



## The Advertising Association

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### **RESPONSE TO THE STRATEGIC REVIEW OF GAMBLING POLICY, PRACTICE AND LAW BY THE DEPARTMENT FOR SOCIAL DEVELOPMENT IN NORTHERN IRELAND**

The Advertising Association is the only body representing all sides of the advertising and promotional marketing industries, worth £18.6 billion in 2008. Its membership represents advertisers, agencies, media and support services in the UK. Further information about the organisation is available at: <http://www.adassoc.org.uk/>

#### **1. Introduction & Summary**

1.1. The Advertising Association responds here to the strategic review of gambling policy, practice and law currently being conducted by the Department for Social Development in Northern Ireland (DSDNI).

1.2. The Advertising Association agrees that a considered review of the legislation governing gambling in Northern Ireland - namely The Betting, Gaming, Lotteries & Amusements (Northern Ireland) Order 1985<sup>1</sup> ('the 1985 Order') - is both timely and necessary for the reasons outlined by DSDNI in its call for evidence and considered in Paragraph 2.1 of this response.

1.3. In this response, the Advertising Association calls on DSDNI to repeal the 1985 Order and seek amendment by the Westminster Government of the Gambling Act 2005 ('the 2005 Act') such that all its provisions would have legal effect in Northern Ireland<sup>2</sup>. If, however, adoption of the 2005 Act in its entirety is, for whatever reason, not regarded as possible, then amongst the amendments DSDNI should make to the 1985 Order (on the basis that experience from the mainland suggests they would not prove problematic) are:

- (a) the lifting of the advertising restrictions that the 1985 Order contains;
- (b) the inclusion within that Statutory Instrument of the definition of a lottery (and what constitutes payment to enter one) that is contained within the 2005 Act, so as to allow in the territory a specific, yet significant, tranche of sales promotion activity that is currently legal on the mainland; and,
- (c) the permitting of suitably regulated prize competitions that involve the forecasting of events.

1.4. The Advertising Association looks forward to publication by DSDNI in due course of a full discussion document informed by the submissions it receives to this initial consultative exercise, together with a summary of those responses. No part of this submission should be treated as if it were confidential in nature.

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<sup>1</sup> Statutory Instrument No. 1985/1204 (N.I. 11), as amended

<sup>2</sup> Presently only Section 43 (Chain-gift schemes), Section 331 (Foreign gambling) and Section 340 (Foreign betting) and the entry related to this latter in Schedule 17 (Repeals) of the 2005 Act apply.

## **2. Comments on the current legislative framework for gambling in Northern Ireland**

2.1. It is hard to fault DSDNI's own analysis of the legal framework that exists in Northern Ireland around gambling, as being old, inflexible, hard to understand and consequently leaves the authorities there poorly equipped, from a legislative perspective, to deal with new products and ways of gambling never envisaged when the 1985 Order was drawn up. These criticisms of the 1985 Order are almost identical to those which ultimately drove the Home Office to initiate its review in 2000 of the legislation governing gambling on the mainland. That review marked the start of five years of detailed scrutiny of the legislative framework for gambling that eventually culminated in the passage of the 2005 Act, which finally came into force just over two years ago, on 1 September 2007.

2.2. Just as DSDNI is now, so the UK Government was then keen to ensure, in drawing up its proposals for updating the legislative framework governing gambling on the mainland, that: crime was kept out; the young and vulnerable were protected; and, consumers were treated fairly. The 2005 Act is widely considered to have been successful in achieving those objectives.

2.3. Whilst DSDNI states that it currently has little hard evidence upon which to develop policy proposals, it does find itself in the advantageous position of being able to draw on the experience of mainland policy-makers, legislators, regulators and other stakeholders from which it may gain an understanding of how decisions were arrived at in respect of the 2005 Act. Furthermore, the 2005 Act has now been in operation for more than two years - DSDNI therefore finds itself in a good position to consider the practical operation of the legislation over that period.

2.4. Needless to say, the decision to update the gambling regime on the mainland was not taken lightly and concerns were certainly expressed by a range of interests about how gambling reform might play out in practice both whilst the legislation was being developed and between the passage of the 2005 Act and it actually coming into force. The fears of some who were critical of the gambling reform proposals have not, however, been realised and the practical application of the new regime presided over by the Gambling Commission (GC) has proven uncontroversial.

## **3. Promotional activity under the Gambling Act 2005**

3.1. Clearly the 2005 Act covers a huge range of activities, but the legislation reformed two areas in particular that had implications for promotional activity on the mainland, both of which the Advertising Association welcomed and upon which it is well-placed to provide observations to DSDNI. These two areas are dealt with below.

3.2. The 2005 Act repealed legislation that had previously served to restrict certain forms of gambling activity from being advertised. Although Part 16 ("Advertising") of the 2005 Act refers to advertising, containing reserve powers as it does for the Secretary of State to issue regulations governing gambling advertisements *in extremis*, the Department for Culture, Media & Sport (DCMS) has no present intention of exercising them. Instead, before the 2005 Act came into force DCMS indicated its intention to allow the future GC to delegate responsibility for the regulation of broadcast and non-broadcast gambling advertising to the Advertising Standards Authority (ASA). Whilst certain parties expressed concern about the liberalisation of gambling advertising as a point of principle, the industry put in place strict rules (having publicly consulted on them) around the advertising of such products to ensure that, for example, 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 – certainly complaints are few to the ASA about advertisements for these products.

3.3. The responsible behaviour exhibited by gambling operators towards their 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 and which it published in February 2008. The ASA found that 99% of the advertisements it reviewed complied with the advertising codes that governed them<sup>3</sup>.

3.4. Turning to the other area of promotional activity affected by the reform of gambling legislation on the mainland – sales promotions: the 2005 Act provided a statutory definition of a lottery, for the first time, via Section 14 (“Lottery”) of the legislation. Previously on the mainland (as continues to be the case in Northern Ireland) case law was relied upon to identify lotteries.

3.5. An important test of whether an arrangement will be classified as a lottery and thereby a determination arrived at as to the scheme’s legality (or otherwise) is whether a payment has to be made in order for an individual to participate. Related to Section 14 is Schedule 2 (“Lotteries: Definition of Payment to Enter”), which defines what constitutes payment to participate in a lottery. In drafting Schedule 2, DCMS 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. What this means in practice is that marketers on the mainland are now permitted to run on-pack instant win arrangements, for example, without the need also to provide a free entry route (i.e. a mechanism for participating that did not involve the purchase of the product on which the promotion appeared). No consumer detriment resulting from such activities was expected and indeed none has been identified on the mainland, since the 2005 Act came into force. Northern Irish consumers are, however, currently unable to participate in such promotional offers (and potentially benefit from them, unlike their counterparts across the Irish Sea) as it is necessary for mainland companies to design such instant-win promotions so as explicitly to exclude them, given the legal differences that presently exist between the two jurisdictions. Meanwhile, Northern Ireland’s own businesses are unable legally to run such product promotion schemes at all within their home territory.

3.6. It is also notable that the 1985 Order specifically prohibits prize competitions in Northern Ireland that involve the forecasting of events. Such competitions were also effectively prohibited on the mainland until the 2005 Act came into force. Now, provided there is no payment being made in order to participate<sup>4</sup>, prize competitions involving the forecasting of events are permissible here. Given the level of participation, consumers appear to enjoy engaging with competitions of this type and no detriment, of which the Advertising Association is aware, has been associated with arrangements abiding by the regime established by the 2005 Act that covers this area.

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<sup>3</sup> *ASA Compliance Survey – Gambling 2007* can be downloaded from the following location: <http://www.asa.org.uk/NR/rdonlyres/126F3711-7E17-4469-A5D2-A366487130D2/0/GamblingSurvey2007.pdf>

<sup>4</sup> The 2005 Act places the same interpretation on the meaning of payment for the purposes of such forecasting competitions as applies to lotteries and which is described in Paragraph 3.5 of this submission.

#### **4. Recommendations in respect of DSDNI's strategic review of gambling policy**

4.1. In light of the foregoing, the Advertising Association sets out below a preferred recommendation to DSDNI, followed by one that the organisation regards as sub-optimal, but still valuable, if pursuit of the first option is not regarded as possible for whatever reason.

4.2. It is anticipated that one outcome of the review will be recognition that the mainland experience of gambling reform has proven uncontroversial in practice. As a consequence, it is strongly recommended that DSDNI simply repeal at the earliest opportunity the 1985 Order and request the concomitant amendment by the UK Government of Section 361 ("Extent") of the 2005 Act, such that the latter statute applies *in toto* to Northern Ireland, just as does in Scotland, Wales and England.

4.3. If DSDNI, pursuant to its review, decides only effectively to amend the 1985 Order, it is here recommended that the Department: repeals those restrictions the measure currently contains on advertising; and, introduces a statutory definition of a lottery (and what constitutes payment to enter one) which is identical to that contained within the 2005 Act. It is also recommended that any amended Order should also allow suitably regulated prize competitions involving the forecasting of events to be run in Northern Ireland.

17 December 2009