

High stakes

As Ireland's Gaming and Lotteries Act reaches its 50th anniversary, Rob Corbet examines the current state of regulation and argues the case for radical reform of this outmoded legislation.

The Gaming and Lotteries Act is 50 years old this year. The Act was originally designed to protect Irish consumers from the dangers of slot machines, casinos and unscrupulous lotteries. However, 50 years on, its scope continues to inhibit bona fide sales promotions, while being largely ignored in practice by an emerging Irish casino industry.

This article will contrast how the scope of the Gaming and Lotteries Act can inhibit common forms of sales promotion, while 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.

Section two of the 1956 Act defines a lottery as including „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“.

While the above definition is non-exhaustive, in the leading Irish case on the topic, *Flynn v Denieffe* [1993], the Irish Supreme Court has elaborated on the statutory definition as follows:

„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.“

Apart from certain lotteries operated at carnivals, dances and similar events where no personal profit is derived by the

person arranging the event, lotteries are generally prohibited under Irish law. There is an exemption for private lotteries held by members of one society. Another exception is the National Lottery, which is operated by a subsidiary of the Irish Post Office (An Post) and which was established under the National Lottery Act 1986.

Section 22 of the Act prohibits the advertisement of lotteries by printing, publishing, exhibiting, broadcasting or circulating any notice or announcement concerning a lottery.

Lotteries and sales promotions

As we have seen, a lottery has three key elements:

- a prize;
- it is drawn at random without any skill on the part of the entrants; and
- there is a stake or another form of payment for entry.

Without all three ingredients, a promotion or competition cannot be deemed a lottery. All three ingredients are frequently found in common marketing promotions. For example, it is common for alcohol companies to offer prizes to drinkers of particular products on promotion nights in pubs. In those circumstances, as the promoter will usually want drinkers to purchase a drink in order to enter and as the winners tend to be drawn at random, all of the ingredients of an unlawful lottery are present.

Common avoidance devices

To avoid the application of the illegal lotteries provisions to such sales promotions, properly advised promoters tend to either introduce a 'no purchase necessary' route of entry or, alternatively, they require entrants to complete a tie-breaker or other 'test of skill'. In practice, these devices tend to be fairly cosmetic, as promoters naturally try to attract as many 'pay' entries as possible without dissuading entrants by

using difficult entry requirements.

Another common device is for commercial entities to cut a deal with a registered charity which holds a lottery licence. However, the terms under which a lottery licence can be obtained are restrictive. For example, a lottery licence will only be granted by the district court for periodical lotteries where it fulfils some charitable or philanthropic purpose and the licensee can derive no personal profit from it. In addition, not more than 40% of the gross proceeds can be utilised for the expenses of promotion, and prizes cannot exceed €19,046 (£13,200).

In practice, commercial entities tend to make a contribution to the charity in return for the charity making a district court lottery licence application. It is for this reason that one will often see in the on-pack terms and conditions for food and drink promotions, references to the promotion being held under a lottery licence issued to a particular named charity.

The 1956 Act also prohibits unlawful gaming. 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“.

A stake is defined as including „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“.

Not all ‘gaming’ is unlawful. However, other than specific exemptions for carnivals and licensed amusement halls, 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.

Gaming and sales promotions

At first glance, these broad definitions would seem to apply to various types of sales promotions. For example, the drinks promoter, referred to earlier, decides to introduce a test of skill in order to avoid the illegal lottery provisions. If the test of skill required entrants to ring a premium rate number or pay another disguised charge (thereby hazarding a stake) and to answer various questions (a game of skill) in order to be in with a chance of winning the prize, all of the ingredients of illegal gaming would be present.

The drinks promoter may need to restructure this test of skill to avoid inadvertently infringing the anti-gaming provisions. However, in practice, the authorities have tended to act only in relation to unlawful 'gaming instruments' such as slot machines or other unlicensed amusement games, and even then, prosecutions are rare.

Casinos

The scope of the definitions of 'gaming' and 'lotteries' outlined above were originally designed to criminalise most forms of casinos or unlicensed amusement halls. However, nothing in the Act specifically addresses or prohibits an Irish resident from gambling on an internet casino site established outside of Ireland.

Accordingly, highly successful Irish online poker and casino operators can simply locate their servers outside the jurisdiction to avoid the application of the legislation. Any attempt to amend the legislation to prevent such operations would be utterly futile given the ease with which Irish consumers could simply migrate to alternative online casino and poker rooms.

Even in the 'offline' world, the legislation has failed to stop the emergence of casinos in Ireland. Currently, there are 12 casinos operating in Ireland, ostensibly as private members' clubs. On the face of it, these private casinos offer

various unlicensed lottery and gaming products apparently in breach of the Gaming and Lotteries Act. However, with the exception of a recent pronouncement by the Minister for Justice that he will take action against commercial casinos, there has been little evidence of enforcement.

Penalties

Other than search and seizure rights under part five of the 1956 Act, the financial penalties for unlawful gaming or operating illegal lotteries are derisory, with a maximum fine of €127 (£88). However, there is an additional custodial penalty of a maximum three months imprisonment available to the courts. Where an offence is committed by a corporate body, the director – who by consent, approval or default is responsible – may also be found guilty of an offence. However, as mentioned above, the appetite for enforcement to date has been low.

The case for reform

The Gaming and Lotteries Act 1956 is in need of radical reform. In sales promotions terms, it does little more than oblige promoters to build in artificial avoidance devices to side-step technical infringements of the legislation. In gaming and casino terms, it is either blatantly ignored or easily avoided by modern communications and hosting technologies.

As a result, the Act does nothing to reduce the perceived dangers of unlicensed gambling which were thought to exist in the 1950s. Indeed, 50 years on, there is a growing realisation that the public cannot and need not be shielded from reputable sales promotions and properly governed gaming activities.

As is the case in the UK, Ireland is a relatively betting-friendly jurisdiction with a thriving online and offline betting and gaming industry. Indeed, with effect from July this year, the rate of betting duty payable by bookmakers in

Ireland will reduce to 1%. In this context, the case for an overhaul of the 1956 Act is compelling.