- 6.1.2. *Distinguish those prizes that could be won, including estimated prize funds, from those prizes that will be won by someone by the end of the promotional period (rule 8.17.6.a);*
 - 6.1.3. *State whether prizes are to be awarded in instalments or are to be shared among recipients (rule 8.17.6.b); and*
 - 6.1.4. *State whether there are any applicable geographical, personal or technological restrictions such as location, age or the need to access the internet or if any need to obtain permission to enter from an adult or employer (rule 8.17.7).*
- 6.2. The CAP Code also provides that promoters must (amongst other things):
- 6.2.1. *Be able to support any claims made with documentary evidence (rule 3.7);*
 - 6.2.2. *Be responsible for all aspects and all stages of their promotions and should ensure that promotions are conducted equitably, promptly and efficiently and promoters should be seen to deal fairly and honourably with consumers. Promoters should avoid causing unnecessary disappointment (rules 8.1 and 8.2);*
 - 6.2.3. *Not create socially undesirable promotions that encourage excessive consumption or inappropriate use (rule 8.5);*
 - 6.2.4. *Ensure that unsuitable or irresponsible material does not reach consumers (rule 8.6);*
 - 6.2.5. *Make clear that stocks are limited (if they are) (rule 3.28.1) and must be able to demonstrate that they have reasonable grounds for believing that they can satisfy demand or that consumers had sufficient information to make an informed decision on whether or not to participate - for example regarding any limitation on availability and the likely demand (rule 8.10). They may not rely on statements such as "subject to availability" (rule 8.9);*
 - 6.2.6. *If the marketer does not intend to fulfil orders, for example, because the purpose of the marketing communication is to assess potential demand, the marketing communication must make that clear (rule 3.28.2);*
 - 6.2.7. *Ensure relevant communication with applicants and consumers and offer a refund or a substitute product if they are unable to supply demand for a promotional offer because of an unexpectedly high response or some other unanticipated factor outside their control. (rule 8.11);*
 - 6.2.8. *Ensure that entry forms and any goods needed to establish proof of purchase are widely available if a prize promotion is widely advertised (rule 8.13);*
 - 6.2.9. *Should not encourage consumers to make a purchase or series of purchases as a precondition to applying for promotional items if the number of those items is limited (rule 8.12); and*
 - 6.2.10. *Not exaggerate consumers' chances of winning prizes (rule 8.20).*
- 6.3. CAP publishes a range of help notes to assist promoters in this area. See, for example:
- 6.3.1. [CAP: promotions with prizes \(non-broadcast\)](#); and
 - 6.3.2. [Advice online, Promotional marketing: terms and conditions.](#)

6.4. **Terms and Conditions**

6.5. Clear and unambiguous terms and conditions are key to a promotion's success. If space restrictions mean that it is not possible to include all the terms, those which have a material bearing on whether someone decides to take part, must be brought to their attention before they either buy the relevant product or enter the competition or draw (rule 8.18, CAP Code). Potential entrants can be directed to a different source for the rest of the terms, such as the promoter's website. Some terms must be brought to the participant's attention before they either buy the relevant product or enter the competition or draw.

6.6. CAP has issued guidance on the positioning of terms and conditions, in particular for online marketing, see [CAP issues updated guidance on significant terms and conditions of sales promotions](#).

6.7. As a matter of good practice, promoters may wish to consider clarifying in their prize promotion terms and conditions, whether:

6.7.1. *Offers are subject to availability;*

6.7.2. *A cash alternative to the prize is available (required by rule 8.28.2 of the CAP Code);*

6.7.3. *There is an intention to use winners in post-event publicity (required by rule 8.28.9 of the CAP Code). This is in addition to the obligation to inform entrants that the name and county of major prize winners will be announced (must also consider relevant data protection legislation);*

6.7.4. *The promoter or entrant owns the copyright in entries (required by rule 8.28.7 of the CAP Code);*

6.7.5. *Entries will be returned (required by rule 8.28.8 of the CAP Code);*

6.7.6. *Offers are available in conjunction with other offers;*

6.7.7. *Entry forms must be original and undamaged; and*

6.7.8. *The promoter accepts liability for entries that are not submitted on time or in full, such as damaged entry forms or corrupted web pages.*

6.8. It is also important to warn participants, if appropriate, that the judge's decision is final and that no correspondence will be entered into.

6.9. Finally, a promoter must explain how entries will be judged. (rule 8.26, CAP Code.)

7. PRIZES

7.1. The CAP Code requires prize promotion organisers to provide prize winners with their prizes within 30 days of the closing date or be told when they will receive their prizes if later than 30 days (rule 8.28.3).

7.2. The CAP Code further requires promoters of prize competitions to ensure that:

7.2.1. *Prizes are awarded in accordance with the laws of chance and, unless winners are selected by a computer process that produces verifiably random results, verified by an independent person, or under the supervision of an independent person (rule 8.24);*

7.2.2. *Participants are able to retain conditions or easily access them throughout the promotion. Prize promotions must specify on all marketing communications or other material referring to them, the following information, clearly before or at the time of entry, where the omission of any of the specified items is likely to mislead (rule 8.28):*

- (a) any restriction on the number of entries;*
- (b) whether the promoter can substitute a cash alternative for a prize;*
- (c) if more than 30 days after the closing date, the date on which winners will receive their prize;*
- (d) how and when winners will be notified of their success;*
- (e) when and where the names and counties of the winners will be published or made available;*
- (f) in a competition, the judging criteria and mechanism;*
- (g) if relevant who owns the copyright in the entries;*
- (h) if relevant how entries will be returned; or*
- (i) any intention to use the winners in post-event publicity.*

7.3. While it may not be directly relevant to the Contest, it is relevant to note, if you may wish to offer such prizes in the future, that certain categories of prizes such as holidays have been called out by CAP and the ASA as requiring special attention by promoters to ensure that marketing communications describing these prizes are very clear. CAP gives as an example in its guidance that if a prize is described as “two nights at a five-star hotel,” the promoter need not pay the consumer’s travel costs to reach the hotel, but describing the same prize as “a luxury mini-break” would not make clear enough that the travel costs were the consumer’s responsibility. Therefore, promoters awarding holiday prizes should:

7.3.1. *Describe the prize as fully as possible to avoid disappointment. This could include issues such as the quality of hotel, type of room, facilities, full board or half board and the number of nights in the resort;*

7.3.2. *Fully explain any costs that the winner must bear, such as transport to and from airports or insurance;*

7.3.3. *Explain any other factors that may influence a person’s decision to enter the competition, for example, that:*

- (a) the hotel is unsuitable for people with disabilities;*
- (b) the holiday can only be taken within a limited time period; or*
- (c) there are excluded dates such as school holidays or bank holidays; and*

7.3.4. *Make it clear that the responsibility for the holiday will lie with carriers or hotels. However, this will not reduce the promoter’s duty to check partners (such as travel agents or tour operators) to ensure that they are reliable and will not let the winner down.*

8. PRACTICAL TIPS FOR EXECUTING LEGALLY COMPLIANT SALES PROMOTIONS

8.1. One of the most spectacular examples of a promotion going wrong was a promotion by Hoover in 1992. Hoover offered two free return flights to anyone who purchased a Hoover product costing at least £100. If someone made a purchase worth more than £300, they would receive a further reward of a £60 voucher, which could be used for car hire and accommodation.

- 8.2. Promoters must be able to demonstrate that they have made a reasonable estimate of the response and that they were capable of meeting that response (rule 8.10). Hoover estimated that 5,000 consumers would redeem the offer and took out redemption insurance for this amount. However in reality, over 200,000 people took up the offer. Following a large number of customer complaints and court action the saga was estimated to have cost Hoover £48 million. The promotion succeeded to the extent that sales increased dramatically, but the increase in revenues were outweighed by the cost of settling the matter with dissatisfied customers and also the negative publicity.
- 8.3. To avoid such a result recurring, promoters should have in mind the following when planning a promotion:
- 8.3.1. *Is the offer too good? Market research should be carried out as a preparatory step;*
- 8.3.2. *What is the likely redemption rate? Is it possible to take out redemption insurance?;*
- 8.3.3. *Is it possible to fulfil the offer? Are contracts in place with prize providers, which include liquidated damages for failure to provide the prize?; and*
- 8.3.4. *Is there a possible contingency plan? For example, perhaps Hoover could have offered flights to different destinations or for different dates to reduce demand.*

9. GENERAL CAP CODE REQUIREMENTS APPLYING TO ALL PROMOTIONS (INCLUDING PRIZE DRAWS AND COMPETITIONS)

- 9.1. Promoters must also be aware of other areas of the CAP Code that apply to all promotions.
- 9.2. The underlying principles of the CAP Code are that all advertisements should:
- 9.2.1. *Be legal, decent, honest and truthful (rule 1.1);*
- 9.2.2. *Be prepared with a sense of responsibility towards consumers and society (rule 1.3); and*
- 9.2.3. *Adhere to the principles of fair competition (rule 1.6).*
- 9.3. **Requirement to communicate significant conditions**
- 9.4. Section 8 of the CAP Code further sets out the significant conditions, or information where the omission of such conditions is likely to mislead, that all promotions must communicate either before purchase or, if no purchase is required, before or at the time of entry or application:
- 9.4.1. *Information on how to participate, including any costs that the consumer would need to incur or any other factor that is reasonably likely to influence his decision to purchase a product or participate in the promotion (rule 8.17.1);*
- 9.4.2. *If a free-entry route is offered, information on how to participate in the promotion using that route must be clearly explained and prominently displayed (rule 8.17.2);*
- 9.4.3. *The promoter's full name and correspondence address unless it is obvious from the context or if entry into an advertised promotion is only through a dedicated website containing that information in an easily found format (rule 8.17.9);*
- 9.4.4. *The start date of the promotion, if applicable (rule 8.17.3);*

9.4.5. *The closing date of the promotion unless (rule 8.17.4):*

- (a) *If there is a closing date, promoters must not change the date unless unavoidable circumstances beyond the control of the promoter make it necessary and either not to change the date would be unfair to those who sought to participate within the original terms, or those who sought to participate within the original terms will not be disadvantaged by the change (rule 8.17.4.e).*

10. OTHER CONSIDERATIONS

10.1. The Consumer Rights Act 2015

10.2. Section 68 of the Consumer Rights Act 2015 (**CRA**) requires that:

(1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.

(2) A consumer notice is transparent for the purposes of subsection (1) if it is expressed in plain and intelligible language and it is legible.

10.3. The E-Commerce Regulation

10.4. The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) (**E-Commerce Regulations**) contain information requirements specific to online promotions. Promoters must:

10.4.1. Clearly identify as such any promotional offer (including any discount, premium or gift) and ensure that any conditions which must be met to qualify for it are easily accessible and presented clearly and unambiguously; and

10.4.2. Clearly identify as such any promotional competition or game and ensure that any conditions for participation are easily accessible and presented clearly and unambiguously.

10.5. Discrimination

10.6. Promoters must ensure any prize promotion complies with anti-discrimination laws including the Equality Act 2010.

11. ANALYSIS OF THE CONTEST PROPOSED BY ABC CARGO

11.1. The Contest offering coupon entries for each £100 paid by ABC Cargo's customers could cause potential issues in relation to whether or not they would be deemed (by the GC and/or courts) to be paying to enter the draw. If so, it could result in it being deemed an illegal lottery.

11.2. As noted above at paragraph 5.2, the GA sets out in section 14 what is deemed to be a lottery, and Schedule 2 to the GA details what does, and what does not, constitute payment (to enter a prize draw / lottery). This includes "paying for goods or services at a price or rate which reflects the opportunity to participate in an arrangement".

11.3. Therefore, someone offering a product promotion (i.e. a promotion of the goods and/or services they sell – such as the delivery services offered by ABC Cargo) will be deemed to be charging their customers for the opportunity to enter the prize draw if the cost of their goods or services is increased for the period of the promotion. Such a prize draw would then be deemed an illegal lottery.

- 11.4. As noted above at paragraph 5.6, the GC has provided guidance that “draws tied to product promotions are not to be treated as requiring payment to enter and are not to be regarded as lotteries, so long as entry involves no cost beyond the cost of the product.” The Contest should therefore avoid ABC Cargo’s price of services being increased to reflect the cost of the prize draw. The price of ABC Cargo’s services could be looked at the GC in comparison to its rivals to determine whether the cost “bears little relation” to comparable services. Any price increase that can be justified due to genuine higher costs unrelated to the Contest is however justifiable, for example due to increases in fuel prices impacting ABC Cargo’s services.
- 11.5. It is often the case that such promotions entitle each customer one entry (e.g. this is common for smaller consumer goods such as chocolate bars and tins of beans). However, provided the conditions above are met, there should be no reason why ABC Cargo cannot provide additional entries for each increment of £100, provided it does not unjustifiably increase the price of services and this is made clear in the prize draw terms.
- 11.6. On the basis that the advice in this section 11 is followed, the Contest is likely to meet the definition of a free prize draw outside the scope of the GA.
- 11.7. As noted above, the winner of the prize draw would need to be selected: by a computer process that produces verifiably random results; by an independent person; or under the supervision of an independent person.
- 11.8. Furthermore, ABC Cargo should ensure it follows the requirements and guidance set out in this note in creating a prize draw as well as in promoting it. These requirements and guidance will be reflected in the prize draw terms that Harper James is drafting for the Contest.

12. ASSUMPTIONS

- 12.1. This opinion is based on the information and facts provided to Harper James by ABC Cargo and other publicly available information as referenced within it. If any of this information is incorrect, incomplete or changes this could impact the advice and ABC Cargo should seek updated advice.

13. QUALIFICATIONS

- 13.1. This opinion and the views expressed in it are only relating to English law in force as at the date of its issue.
- 13.2. This advice does not consider tax laws.

14. RELIANCE

- 14.1. This opinion is addressed to ABC Cargo and is furnished by us solely for your use, upon the understanding that (1) we are not assuming any responsibility of any kind to any other person or entity whatsoever; (2) the legal opinion is considered by us to be a confidential communication that may not be furnished, reproduced, distributed, circulated, or disclosed to anyone without our prior express written consent; (3) may not be relied upon by any person or entity other than you or for any other purpose.
- 14.2. The positions in this opinion are not binding on any court or regulatory authority, such as the GC, and they could take a position different to that stated in the opinion. The matters set forth in this opinion are as of the date of the opinion, and we do not undertake, and expressly disclaim any obligation, to

advise you of any change in law or facts or any other developments with respect to the matters set out in this advice or upon which this advice is based.

Yours faithfully,

A handwritten signature in black ink that reads "Harper James". The signature is written in a cursive, flowing style.

Harper James Solicitors