

**PART 1**

**GENERAL LAW AND REGULATION**



## Chapter 1

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# Competitions and Prize Promotions

### Introduction

**[1.01]** Advertisers often employ some form of competition in promoting their products and services to encourage customers to choose one particular product over another. While this can be an effective method of advertising, such competitions are subject to strict law and regulation in Ireland.

**[1.02]** The primary legislation in this area is the Gaming and Lotteries Acts 1956–2013 (the Gaming and Lotteries Acts), which controls and regulates gaming and lottery activities in the State (other than State sponsored lotteries). Under the Gaming and Lotteries Acts gaming and wagering contracts are void,<sup>1</sup> and advertisements for unlawful lotteries are unlawful.<sup>2</sup> The law relating to betting, including betting on sporting events, is contained in the Betting Acts 1931 and 2015 (the Betting Acts). Prior to 15 April 2015 advertisements relating to betting on football games were unlawful,<sup>3</sup> however, this was repealed<sup>4</sup> by the Betting (Amendment) Act 2015,<sup>5</sup> making advertisements relating to betting on football games lawful from 15 April 2015.

**[1.03]** There may be restrictions on the use of third party products as prizes as part of promotions. For example, if it is intended that a competition or promotion will have as its prize a product produced by electronics manufacturer Apple, such as an iPad or iPhone, the advertiser must adhere to the ‘Guidelines for Using Apple Trademarks and Copyrights’<sup>6</sup> (Apple Guidelines). Only Apple and its authorised resellers and licensees may use the Apple logo in advertising, promotional, and sales materials. No Apple-owned graphic symbol, logo, or icon (or any variation, take-off or abbreviation thereof) may be used on or in connection with promotional or advertising materials except pursuant to an express written trademark license from Apple. In particular, Apple does not support the use of its logos, company names, product names, or images of Apple products by other parties in marketing, promotional or advertising materials as their use may create the perception that Apple endorses or sponsors the product, service or promotion.

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<sup>1</sup> Gaming and Lotteries Acts 1956–2013, s 36(1).

<sup>2</sup> Gaming and Lotteries Acts 1956–2013, s 22.

<sup>3</sup> Betting Act 1931, s 32(1).

<sup>4</sup> Betting (Amendment) Act, 2015, s 37.

<sup>5</sup> No 7 of 2015. The Betting (Amendment) Act, 2015 was signed into law on 15 March 2015 and will be commenced in phases during 2015; Betting (Amendment) Act 2015 (Commencement) Order 2015. See paras **[1.40]–[1.41]** below.

<sup>6</sup> Formerly entitled ‘Guidelines for Third Parties Using Apple Trademarks and Copyrights’. See [www.apple.com](http://www.apple.com).

[1.04] In addition, if the promotion is advertised or promoted via social media, many social media platforms will have their own terms of use, statements of rights and responsibilities or community standards that need to be adhered to.<sup>7</sup>

## Lottery

[1.05] Apart from certain lotteries operated at carnivals,<sup>8</sup> dances where no personal profit is derived by the person arranging the event<sup>9</sup> and private lotteries held by members of a society,<sup>10</sup> Irish law prohibits the promotion of, or assistance in promoting, a lottery.<sup>11</sup>

Under the Gaming and Lotteries Acts a ‘lottery’ includes all competitions for money or money’s worth involving guesses or estimates of future events or of past events the results of which are not yet ascertained or not yet generally known.<sup>12</sup>

[1.06] There is significant case law on what constitutes a lottery.<sup>13</sup> In *Bolger v Doherty*<sup>14</sup> the High Court held that the definition of lottery, and in particular the word ‘includes’ as referred to at s 2 of the Gaming and Lotteries Acts was designed to extend the definition to activities which would not fall within the ordinary meaning of that word but that this extended meaning did not exclude from the definition those lotteries which would fall within the ordinary sense of the word. The Supreme Court later affirmed this view.

The Supreme Court has also elaborated on the statutory definition, stating that ‘a lottery consists of an arrangement for the distribution of prizes by chance, where there is no element of skill on the part of the person participating, and where there is some payment or consideration by or on behalf of the participant’.<sup>15</sup>

[1.07] Therefore a competition will be deemed to be a lottery if: (1) there is a prize; (2) there is a payment or other form of consideration for entry to the competition; and (3) the prize must be won by chance, ie without any bodily or mental skill or dexterity on the part of the entrants. The court will pay little regard to how the competition is described if all three of these key elements are present and in the past has held a sweepstake<sup>16</sup> and the game of bingo<sup>17</sup> to be a lottery.

## Prize

[1.08] The necessary element that is common to all definitions of a lottery is that there must be a prize.<sup>18</sup> The word ‘prize’ can be defined as anything offered as a reward of

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<sup>7</sup> Eg, *Facebook Pages Terms* (last revision: 14 July 2014) governs the publication of any promotions on Facebook.

<sup>8</sup> Gaming and Lotteries Acts 1956–2013, s 25.

<sup>9</sup> Gaming and Lotteries Acts 1956–2013, s 24.

<sup>10</sup> Gaming and Lotteries Acts 1956–2013, s 23.

<sup>11</sup> Gaming and Lotteries Acts 1956–2013, s 21.

<sup>12</sup> Gaming and Lotteries Acts 1956–2013, s 2.

<sup>13</sup> See, eg, *Scott v The Director of Public Prosecutions* [1914] 2 KB 868; *AG (Enright) v Best’s Stores Ltd* [1970] IR 225; *AG (McGrath) v Healy* [1972] IR 393; *Reader’s Digest Association Ltd v Williams* [1976] 3 All ER 737.

<sup>14</sup> *Bolger v Doherty* [1970] IR 233.

<sup>15</sup> *Flynn v Denieffe* [1990] ILRM 391.

<sup>16</sup> *Allport v Nutt* 1 CB 974.

<sup>17</sup> *Bolger v Doherty* [1970] IR 233.

<sup>18</sup> *The Attorney General v Best’s Stores Ltd* [1970] IR 225.

contest.<sup>19</sup> It can be distinguished from a ‘bet’ or ‘wager’ in that it is known before the event who is to give the prize, and there is but one operation until the accomplishment of the act, thing or purpose for which it is offered.<sup>20</sup> At the very least, the word ‘prize’, ‘connotes conscious participation and some form of competition’.<sup>21</sup> It is also clear from the Gaming and Lotteries Acts’ definition of a lottery that a lottery prize can be ‘money or money’s worth’,<sup>22</sup> and therefore the prize in a lottery need not be a sum of money but can instead be goods or services.

**[1.09]** In fact the courts have held that the opportunity to win a sum of money can itself constitute a prize. In *Attorney General (McGrath) v Healy*<sup>23</sup> the defendant had promoted the game of bingo, a game previously held by the courts to a lottery.<sup>24</sup> He had, however, added a further rule to the game which meant that the successful player could not get his prize money until he had answered a question which, to answer correctly, required a certain amount of skill. The defendant argued that this additional part of the game prevented it from being a lottery. It was held that the first part of the game had been a lottery involving the distribution of a prize by chance, and the prize was the opportunity to win a sum of money upon answering correctly a comparatively simple question. Therefore, although the player who was successful had not won the ultimate prize, they had ‘won the opportunity of winning a money prize by answering a comparatively simple question’<sup>25</sup> and thereby ‘achieved a valuable result’.<sup>26</sup>

**[1.10]** Advertisers should also be aware that there may be restrictions on the offer of certain third party products as prizes. For example, the offer of tickets to a major sporting event by an advertiser who is not an official sponsor of the event may be deemed ‘ambush marketing’ by the event organiser.<sup>27</sup>

### ***Pay to enter competition***

**[1.11]** In order to avoid falling within the definition of a lottery, many promoters have attempted to structure the competition so that entry would be ‘free’. However, the consideration for a sale need not necessarily be money; any consideration may be sufficient and, in a legal sense, usage of the word ‘purchase’ has been interpreted to mean the acquisition of property by one’s personal action and not by inheritance.<sup>28</sup> Many competitions or promotions will stipulate ‘no purchase is necessary’, but if a customer must purchase a product or service to enter a competition the courts are likely to determine that by doing so the requirement for payment is met, and it is irrelevant that the participant gets full value for his money for the product purchased.

<sup>19</sup> *Black’s Law Dictionary Deluxe* (10th edn, Thomson West, 2014).

<sup>20</sup> *Black’s Law Dictionary Deluxe* (10th edn, Thomson West, 2014).

<sup>21</sup> *Flynn v Denieffe* [1990] ILRM 391.

<sup>22</sup> Gaming and Lotteries Acts 1956–2013, s 2.

<sup>23</sup> *Attorney General (McGrath) v Healy* [1972] IR 393.

<sup>24</sup> *Bolger v Doherty* [1970] IR 233.

<sup>25</sup> *Attorney General (McGrath) v Healy* [1972] IR 393.

<sup>26</sup> *Flynn v Denieffe* [1990] ILRM 391, per Murphy J.

<sup>27</sup> See Ch 15 on *Sponsorship and Ambush Marketing*.

<sup>28</sup> Butler J in *Attorney General v Best’s Stores Ltd* [1970] IR 225.

[1.12] By way of example, in *Imperial Tobacco Ltd v Attorney General*<sup>29</sup> the same cigarette products were simultaneously available on identical terms, however the packaging on which some of these cigarette products were distributed contained coupons that provided for entry to the competition entitling the customer to a prize while the other packaging did not. It was argued that the customer was not obliged to pay extra to buy a packet with a coupon as packets of the same cigarettes were concurrently on sale without coupons for the same price. The courts found that a lottery existed even though no additional charge was made for the cigarette packets containing the coupon.

[1.13] It is also worth remarking on an English High Court case, *Reader's Digest Association Ltd v Williams*,<sup>30</sup> where it was held that if the competition is open to all people, including those that do not actually purchase a product, it is still a lottery where a *substantial number*<sup>31</sup> of competitors have made the purchase, and especially so where the purpose of the lottery is to promote the product concerned. In that case Reader's Digest had mounted a significant advertising campaign, addressing letters to nearly five million people, inviting them to buy certain goods on offer by returning an envelope marked 'Yes, please' or by returning an envelope marked 'No, thank you' to decline the offer. Every envelope, whether accepting or rejecting the offer, contained a distinctive number and, depending upon the luck of the draw, the holder of any given number might win a prize. The crucial feature of the case was that the opportunity to participate in the draw was wholly independent of whether one was accepting or rejecting the offer. It could not be argued, as it subsequently was in the *Imperial Tobacco* case,<sup>32</sup> that the purchase price concealed some form of subscription or entry fee for the draw. Those who returned the negative envelope (and they were twice as numerous as those who returned the positive one) had precisely the same opportunity of winning a prize. The Irish Supreme Court has similarly held that a lottery exists where a substantial number of competitors have made the purchase.<sup>33</sup>

### **Chance**

[1.14] Under Irish law, a game involving the distribution of a prize by chance will constitute a lottery<sup>34</sup> and it is the winning or losing of the prize depending on chance that is the essential feature of a lottery.<sup>35</sup> Therefore, the most obvious way that a promoter can ensure that the competition does not fall within the definition of a lottery is by removing this essential feature of chance.

[1.15] The Irish High Court has found that if there is an element of skill in the game, then the competition does not constitute a lottery.<sup>36</sup> The word 'skill' does not appear to

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<sup>29</sup> *Imperial Tobacco Ltd v Attorney General* [1981] AC 718.

<sup>30</sup> *Reader's Digest Association Ltd v Williams* [1976] 3 All ER 737.

<sup>31</sup> *Reader's Digest Association Ltd v Williams* [1976] 3 All ER 737, per Lord Widgery CJ at 739.

<sup>32</sup> *Imperial Tobacco Ltd v Attorney General* [1981] AC 718.

<sup>33</sup> *Flynn v Denieffe* [1990] ILRM 391.

<sup>34</sup> *Attorney General (McGrath) v Healy* [1972] IR 393.

<sup>35</sup> *Flynn v Denieffe, Independent Newspapers plc and Eason & Son Ltd* [1990] ILRM 391.

<sup>36</sup> *Flynn v Denieffe* (15 December 1989) HC as per Murphy J at 396.

be defined under Irish law,<sup>37</sup> but it is defined in *Black's Law Dictionary*<sup>38</sup> as 'practical and familiar knowledge of the principles and processes of an art, science or trade, combined with the ability to apply them in practice in a proper and approved manner and with readiness and dexterity' Separately, the Supreme Court of Alabama was of the view that 'skill', in the context of activities:<sup>39</sup>

'... is merely the exercise, upon known rules and fixed probabilities, of ... quickness or acuteness of sense perceptions; keenness of discernment or penetration with soundness of judgment; shrewdness; [the] ability to see what is relevant and significant.'<sup>40</sup>

[1.16] The test of skill must be real and not 'a mere colourable skill'.<sup>41</sup> Therefore a test of skill included in an attempt to remove the element of chance from competitions must not be too easy, and it is important not to attempt to transform the competition from one of chance to one of skill simply by inserting an overtly simple question. For example, it was found by the Irish High Court<sup>42</sup> that the question: 'In which sea would you find Majorca?: (a) Bering Sea (b) Caspian Sea or (c) Mediterranean Sea' was too easy to change the competition from a lottery. Therefore, in order to ensure a proper test of skill promoters often include a 'tie-breaker', for example, 'XYZ Bank is the best bank for students because ... (25 words maximum)'. If the competition comprises a simple question and a tie breaker, and all correctly answered questions are judged by a committee to determine which tie-breaking phrase is the best, the element of chance is removed from the competition rendering it a test of skill.

### *ASAI Code*

[1.17] The ASAI Code<sup>43</sup> provides that if the selection of winning entries is open to subjective interpretation, an independent judge (or a panel including one member who is independent of the competition's promoters and intermediaries) who is competent to judge the subject matter of the competition should be appointed.

Where a prize promotion involves any form of draw, promoters should ensure that tokens, tickets or numbers are allocated on a fair and random basis, and an independent

<sup>37</sup> Although under English law there is similarly no settled body of case law to clarify the interpretation of 'skill, judgment or knowledge' referred to in s 14 of the Gambling Act 2005, in its guidance the Gambling Commission establishes a set of ground rules which may indicate whether the 'skill, judgment or knowledge' is sufficient. In particular, the Gambling Commission appears to be of the general view that a genuine prize competition is one run in such a way that the organisers believe that the requirement for skill, knowledge or judgment should either deter a significant proportion of those who wish to enter from doing so, or prevent a significant proportion of those who do enter from winning a prize (see Gambling Commission publications, *Running prize competitions and free draws - December 2009*).

<sup>38</sup> *Black's Law Dictionary Deluxe* (10th edn, Thomson West, 2014).

<sup>39</sup> *Opinion of the Justices v Opinion of the Justices*, No 358, April 08, 1997.

<sup>40</sup> Here the Court made reference to 'sagacity' as defined in Webster's *New International Dictionary* 2198 (2nd edn, (unabridged) 1953).

<sup>41</sup> *AG (McGrath) v Healy* [1972] IR 393. Pringle J approved Lord Parker CJ in *DPP v Bradfutre and Associates Ltd* [1967] 2 QB 291 at 295.

<sup>42</sup> *Flynn v Denieffe* [1990] ILRM 391, per Murphy J at 394.

<sup>43</sup> Manual of Advertising Self-Regulation with the Code of Standards for Advertising, Promotional and Direct Marketing in Ireland' (7th edn) issued by the Advertising Standards Authority for Ireland. See Part 3 of this book.

observer should supervise the draw to ensure that individual entries enjoy equal chances. Promoters should not exaggerate consumers' chances of winning prizes, and should not include a consumer who has been awarded a gift in a list of prize winners. Promoters should also avoid claiming or implying that consumers are luckier than they are. They should not use terms such as 'finalist' or 'final stage' in a way that implies that consumers have progressed, by chance or by skill, to an advanced stage or promotion if they have not.

The 7th edition of the ASAI Code now notes that marketing communications that include a promotion and are significantly limited by time or space should include as much information about significant terms and conditions as practicable and should direct consumers clearly to an easily accessible alternative source where all terms and conditions of the promotion are prominently stated. Participants should be able to retain these or easily access them throughout the promotion.

### ***Lottery licences***

**[1.18]** Section 22 of the Gaming and Lotteries Acts prohibits advertising or publicity in relation to lotteries and provides that:

'No person shall print, publish in any newspaper or periodical publication, exhibit on any cinema screen or broadcast by radio any notice or announcement concerning a lottery ... or cause or procure any such notice or announcement to be so printed, published, exhibited or broadcast or knowingly circulate or cause or procure to be circulated any newspaper or periodical publication containing any such notice or announcement.'

This effectively means that a number of third party entities, such as magazines that advertise the product or service, could be prosecuted should the promotion be deemed to be a lottery.

**[1.19]** However, the National Lottery Act 2013<sup>44</sup> restates<sup>45</sup> the position under the now repealed National Lottery Act 1986<sup>46</sup> that this restriction shall not apply to a lottery held pursuant to a licence from the District Court in accordance with s 28 of the Gaming and Lotteries Acts, or where a permit from a Superintendent of An Garda Síochána has been obtained in accordance with s 27 of the Gaming and Lotteries Acts.

**[1.20]** Therefore, where the three elements of a lottery are deemed to exist, the lottery will only be lawful where a licence from the District Court<sup>47</sup> or a permit from a superintendent of An Garda Síochána has been obtained.<sup>48</sup> A superintendent of An Garda Síochána may, on the application of any person residing in his district, issue a permit for the promotion of a lottery provided the permit-holder derives no personal profit from the lottery. The total value of the prizes must be not more than €5,000,000 (or such other amount that, for the time being, stands specified in lieu of that amount in regulations made by the Minister)<sup>49</sup> and the value of each prize must be stated on every

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<sup>44</sup> No 13 of 2013 commenced 27 February 2014; s 2 of the National Lottery Act 2013 (Commencement) Order 2014.

<sup>45</sup> National Lottery Act 2013, s 51(1)(a).

<sup>46</sup> National Lottery Act 1986, s 33(1).

<sup>47</sup> Gaming and Lotteries Acts 1956–2013, s 28.

<sup>48</sup> Gaming and Lotteries Acts 1956–2013, s 27.

<sup>49</sup> Gaming and Lotteries Acts 1956–2013, s 27(2)(b) as amended by the National Lottery Act 2013, s 51(1)(b).

ticket or coupon.<sup>50</sup> If the superintendent refuses to grant a permit an appeal may be made to the District Court, and the decision of the District Court is final.<sup>51</sup>

[1.21] The lottery may be promoted in any part of the State, as well as the district in which the court granted the licence.<sup>52</sup> The District Court may grant a licence for a promotion for a period not exceeding one year;<sup>53</sup> however there are a number of restrictive requirements that must be fulfilled, for example, the lottery should be for some charitable or philanthropic purpose or purposes,<sup>54</sup> the value of each prize must be stated on every ticket or coupon<sup>55</sup> and the licensee should derive no personal profit from it.<sup>56</sup> In addition, no more than 40 per cent of the gross proceeds can be used for the expenses of promotion, including commission,<sup>57</sup> and the value of total prizes cannot exceed €30,000 (or such other amount that, for the time being, stands specified in lieu of that amount in regulations made by the Minister).<sup>58</sup>

[1.22] As a result of the requirement that the lottery should be for some charitable or philanthropic purpose or purposes,<sup>59</sup> it is quite common for a commercial entity to run a promotion by association with a registered charity which holds a lottery licence and, in return, the charity receives a donation from the promoter. By way of example, while the promoter of the 2006 ‘unwrap happiness’ promotion was Cadbury Ireland, the chocolate manufacturer, the terms and conditions stated that the lottery licence-holder was the Irish Wheelchair Association.<sup>60</sup>

### Gaming and betting

[1.23] ‘Gaming’ and ‘betting’ are distinct activities. ‘Gaming’ is defined as playing a game (whether of skill or chance or partly of skill and partly of chance) for stakes hazarded by the players,<sup>61</sup> where a ‘stake’ includes any payment for the right to take part in a game and any other form of payment required to be made as a condition of taking part in the game but does not include a payment made solely for facilities provided for the playing of the game.<sup>62</sup>

[1.24] It is possible that, in an attempt to avoid a competition falling within the legal definition of a lottery by removing the element of chance, a test of skill may inadvertently infringe upon the anti-gaming provisions of the Gaming and Lotteries Acts. For example, if a competition entrant is required to ring a premium rate number or

<sup>50</sup> See paras [1.30]–[1.38].

<sup>51</sup> Gaming and Lotteries Acts 1956–2013, s 27(7).

<sup>52</sup> Gaming and Lotteries Acts 1956–2013, s 29(1).

<sup>53</sup> Gaming and Lotteries Acts 1956–2013, s 28(1).

<sup>54</sup> Gaming and Lotteries Acts 1956–2013, s 28(1)(a).

<sup>55</sup> Gaming and Lotteries Acts 1956–2013, s 28(1)(d).

<sup>56</sup> Gaming and Lotteries Acts 1956–2013, s 28(1)(b).

<sup>57</sup> Gaming and Lotteries Acts 1956–2013, s 28(1)(e).

<sup>58</sup> Gaming and Lotteries Acts 1956–2013, s 28(2)(c) as amended by the National Lottery Act 2013, s 51(1)(d).

<sup>59</sup> Gaming and Lotteries Act 1956, s 28(1)(a).

<sup>60</sup> LK Shields Solicitors’ Update, Issue 18 - Spring 2007, A Matthews, ‘The Luck of the Draw’.

<sup>61</sup> Gaming and Lotteries Acts 1956–2013, s 2.

<sup>62</sup> Gaming and Lotteries Acts 1956–2013, s 2.

pay some other charge, this could constitute hazarding a stake. If the entrant must then answer questions in order to be in with a chance of winning the prize, this would constitute a game of skill and therefore all of the elements of illegal gaming would be present. In practice, however, the authorities have tended to act only in relation to unlawful gaming instruments<sup>63</sup> such as slot machines or other unlicensed amusement games and, even then, prosecutions are rare.

[1.25] Not all 'gaming' is unlawful but other than specific exemptions for circuses,<sup>64</sup> carnivals<sup>65</sup> and licensed amusement halls,<sup>66</sup> gaming is permitted only where there is no stake, apart from a charge to take part in the game and no personal profit is derived by the promoter of the game.<sup>67</sup>

[1.26] Competition organisers should also consider whether the competition could involve betting, in particular prediction competitions, such as a fantasy football style competition, which depends upon the outcome of a sporting event. Under Irish law the term 'bet', 'includes a wager and cognate words shall be construed accordingly'.<sup>68</sup> The term 'wager' is not defined by either the Betting Acts or the Gaming and Lotteries Acts; however *Murdoch's Dictionary of Irish Law* provides that a 'wagering contract' is:

'An agreement between two parties that upon the happening of some uncertain event, one party will pay a sum of money to the other, which party is to pay depending on the issue of the event. Neither party must have any other interest in the contract other than the sum he will win or lose. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.'

[1.27] A wager, therefore, will exist if there is (a) the offer to forfeit, based upon one's forecast of the outcome of some doubtful event, money or articles of value to one who maintains the opposite forecast backed by a corresponding offer, and (b) no interest by either party other than the respective forfeits offered.

[1.28] Both parties must also be capable of winning or losing the sum or stake, and the courts have held that a bet placed with a tote is not a wager as the Racing Board is legally bound to pay the money received to successful ticket holders and, consequently, it cannot win or lose.<sup>69</sup>

[1.29] Every contract by way of gaming or wagering is void,<sup>70</sup> and no action may lie for the recovery of any money or thing which is alleged to be won or to have been paid upon a wager.<sup>71</sup> Further, a promise, express or implied, (a) to pay any person any money paid by him under a gaming or wagering contract or (b) to pay any money by way of

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<sup>63</sup> Defined as 'any table or instrument of gaming and any coin, card, token or other article used as an instrument or means of gaming'; Gaming and Lotteries Acts 1956–2013, s 2.

<sup>64</sup> Gaming and Lotteries Acts 1956–2013, s 6(1).

<sup>65</sup> Gaming and Lotteries Acts 1956–2013, s 7(1).

<sup>66</sup> Gaming and Lotteries Acts 1956–2013, s 14.

<sup>67</sup> Gaming and Lotteries Acts 1956–2013, s 4(1).

<sup>68</sup> Betting Act 1931, s 1.

<sup>69</sup> *Duff v Racing Board* [1971] HC.

<sup>70</sup> Gaming and Lotteries Acts 1956–2013, s 36(1).

<sup>71</sup> Gaming and Lotteries Acts 1956–2013, s 36(2).

commission, fee, reward or otherwise in respect of such contract or of any services connected with same, is void and no action can be brought to recover such money.<sup>72</sup>

[1.30] Prior to 15 April 2015 it was unlawful for any person, other than a registered proprietor of registered premises,<sup>73</sup> to write, print, publish or knowingly circulate any advertisement, circular or coupon advocating or inviting or otherwise relating to betting on football games or knowingly to cause or procure, or attempt to cause or procure, any such advertisement, circular or coupon to be written, printed, published or circulated.<sup>74</sup> Every person who did so was guilty of an offence and was liable on summary conviction, in the case of a first offence, to a fine not exceeding €31 or to imprisonment for any term not exceeding one month and, in the case of a second or any subsequent offence, to a fine not exceeding €127 or to imprisonment for any term not exceeding three months.<sup>75</sup> However, this was repealed by the Betting (Amendment) Act 2015,<sup>76</sup> making advertisements relating to betting on football games lawful.

### Offences

[1.31] The financial penalties for operating unlawful lotteries, gaming or wagers are small, with a maximum fine of €127; however there is an additional custodial penalty of a maximum three months imprisonment available to the courts.<sup>77</sup> Where an offence is committed by a corporate body, a director who by consent, approval or who by his default facilitated the offence, may also be found guilty of an offence.<sup>78</sup> Powers of search and seizure are also provided<sup>79</sup> and on a conviction for an offence in relation to a lottery the court may order the destruction of any documents relating to the lottery.<sup>80</sup> However, as mentioned, the appetite for enforcement to date has been low.

[1.32] If a promotion operated by a financial services entity is found to constitute an illegal lottery, both the promotion and the advertised product or service will need to be withdrawn with the loss of any amounts invested in the campaign, such as printing and press advertising. Arguably more damaging would be the negative impact upon the reputation of the relevant entity promoting the product or service.

### Law reform

[1.33] It has been argued that the Gaming and Lotteries Acts is in need of radical reform as, in its current form, it inhibits *bona fide* sales promotions. The emergence of the internet has largely eliminated the practical application of the legislation in protecting individuals from the supposed evils of casinos and unlawful gaming, and it is arguable

<sup>72</sup> Gaming and Lotteries Acts 1956–2013, s 36(3).

<sup>73</sup> Betting Act 1931, s 32(2).

<sup>74</sup> Betting Act 1931, s 32(1).

<sup>75</sup> Betting Act 1931, s 32(3).

<sup>76</sup> No 7 of 2015. The Betting (Amendment) Act, 2015 was signed into law on 15 March 2015 and will be commenced in phases during 2015; Betting (Amendment) Act 2015 (Commencement) Order 2015. See paras [1.40]–[1.41] below.

<sup>77</sup> Gaming and Lotteries Acts 1956–2013, s 44.

<sup>78</sup> Gaming and Lotteries Acts 1956–2013, s 45.

<sup>79</sup> Gaming and Lotteries Acts 1956–2013, Part IV.

<sup>80</sup> Gaming and Lotteries Acts 1956–2013, s 48.

that protections intended by the Gaming and Lotteries Acts are either blatantly ignored or easily avoided by modern communications and hosting technologies.

[1.34] A report on the regulatory environment within which gaming and lottery activities are carried out in the State was published by the then Department of Justice, Equality and Law Reform<sup>81</sup> in June 2000<sup>82</sup> (the 2000 Report). The 2000 Report noted that major developments in technology, national lotteries and internet-based gaming determined<sup>83</sup> that, for a number of reasons, the Gaming and Lotteries Acts is not providing the required control of regulation and lotteries activities. It contained recommendations for new legislation to reform of the law relating to lotteries which would distinguish between categories of lottery depending on whether the core ‘use’ of the lottery is the promotion of a commercial product or direct fundraising by means of the lottery component. The report included a proposal to create a Gaming and Lotteries Authority to oversee registration and gambling, charitable lotteries and commercial sales promotions. On foot of a recommendation contained in the report that an age limit of 18 years should apply to the use of gaming machines, the purchase of lottery tickets, and the placing of bets with bookmakers and totalisers, a draft Totaliser (Amendment) Bill 2005 (the 2005 Bill) sought to amend the Totaliser Act 1929 by setting an age limit below which persons may not place bets with a totaliser<sup>84</sup> and to increase the penalties for offences of up to €3,000; however, the 2005 Bill was defeated at the Second Stage in the Seanad.<sup>85</sup>

[1.35] Following a public consultation on reform of gambling laws in Ireland, in December 2010 the then Department of Justice and Law Reform<sup>86</sup> published a report<sup>87</sup> which, although focused primarily on the law relating to traditional gambling and casinos, also considered the law relating to lotteries. The report acknowledged that lotteries were on the ‘soft side’ of gambling<sup>88</sup> and proposed new categories of lotteries which would operate under a permit issued by the Department of Justice and Law Reform, including a distinct category of ‘promotional lottery’ associated with sales or marketing.<sup>89</sup> Any such lottery would operate under a permit issued by the Department of Justice and would also need to comply with requirements set out in future regulations.<sup>90</sup>

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<sup>81</sup> Now the Department of Justice and Equality.

<sup>82</sup> Report of the Interdepartmental Group in June 2000 entitled ‘Review of the Gaming and Lotteries Acts 1956–86’.

<sup>83</sup> Review of the Gaming and Lotteries Acts 1956–86, p 2.

<sup>84</sup> ‘An apparatus or organisation by means of which an unlimited number of persons can each stake money in respect of a future event on the terms that the amount to be won by the successful stakers is dependent on or to be calculated with reference to the total amount staked by means of the apparatus or organisation in relation to that event but not necessarily on the same contingency, and the said word includes all offices, tickets, recorders, and other things ancillary or incidental to the working of the apparatus or organisation.’ Totaliser Act 1929, s 1.

<sup>85</sup> The lower House of the National Parliament (Oireachtas) in Ireland.

<sup>86</sup> Now the Department of Justice and Equality.

<sup>87</sup> ‘Options for Regulating Gambling’, December 2010.

<sup>88</sup> ‘Options for Regulating Gambling’, s 10.2.

<sup>89</sup> ‘Options for Regulating Gambling’, December 2010, s 10.5.

<sup>90</sup> ‘Options for Regulating Gambling’, December 2010, s 10.5.

**[1.36]** On 15 July 2013 the Irish government published a General Scheme for a Gambling Control Bill<sup>91</sup> (the Scheme) to modernise the legislative framework for gambling casinos and lotteries. The Scheme specifically lists consumer choice and protection among its primary purposes,<sup>92</sup> and the spirit of the Scheme can be further considered in light of comments by the then Minister for Justice, Mr Alan Shatter, who, in Written Answers on Gaming Regulation,<sup>93</sup> said ‘... the first priority must be public safety and the maintenance of clear, transparent controls ...’.

**[1.37]** The proposals set out in the Scheme provide for the establishment of a gambling regulator, the Office of Gambling Control Ireland (OGCI). In relation to lotteries specifically,<sup>94</sup> the Scheme proposes that a District Court lottery licence application will not be required for certain categories of lotteries from which the promoters derive no personal gain and where prizes fall under certain thresholds; however, there will be a requirement to notify the OGCI in advance of these lotteries taking place.

**[1.38]** A lottery licence will be required where the level of prize money to be won by the player is determined by the extent to which the selected numbers match those on the player’s ticket, or where the numbers required in order to win the top prize are not matched and the prize is held over until the next draw or is added to the general pool of prize money. In order to obtain a lottery licence, it must be demonstrated that the licence has some charitable or philanthropic purpose, and, at a minimum, 25 per cent of the proceeds of ticket sales in a licensed lottery must be allocated to charitable or philanthropic causes. The Scheme will differentiate between different types of lottery licence depending on the level of prizes, namely lotteries with an annual prize fund of up to €120,000, those offering prize money of up to €50,000 per week or €250,000 per month, and those offering prize money exceeding €50,000 per week or €250,000.

**[1.39]** Of particular relevance to this work, the Scheme proposes the introduction of separate categories of licences for lotteries operating in conjunction with sales or marketing promotions and for scratch cards, whereby anyone running a commercial sales promotion which falls within the definition of a lottery can apply to the OGCI for a licence.

**[1.40]** Separately, the Betting (Amendment) Act 2015<sup>95</sup> (‘Betting Amendment Act’) was signed into law on 15 March 2015 and will be commenced in phases during 2015. The purpose of the Betting Amendment Act is to ensure fair and equal treatment of all bookmakers and betting exchanges in terms of taxation and licensing regardless of the platform used, and brings all remote bookmakers and betting intermediaries into the licensing and taxation regime. The Betting Amendment Act prohibits the advertisement, or causing to be advertised, a remote bookmaking operation carried on by a person who does not hold a bookmaker’s licence (or is otherwise deemed to have been issued such licence under the Betting Acts).<sup>96</sup> It is also prohibited to sell or cause to be sold by retail,

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<sup>91</sup> Gambling Control Bill 2013, General Scheme, July 2013.

<sup>92</sup> Gambling Control Bill 2013, General Scheme, July 2013, Head 4(iv).

<sup>93</sup> Dáil Éireann Debate, Tuesday, 19 July 2011 Vol 739 No 2.

<sup>94</sup> Gambling Control Bill 2013, General Scheme, July 2013, Head 19.

<sup>95</sup> No 7 of 2015.

<sup>96</sup> Betting Act 1931, s 32A(2) as inserted by Betting (Amendment) Act 2015, s 28. This section of the Betting (Amendment) Act 2015 will not commence until 1 August 2015; see s 2 of the Betting (Amendment) Act 2015 (Commencement) Order 2015.

or otherwise supply or cause to be supplied, to a member of the public a product that bears the name of any such unlicensed person, or any trade description, designation, trademark, emblem, marketing image or logo owned or used by such person in connection with a remote bookmaking operation carried on by such person.<sup>97</sup>

[1.41] The Betting Amendment Act will give the Revenue Commissioners power to serve a compliance notice upon any person who advertises or sells by retail in contravention of this prohibition.<sup>98</sup> A person may appeal a compliance notice served upon them to the District Court.<sup>99</sup> Failure to comply with a compliance notice by the specified date in that notice will be an offence liable, on summary conviction to a class A fine<sup>100</sup> or imprisonment for a term not exceeding six months or both, or, on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding two years or both.<sup>101</sup>

### **Consumer Protection Act 2007**

[1.42] There is an overlap between the rules governing competitions, prize draws and lotteries under the Gaming and Lotteries Acts and those under the Consumer Protection Acts 2007 and 2014 (Consumer Protection Acts), as the latter includes among the list of ‘Prohibited Commercial Practices’<sup>102</sup> the following:

- (i) operating, running or promoting a competition or prize promotion without awarding the prizes described or reasonable equivalents;<sup>103</sup>
- (ii) making a representation or creating an impression that a consumer has won or will win a prize or other equivalent benefit, if—
  - (a) there is no prize or equivalent benefit, or
  - (b) in claiming the prize, the consumer has to make a payment or incur a loss.<sup>104</sup>

[1.43] In the context of this latter requirement, advertisers should be mindful of the 2012 preliminary ruling of the Court of Justice of the European Union<sup>105</sup> (CJEU), which

<sup>97</sup> Betting Act 1931, s 32A(3) as inserted by Betting (Amendment) Act 2015, s 28. This section of the Betting (Amendment) Act 2015 will not commence until 1 August 2015; see s 2 of the Betting (Amendment) Act 2015 (Commencement) Order 2015.

<sup>98</sup> Betting Act 1931, s 32B(1) as inserted by Betting (Amendment) Act 2015, s 28. This section of the Betting (Amendment) Act 2015 will not commence until 1 August 2015; see s 2 of the Betting (Amendment) Act 2015 (Commencement) Order 2015.

<sup>99</sup> Betting Act 1931, s 32B(5) as inserted by Betting (Amendment) Act 2015, s 28. This section of the Betting (Amendment) Act 2015 will not commence until 1 August 2015; see s 2 of the Betting (Amendment) Act 2015 (Commencement) Order 2015.

<sup>100</sup> A fine between €4,000–€5,000.

<sup>101</sup> Betting Act 1931, s 32B(10) as inserted by Betting (Amendment) Act 2015, s 28. This section of the Betting (Amendment) Act 2015 will not commence until 1 August 2015; see s 2 of the Betting (Amendment) Act 2015 (Commencement) Order 2015.

<sup>102</sup> Consumer Protection Act 2007, Pt 3 Ch 4.

<sup>103</sup> Consumer Protection Act 2007, Pt 3, Ch 4, s 55(1)(u).

<sup>104</sup> Consumer Protection Act 2007, Pt 3, Ch 4, s 55(1)(u).

<sup>105</sup> Case 428/11, *Purely Creative Ltd and Ors v Office of Fair Trading*, Judgment of the Court (6th Chamber) of 18 October 2012.

interpreted the underlying section of the Unfair Commercial Practices Directive<sup>106</sup> as prohibiting the consumer from bearing any cost whatsoever, even if it is *de minimus* compared to the value of the prize, or a cost which would not procure any advantage for the promoter, such as the cost of a postage stamp. The CJEU also considered it irrelevant that the actions required to claim the prize could be completed via several methods offered to the consumer, one of which was free of charge. The CJEU emphasised the need for clear and sufficient information to be provided to the consumer in order to enable them to identify precisely the nature of the prize. By way of example, the CJEU stated that a prize defined as an ‘entrance ticket’ for a football match would not cover the costs of transport from the consumer’s home to the football stadium, however, a prize of ‘attendance’ at the game would require the trader to bear the travel costs.<sup>107</sup> Consequently, the advertising of prize draws must be structured with considerable care, and promoters should delineate the scope of prizes exactly. The CJEU left the assessment of the clarity and comprehensibility of information to the national courts.<sup>108</sup>

**[1.44]** Breach of the Consumer Protection Acts can constitute a criminal offence. For further information about the Consumer Protection Acts, see Chapter 2, *Consumer Protection*.

### **Premium rate services**

**[1.45]** In Ireland, premium rate services are regulated by the Commission for Communications Regulation (ComReg) by way of a Code of Practice<sup>109</sup> (ComReg Code).

**[1.46]** The ComReg Code should be considered by promoters running competitions or ‘sweepstakes’, and permitting entry through certain premium rate telephone numbers or premium rate SMS numbers. In relation to any competition using a premium rate number for entry, the promoter must provide the following information on promotional materials:

- (i) details of how the competition operates and winners are selected;
- (ii) any material terms and conditions;
- (iii) an accurate and clear description of prizes;
- (iv) the closing date;
- (v) any eligibility restrictions;
- (vi) any costs in order to receive or use the prize; and
- (vii) Any requirement for the winner to participate in further publicity.

**[1.47]** Promotions must not seek to take advantage of lack of consumer knowledge by using technical jargon or other methods. There are also restrictions on what wording can

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<sup>106</sup> Directive 2005/29/EC concerning unfair business-to-consumer commercial practices.

<sup>107</sup> Case 428/11, *Purely Creative Ltd and Ors v Office of Fair Trading*, Judgment of the Court (6th Chamber) of 18 October 2012, para 52.

<sup>108</sup> Case 428/11, *Purely Creative Ltd and Ors v Office of Fair Trading*, Judgment of the Court (6th Chamber) of 18 October 2012, para 53.

<sup>109</sup> Code of Practice Premium Rate Services issued by the Commission for Communications Regulation, 5 April 2012, Reference ComReg 12/29. See [www.comreg.ie](http://www.comreg.ie).

be used in promotional materials; for example, a promoter cannot suggest that winning a prize is a certainty or exaggerate the chances of winning a prize. All competitions where the entry cost of a call to a premium rate number or the text message to a short code number exceeds 25 cent must be licensed, and it is a requirement for the provider of the premium rate number or short code to apply for, and obtain, the licence.

[1.48] Advertisements for the premium rate services must not contain or promote anything which is in breach of the law, nor omit anything which the law requires. Under the ComReg Code, ComReg has the right to request evidence of compliance with all legal obligations of the promoter, including legislation not specifically under the supervision of ComReg, such as misleading advertising requirements. In the event that a competition is found to be non-compliant with the ComReg Code, ComReg can block the entry number.

### **ASAI Code**

[1.49] Chapter 1 of the ASAI Code<sup>110</sup> includes a section relating to ‘Promotional Marketing Practices’ which sets out a number of requirements that must be adhered to when considering a sales promotion. The terms and conditions of the promotion must be clear, complete and easy for the consumer to understand. In particular, the following points should be clearly explained:

- (a) how to participate, including any conditions and costs;
- (b) the promoters’ full name and business address in a form that can be retained by consumers;
- (c) the closing date prominently displayed; where the final date for purchase of the promoted product differs from the closing date for the submission of claims or entries, this should be made clear to participants;
- (d) any proof-of-purchase requirements; this information should be emphasised, for example by using bold type, separating it from other text or using a different colour. A requirement to purchase more than one unit of a product to participate in a promotion ideally should be stated on the front of any label or material carrying details of the promotion;
- (e) any geographical or personal restrictions;
- (f) any necessary permissions (eg those of parents or guardians);
- (g) any limit on the number of applications permitted;
- (h) any limit on the number of promotional products or prizes that an individual consumer or household may claim or win;
- (i) any other factor likely to influence consumers’ decisions or understanding about the promotion.

[1.50] The promoter should not state anything in the terms and conditions of the promotion that it does not intend to be bound by, and it is worth noting that the corresponding English body, the Advertising Standards Authority, handed down a reprimand to the Bradford and Bingley Building Society in 2008 for judging an internet competition on criteria that were not explicit and which did not match those advertised on its website. Bradford and Bingley had advertised for entrants for its ‘Property

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<sup>110</sup> See Part 3 of this book.

Woman of the Year' competition, stating that 'Judging will be based on your financial nous, feedback from your tenants, how long it took to build your business, how you run it, and your personal drive and determination to succeed'. An unsuccessful regional finalist complained that she had been rejected despite not having been asked to provide any evidence on which a decision based on those criteria could have been made.

**[1.51]** Consumers should also be told before entry if participants may be required to become involved in any of the promoters' publicity or advertising, whether it is connected with the sales promotion or not.

**[1.52]** The section of the ASAI Code relating to 'Children' provides additional requirements for promotions aimed at children, and requires that any promotions addressed to or likely to attract children:

- (a) should not offer promotional products that are unsuitable for distribution to children;
- (b) should be carried out responsibly, taking into account the location in which the promotion is conducted;
- (c) should make it clear that parental permission is required if prizes and incentives might cause conflict between children and their parents; examples include animals, bicycles, outings, concerts and holidays;
- (d) should allow a sufficient timeframe for participation in a manner that will reflect moderate consumption of a product;
- (e) should clearly explain the number and type of any additional proofs of purchase needed to participate;
- (f) should contain a prominent closing date;
- (g) should not exaggerate the value of prizes or the chances of winning them;
- (h) should not exploit children's susceptibility to charitable appeals.

**[1.53]** The ASAI Code also specifically draws attention to the requirements of the Data Protection Act 1988 to 2003 and the ePrivacy Directive (SI 336/2011), in regard to the collection, processing, keeping, use and disclosure of personal data.

