

Advertising Association response to the Department for Social Development's consultation on the Future Regulation of Gambling in Northern Ireland

1. The Advertising Association

The Advertising Association is the only organisation that represents all sides of the advertising and promotion industry in the UK - advertisers, agencies and the media. In the UK, the advertising industry employs nearly 300,000 people. In 2009, advertising expenditure was £14.5bn.

We promote and protect advertising. We communicate its commercial and consumer benefits and we seek the optimal regulatory environment for our industry. Our goal is that advertising should enjoy responsibility from its practitioners, moderation from its regulators, and trust from its consumers.

2. Advertising gambling products in Great Britain

Gambling advertising has been permitted on British television and in other British media since 2007, when the new rules in the Advertising (CAP and BCAP) Codes came into force, following the 2005 Gambling Act which lifted gambling advertising restrictions in Great Britain.

Following a public consultation, the industry put in place strict rules around the advertising of such products to ensure that children and other vulnerable persons were suitably protected. Gambling advertising, which has been handled sensitively, has not proven controversial in practice and appears to be accepted by the public; there are few complaints to the ASA about advertisements for these products.

The Codes have now been in place for over three years and in that time the gambling industry has also developed its own codes for socially responsible advertising. These include a requirement for advertisements to contain GambleAware website information.

The responsible behaviour exhibited by gambling operators in advertising practices is also borne out by a compliance survey the ASA conducted over a two month period in the immediate aftermath of the 2005 Act coming into force, which it published in February 2008. The ASA found that 99% of the advertisements it reviewed complied with the advertising codes that governed them.

3. Overview of the Department of Social Development's (DSD) approach

The Advertising Association supports any moves towards clearer, more flexible and more consistent regulation. Therefore, the overriding policy objective of simplification set out in the consultation paper is one that we support.

We wholly endorse the Department of Social Development Northern Ireland's (DSD) assessment that the current gambling legislation in Northern Ireland fails to take account of the various developments in the gambling sector that have taken place over the last few years in the rest of the UK. We support the balanced approach taken by the DSD which would strengthen the regulatory regime while also relaxing regulatory barriers to industry growth.

The proposals to make gambling rules in Northern Ireland consistent with those in the rest of the UK would have a positive impact in a number of ways, which we outline below.

4. Impact of proposals on problem gambling

When looking at a liberalisation of advertising rules for gambling services, the obvious concern for any regulator or operator is problem gambling and any potential impact that increased advertising of gambling services could have on problem gambling. We believe that liberalisation of the Northern Ireland market will not lead to an increased level of problem gambling, and we base this judgment on the outcomes of the 2005 Gambling Act.

The three core aims of the 2005 Gambling Act were to: keep crime out; protect the young and vulnerable; and treat consumers fairly. The 2005 Act has been successful in achieving those objectives. If DSD's approach and objectives are to mirror the intentions of the 2005 Act, then the outcome should be stronger regulation, with enhanced controls and stricter enforcement, set alongside an industry environment with a focus on social responsibility.

We believe that the approach set out in the DSD paper is entirely appropriate, particularly given that the mainland experience of gambling reform has proved uncontroversial in practice. The Gambling Prevalence Survey 2010¹, conducted by the National Centre for Social Research on behalf of the Gambling Commission, contained detailed population-level data about gambling behaviour and attitudes. The survey identified no clear evidence of an increase in problem gambling.

The Prevalence Survey measured the rate of problem gambling using two different methodologies, and both methodologies found that the levels of problem gambling were minimal – consistently less than 1%. In the report, advertising is not referenced as a cause of problem gambling.

The latest Gambling Prevalence Survey clearly shows that a liberalisation of the advertising rules for gambling products has not led to an increase in problem gambling in Great Britain.

5. Impact of proposals for the media

As stated above, broadcasters and publishers have considerably more freedom to advertise gambling products in Great Britain than in Northern Ireland. This poses a problem for broadcasters who cannot differentiate their feeds into Northern Ireland, as the rules effectively require all gambling advertising they carry to be in a form that will not breach Northern Ireland legislation. In order to stay the right side of the current legislation, broadcasters have taken an understandably conservative approach, for example determining that the inclusion of a disclaimer in an advertisement to the effect that the advertisement does not apply to Northern Ireland, or Northern Irish residents, is not a sufficient measure to ensure compliance with the Northern Irish legislation.

We are, therefore, pleased to see the recognition in the DSD paper of broadcaster concerns about the risks of inadvertently broadcasting advertising for products or services illegal in Northern Ireland to that part of the United Kingdom.

¹ British Gambling Prevalence Survey 2010:

www.gamblingcommission.gov.uk/PDF/British%20Gambling%20Prevalence%20Survey%202010.pdf

Satellite broadcasters do not have technology to enable them to carry different advertisements in Northern Ireland to those shown in Great Britain. The result is that Northern Ireland law determines the content of gambling advertisements broadcast by satellite providers throughout the UK, notwithstanding the more relaxed regulatory regime available within Great Britain. This deprives consumers in Great Britain of advertising they may be interested in because of the different legal situation in Northern Ireland.

Broadcasters need to invest considerable resources to ensure gambling advertisements are compliant with the law in Northern Ireland or that there are sufficient restrictions in place to prevent people in Northern Ireland from taking part.

We therefore request that the DSD use the opportunity presented by the current consultation to harmonise the rules across the UK, thereby addressing this burdensome situation for broadcasters which has no benefit for consumers or gambling operators.

Apart from the specific benefits to UK-wide broadcasters, further benefits to the media as a whole will derive from these proposals as the Northern Irish market will be able to benefit from the considerable advertising spend by gambling operators now able to enter that market. Gambling operators spent £150 million advertising their services in 2010 and the further advertising spend which will be created as a result of these proposals will provide valuable revenue to the media in Northern Ireland.

6. Impact of proposals for sales promotions

As stated in the DSD paper, the 2005 Act provided a statutory definition of a lottery, for the first time, via Section 14 ("Lottery") of the legislation. As a result of this, the statutory definition of a lottery now allowed games of chance linked to product or service purchased at their normal market price. Crucially, the 1985 Order in Northern Ireland does not allow this to be the case. The DSD proposal therefore presents an excellent opportunity to address this discrepancy.

In drafting Schedule 2 of the 2005 Act, the Government intentionally excluded the price of a product or service (when that price has been dictated by normal market factors and not inflated on account of the arrangement) from being considered as payment to enter for the purposes of identifying a lottery. This allows marketers in Great Britain to run on-pack prize promotions, such as instant win mechanics, without the need also to provide a free entry route - a mechanism for participating that does not involve the purchase of the product. No consumer detriment resulting from such activities was expected and indeed none has been identified in Great Britain, since the 2005 Act came into force.

We believe that Northern Irish consumers would benefit from participating in such promotional offers, such as instant-win promotion, which currently explicitly exclude them, as a result of the legal differences that presently exist between the two jurisdictions. Northern Ireland's own businesses also suffer as they are unable legally to run such product promotion schemes at all within their home territory.

We believe that the law should be changed to enable people in Northern Ireland to participate in prize competitions and free draws on the same basis as those in the rest of the UK. It is clearly disadvantageous to the consumer interest that promoters exclude consumers in Northern Ireland from certain promotions.

7. Impact on proposals with regard to conformity of NI law with EU law

There is a requirement for the law in Northern Ireland to accord with EU law. In our view, the law of Great Britain does comply with EU law and, as it stands, the law of Northern Ireland does not. Specifically, we are concerned that there is European case law which suggests that the Northern Ireland Executive could not prevent prize promotions linked to product or service purchase requirements from taking place. Indeed, the 2010 judgment made by the European Court of Justice in the case of *Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH* (Case C304/08) effectively makes this point.

In summary, this case involved a German business, Plus, that launched a promotional campaign in which the public was invited to purchase goods sold in its shops in order to collect points. By collecting 20 points, customers could take part free of charge in certain draws held by Deutscher Lottoblock (national association of 16 lottery undertakings). Following legal proceedings brought by the German association founded to combat unfair competition, Plus was ordered to put an end to this practice. These legal proceedings were based on the German Law on unfair competition which provides for a general prohibition of combining a prize competition and lottery with the obligation to purchase.

On a request for a preliminary ruling from Germany, the European Court of Justice ruled in January 2010 that the Unfair Commercial Practices Directive (UCPD) was a Maximum Harmonisation Directive and therefore national law could not go further than the restrictions in the Directive. A sales promotion scheme had to be judged against the terms of the Directive and, on that basis, the German law was invalid because it constituted an automatic ban on games of chance linked to purchase. In respect of UCPD, it is clear from this case that European law takes precedence over national law. The rationale for this decision has been followed in two further references to the European Court, one from Belgium and one from Austria.

Therefore, as sales promotions schemes were ruled to be subject to the EU Directive on UCPD, it is essential that the Northern Ireland Executive modify its rules to ensure that they are consistent with the Directive. This can be achieved through liberalising the Northern Ireland gambling rules to make them consistent with those set out in the 2005 Gambling Act.

8. Impact of the proposals on overseas gambling operators

As stated in the DSD paper, this is an issue which should be addressed at a UK level.

9. Conclusion

The Advertising Association endorses the balanced approach set out by DSD that will make gambling rules in Northern Ireland consistent with the rest of the UK. This is a sensible approach which will both strengthen the regulatory regime in order to protect consumers while also relaxing unnecessary regulatory barriers to industry growth.

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