

# HOW 'FREE' IS YOUR 'FREE BET' PROMOTION?

The Gambling Commission's elevation of the CAP and BCAP codes to licence condition requirements in February signalled its commitment to policing free bet offers more robustly, warns **Claire Sng** of DLA Piper London's IP Team.

**Free bet and** bonus promotions continue to remain under the spotlight in the UK, with advertising regulator the ASA reporting that they received 649 complaints in respect of 398 gambling ads by the end of October 2014 alone.

We are seeing not only an increase in the number of complaints but in levels of gambling advertising as a whole. This is not surprising in light of the de-regulation of the gambling market by the Labour Government with the introduction of the Gambling Act 2005. Furthermore, with the move from point-of-supply to point-of-consumption regulation we have seen 170 applications by overseas remote operators. This increased focus on gambling advertising is therefore part and parcel of the evolution of gambling activities and the reach and approach of the British system.

In spring 2014, the Department for Media, Culture and Sport (DCMS) published a report entitled *Gambling Protections and Controls*. The report noted the industry's innovations, new products and their increased availability enabled by technology, as well as the increased scale of gambling advertising and the Government's view that there's more to be done. The report announced a four-strand review, with the Remote Gambling Association (RGA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP), the Advertising Standards Authority (ASA) and the Gambling Commission (Commission) each tasked to report by the end of 2014. At the time of

writing the RGA's report is still outstanding, but the implications of the three other reports are clear.

## The ASA's approach

In its report published in October 2014, the ASA confirmed it was satisfied that it had met its key objectives of protecting young people and vulnerable adults. Unsurprisingly, the report noted that among the key issues people complained about were free bet ads being misleading, as well as expressing harm and social responsibility concerns. The report directed people to the CAP and BCAP Help Notes published in February 2014. Similarly, in the CAP and BCAP report published in December 2014, CAP and BCAP confirmed they were satisfied that the evidence of the complaints to date and the issues they are seeing do not constitute a case for new gambling advertising rules or a new approach to how they develop the rules.

## The Commission's approach

In February 2015, following the conclusion of the consultation on 31 October 2014, the Commission published amendments to the social responsibility provisions in the Licence Conditions and Codes of Practice (LCCP) for all operators, Strengthening Social Responsibility. The majority of amendments are due to come into effect on 8 May 2015.

The changes to be made to the LCCP include a tightening of the rules on marketing and advertising, with the aim

of ensuring operators practice socially responsible advertising and offer fair and open terms to players.

In the "Marketing, advertising and fair and open terms" section of the consultation, five topics were covered. Here we focus on the two of most relevance and importance to operators.

## 1. Fairness and openness of gambling terms and condition

Existing licence condition 7.1.1 gives the Commission the power to take action against operators over unfair terms and conditions, but the Commission wanted to review the effectiveness of the terms and conditions currently offered by operators. Respondents flagged examples of potentially unfair terms around free bets and bonuses, especially if linked to a minimum churn. The consultation also considered whether a clear definition of 'free bet' was required.

The Commission has confirmed it does not plan to amend the LCCP to prohibit use of specific terms and conditions, but it will introduce new licence condition 7.1.1.B. This condition will replace references to existing unfair terms legislation with those from the Consumer Rights Bill (Bill), once enacted.

The Bill is expected in early 2015, but will not come into force until October 2015. It is understood that the Government will issue guidance to businesses in April 2015, and to consumers in October 2015. The Gambling Commission will also review this guidance and potentially supplement this if required.

The Bill is currently in the "ping pong" stage in the Houses of Parliament, but the general consensus is that it is likely to receive Royal Assent by the time Parliament is dissolved on 30 March 2015.

In general terms, Part 2 of the Bill consolidates existing consumer protection legislation, relating to unfair terms applicable to business-to-consumer interactions.

The Bill provides that a consumer is not bound by a term or notice in a contract if that term is “unfair”. As with the current rules, the Bill seeks to clarify what is meant by “unfair” and lists some types of terms that “may be regarded as unfair”, as outlined in Part 1 of Schedule 2 to the Bill. This list is referred to as the “Grey List”, because the terms listed are not necessarily unfair, but the Bill also “blacklists” some terms or notices so they are never binding.

## 2. Fair and open marketing and advertising

The LCCP amendments to provision 5.1.6 are aimed at strengthening the references to CAP and BCAP advertising Codes (and also to The Help Note on free bets), to reinforce awareness of these rules.

In addition, the Commission is bringing in a new social responsibility code, Provision 5.1.7, to deal with marketing of offers. The new LCCP condition stipulates that:

- Licensees must be satisfied that their marketing communications (including free bet offers) “do not amount to or involve misleading actions or misleading omissions within the meaning of [the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)].”
- Licensees must “abide by any relevant provision of the CAP or BCAP code, which relates to ‘free bet’, ‘bonus’ or similar offers..” and “follow the CAP/BCAP “Guidance on the rules for gambling advertisements”.
- Terms and conditions “must be available

for the full duration of the promotion”.

These new conditions within the LCCP as they relate to the CAP and BCAP codes are significant. Currently, breaches of the CAP/BCAP codes typically result in a negative adjudication from the ASA published on the ASA website, which in some cases are picked up by the press. This new LCCP condition elevates the importance of the advertising code provisions relating to this type of promotion by empowering the Commission to penalise an operator with the ultimate sanction of removing their licence for breaches of the condition.

Those familiar with the CAP/BCAP Codes will of course be familiar with the obligations in the new provision that:

- “Marketing communications...must state significant limitations and qualifications”, and “qualifications may clarify but cannot contradict..”
- “Marketing communications that include a promotion and are significantly limited by time and space must include as much information about significant conditions as practicable, and must direct consumers to an easily acceptable alternative source”
- Terms and conditions for free bet offers should “generally be stated in advertisement itself”, but where limited by time and space e.g. banner ads, “significant conditions likely to affect a consumer’s decision to participate should be displayed no further than one click away from the advertisement itself”. Finally, if significant conditions “are not displayed with sufficient prominence, the advertisement will be seen as misleading”.

## Conclusion

Despite the number of adjudications, operators continue to fall prey to the

same traps, such as failing to include a reference to the fact that significant terms and conditions apply within creative such as banner ads and not ensuring that these terms and conditions are only one click away.

As we all know, it only takes one complaint for an advert to be investigated. The ASA stated in its October 2014 report that it is prioritising potential code breaches relating to sales promotions in gambling ads, and also that it is going to proactively challenge issues even if they are not raised by a consumer, making it more likely to seek a published ruling.

Turning to the Commission, the main basis for the consultation was to ensure the compliance of gambling advertising with licensing objectives of the Gambling Act 2005. By elevating the CAP and BCAP codes to explicit condition requirements, the Commission is signalling a commitment to policing free bet offers even more closely. Operators need to heed the strong warnings about the robust approach being taken and adopt a similarly robust approach to compliance when coming up with a free bet or bonus promotion.



**Claire Sng** is an Associate in DLA Piper’s London IP team. Claire regularly undertakes advisory and clearance work in relation to advertising and promotions across sectors, including for several clients in the gambling sector. She is involved in a wide variety of both contentious IP and transactional matters, and has worked in-house at an online gaming company and at London 2012.