

Speech: Online gambling: the investigation so far and next steps

Speech given by George Lusty, CMA Project Director, at the Gambling Commission's Raising Standards Conference 2017.

Introduction

I'm George Lusty and I lead the work by the Competition and Markets Authority (CMA) investigating potentially unfair and misleading terms and practices in the remote gambling sector.

I'm grateful to the Gambling Commission (GC) for providing me with an opportunity to update you on our work today, and delighted to be sharing a platform with Paul Hope, Programme Director at the GC. My team has worked closely with Paul's over the past 18 months as part of a joint programme of work, with a view to ensuring a number of important changes for consumers and a much stronger focus on fairness and transparency in operators' terms and practices.

The particular focus of my presentation today will be to:

- update you on our ongoing consumer enforcement activity in the remote gambling sector
- describe a number of key terms and practices that have given us particular concern as a matter of consumer law
- outline some important changes that we're expecting from operators

This is an important update, as it outlines the parameters of what the CMA and GC consider to be acceptable (and unacceptable) behaviour in the remote gambling sector, particularly in relation to promotions. Paul and I will return to this topic later, but the GC has been clear that operators across the sector will be expected to implement these changes. We'll be able to share more information following the conclusion of our enforcement action with a number of operators.

Before I continue, I'd like first to:

- provide an overview of the CMA's role in enforcing key consumer protection legislation, and our overall approach to the use of our enforcement powers
- explain how and why we decided to take action in the remote gambling sector

The CMA – our role in enforcing consumer protection

legislation

The CMA is the UK's primary competition and consumer agency, and the focus of our work in the remote gambling sector has been the enforcement of consumer protection legislation. Two pieces of legislation have a particular bearing on operators' dealings with consumers in the remote gambling sector:

- The Consumer Protection from Unfair Trading Regulations 2008 (CPRs), which prohibit certain unfair commercial practices, in particular misleading acts or omissions, but also behaviour that is contrary to the requirements of professional diligence.
- The Consumer Rights Act 2015 (CRA), which – amongst other things – prohibits unfair contract terms in consumer contracts. The CRA requires that terms be fair and transparent. The 2 are interrelated, as terms that are not transparent are much more likely to be unfair. In assessing the fairness of a particular term, the CRA asks whether that term creates a significant imbalance, contrary to the requirements of good faith, to the detriment of consumers.

I'll explain later how the CMA has applied this legislation to certain terms and practices as part of this investigation. However, I should highlight that any assessment of how consumer protection legislation applies has to take account of the prevailing market context and the nature of consumer behaviour. I've mentioned requirements of 'professional diligence' and 'good faith' in my summary of the relevant legislation. The CMA's view is that these terms are informed by the market context, and in particular – given that gambling is a licensed activity – by the terms of the licensing regime and the accompanying codes of practice and technical standards requirements. These appropriately frame the standards expected of operators in this market when considering compliance with consumer protection legislation, in particular:

- Paragraph 4.2 of the Gambling Commission's 'Statement of principles for licensing and regulation' (versions in force March 2015 and June 2017) (SPLR) states that:

"the Commission expects operators to ...have due regard to the interests of customers and treat them fairly ... have due regard to the information needs of customers and communicate with them in a way that is clear, not misleading, and allows them to make a properly informed judgment about whether to gamble..."

- Section 5 of the Gambling Commission's 'Licence conditions and codes of practice' (versions in force March 2015 and January 2017) (LCCP) requires (at paragraph 5.1.1) that in relation to an incentive scheme (bonus):

"neither the receipt nor the value or amount of the benefit is (i) dependent on the customer gambling for a pre-determined length of time or with a pre-determined frequency; or (ii) altered or increased if the qualifying activity or spend is reached within a shorter time than the whole period over which the benefit is offered"

- The ‘remote gambling and software technical standards’ (version in force July 2015) (RTS) provide as follows:
 - RTS 14 (Responsible product design) is designed to “ensure that products are designed responsibly and to minimise the likelihood that they exploit or encourage problem gambling behaviour.”
 - RTS requirement 14A states that: “Gambling products must not actively encourage customers to chase their losses, increase their stake or increase the amount they have decided to gamble, or continue to gamble after they have indicated that they wish to stop.”

The CMA has had regard to these (and other) overarching statements of principle as part of its assessment. We have also carefully considered the typical consumer groups that participate in gambling, the nature of interactions between gamblers and operators, and the typical customer journey experienced by those who gamble online. All of these factors inform our assessment of what consumer law requires in this market. They should similarly inform operators’ own ongoing assessment of what they need to do to comply with this legislation in their interactions with consumers.

Stepping back, the CMA’s ultimate objective when it intervenes using its consumer powers in any market is to promote sector-wide compliance with consumer law. Accordingly, whilst we are taking forward individual enforcement cases against specific operators, we expect operators more widely to make equivalent changes to their terms and practices to ensure a consistent approach. Both the GC and CMA will carefully consider whether further enforcement action is required, should these issues not be addressed.

Why we came into the sector

So, what led the CMA to launch enforcement action in the remote gambling sector? The GC approached us initially, concerned by a rising number of complaints from consumers about potentially unfair terms and practices by operators, and that terms and conditions more generally were not ‘fair and open’ within the licence condition definition. The GC approached the CMA because we have a particular expertise in unfair terms, and act as the primary enforcement body in this area.

The CMA conducted some initial work, reviewing websites and terms, gathering complaints evidence and monitoring social media. We worked closely with the GC throughout this process, and also engaged with the Advertising Standards Agency. Having conducted this initial work, we agreed with the GC’s provisional assessment that a number of terms and practices were likely to breach the law. In particular, we were concerned that a number of important terms placed significant restrictions on consumers’ own funds, afforded operators a wide degree of discretion, and exposed consumers to disproportionate sanctions.

Given the nature of the concerns that we had identified during our initial work, including evidence of a number of likely breaches of consumer law, the CMA decided that it was appropriate to move directly to the use of our

enforcement powers under the Enterprise Act 2002. That legislation provides for the CMA to seek court orders to stop businesses from acting in breach of consumer law. The CMA can, alternatively, accept appropriate undertakings from businesses where these would address the CMA's concerns.

The focus of the investigation

The GC had flagged particular concerns in the growing remote gambling sector, and with online gaming sites in particular. It is important to bear in mind a number of key features of operators' interactions with consumers on gaming websites.

Customers typically open accounts, deposit money, and then enter into a series of interactions with the gaming operator, often within the framework of a particular promotion. This means that the consumer can potentially experience a number of restrictions and limitations on their gameplay and wider behaviour which they would not experience in other gambling contexts (most notably 'one off' stakes placed in a high street shop). Such restrictions can potentially extend to their ability to withdraw winnings and deposits, and these have been the particular focus of our investigation.

Within the online gaming world, we have had a particular focus on promotions and their accompanying terms and conditions. Whilst the CMA accepts that appropriately framed promotions that respect the key principles of the GC's licensing regime are an important aspect of a competitive market, we encountered a very large number of concerns with promotional terms and conditions, and I'll expand on some of our key concerns shortly.

The status of our enforcement activity

Having identified potential breaches of consumer law, we were keen to understand how restrictive terms and practices might be encountered by consumers as part of gameplay, and to understand any possible industry motivations for restrictive terms and conditions. Our overall aim was to identify a number of sensible and practical solutions to remedy such breaches.

We've used our formal powers as part of our investigation to gather information from operators, and asked for demonstrations of live gameplay to be provided, in particular to demonstrate how specific terms and conditions 'map onto' the reality of gameplay, and how consumers would encounter the restrictions within particular terms in practice.

It was striking that, even after a very detailed study of operators' terms and conditions, the reality of gameplay was frequently quite different from what we expected, suggesting that operators' terms were inadequate in informing customers about the parameters of promotional play. There were important issues that remained unclear to us even after operators had provided such demonstration. We were concerned that, to the extent that these matters were not clear to the CMA with our expertise in consumer law, they would likely not be clear to consumers at large.

We formally opened enforcement cases against a number of operators in the summer, and began a process of consultation with the majority of these operators last month. That process is ongoing, and we expect to take a decision in December about whether we need to proceed to court, or if we can secure acceptable undertakings to address our concerns.

I'm going to turn to some of the key concerns that we have identified in relation to online gaming promotions, but before doing so, I would just like to mention a further line of investigation that we opened over the summer. This concerns a broader set of restrictions faced by consumers when trying to withdraw funds from online accounts, particularly connected with the application of so-called 'dormancy' terms, the use of minimum withdrawal limits and other terms that appear inappropriately to make it harder for consumers to access money which is legally theirs. We are still scoping that separate piece of work, and are contemplating a further round of enforcement activity next year alongside other options.

We have worked closely with the GC throughout this enforcement activity, sharing information within our powers, to ensure both that the CMA benefits from the GC's sector and regulatory expertise, and that the GC in turn continues to build its capability in assessing issues of fairness in gambling contracts.

The substantive concerns

I'd like to turn now to outline 6 key concerns that have been at the centre of our enforcement work to date. As I've already highlighted, these predominantly relate to online gaming promotions, although the underlying principles are likely to be of wider application.

(1) Lack of transparency of significant promotion restrictions

The issue

We found during our investigation that operators were offering promotions that did not clearly or adequately communicate to consumers, either before or after they sign up for a promotion, a number of significant restrictions and conditions that apply under the promotion and their practical implications. As a consequence, consumers cannot fully evaluate the deal on offer to make an informed decision about whether to take it up, and may be misled about the restrictions and their individual and combined impact.

As I have already mentioned, we were generally concerned – following the live gameplay demonstrations provided by a number of operators – that the existing terms and conditions did not properly equip consumers with the information they might need to reach a considered view about the nature and value of the promotion.

Examples of significant restrictions that we found were not being properly flagged to consumers included:

- that consumers could not withdraw winnings made from gameplay with their

own funds until wagering requirements were met

- that play restrictions applied to their gameplay, in some cases resulting in the forfeiture of consumers' entire winnings
- that certain bonuses could not themselves be withdrawn and were for wagering purposes only
- where multiple bonuses were offered simultaneously, that the interaction of these bonuses had an impact on how wagering requirements would be met and on other aspects of promotional play

The underlying principles

Our view is that a failure to communicate such significant terms, which have important consequences for consumers, could amount to a misleading action or omission for the purposes of the CPRs. Similarly, they fail to meet the CRA requirement of transparency, as consumers are not given the opportunity to know and understand the terms of the contract they are invited to enter, particularly given the complexity of the rules that operators are seeking to rely on. Accordingly, they are not given the information necessary for them to understand the economic consequences of their decision.

The problem continues once gameplay has begun, in particular due to a lack of prompts, alerts or other mechanisms to flag to consumers the consequences of a particular type of behaviour. This gives rise to further potential misleading actions and omissions, and is likely to contravene the requirements of professional diligence.

What do operators need to do?

To address these concerns relating to their promotions, the CMA considers that operators need to:

- Ensure all significant conditions are provided to consumers in a clear, timely, intelligible, unambiguous, transparent, non-misleading and prominent manner, including within the advert and with the headline offer on all relevant landing pages and sign-up pages for the promotion, and on any other advertising on any medium for the promotion.
- Ensure that all terms and conditions relating to a promotion, including terms which apply to all bonuses are accessible:
 - before the consumer signs up, within a single click from (i) all relevant landing pages and sign-up pages for that promotion and (ii) any other advertising on any medium for that promotion; and
 - once play commences, within a single click from the bonus tab on the consumer's account page.

(2) Restriction on withdrawing deposit winnings

The issue

Over and above our concerns that certain significant restrictions that apply to promotions are not adequately communicated to consumers, the CMA has a more fundamental concern with a key feature of a large number of promotions across the sector.

A common feature of deposit match and bonus promotions is that consumers are prevented from being able to access any winnings obtained using their deposit funds unless and until the specified wagering requirements of the promotion are met. This is the case whether or not the customer has 'touched' the bonus element of the promotion, and commonly deposit and bonus funds are co-mingled, with a general restriction on withdrawing winnings generated from that co-mingled 'pot'.

The underlying principles

In our view, such a restriction is both substantively unfair under the CRA and implementing such a restriction amounts to an unfair commercial practice contrary to the CPRs.

The ordinary position that would apply, absent the terms of a promotion, is that a consumer is legally entitled to winnings obtained through play with their own funds as an enforceable debt. Consequently, any term that prevents or restricts the withdrawal of such winnings raises fairness concerns.

We think that making the withdrawal of deposit winnings conditional on meeting wagering requirements is a significant restriction on the consumer's right to withdraw, in particular given the practical impact of repeated wagering on the average return to player percentage. It represents a significant shift in the legal position from the consumer's perspective, with no equivalent restriction imposed on the operator (any lost wagers are immediately accessible by the operator). It brings about a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. The CMA considers that any additional benefits conferred on consumers under the promotion do not remedy this fundamental imbalance.

Our view is that such a restriction is contrary to the requirement of good faith under the CRA, and for similar reasons, contravenes the requirements of professional diligence under the CPRs, in particular taking account of:

- the difficulty in properly assessing the risk that they are being asked to take within the promotion: consumers are being asked to risk an unknown amount of potential deposit winnings in return for the benefit of playing with bonus funds, where the value of that opportunity cannot properly be assessed;
- known behavioural biases, including the tendency of consumers to disproportionately value the notional additional funds made available; and
- the requirement for consumers to commit to an extended period of gambling before winnings can be withdrawn, preventing them from stopping gambling whenever they choose (and thus presenting a particular risk to consumers vulnerable to problem gambling).

What do operators need to do?

Given our conclusions about the inherent unfairness of this restriction, we do not consider that our concerns can be adequately addressed through

improved transparency. In particular, we do not see how consumers can ever make an informed decision when the need to assess the trade-off between possible deposit winnings and possible outcomes following play with a bonus which is subject to wagering requirements.

Accordingly, the CMA considers that operators need to:

- stop offering gaming promotions that include a restriction on the withdrawal of deposit winnings
- ensure that terms clearly and prominently articulate the right to withdraw deposit winnings
- ensure that consumers can clearly distinguish between play with funds that are subject to restrictions and play with unrestricted funds

(3) Restriction on withdrawing unspent deposit funds

The issue

The CMA has found that some operators have sought to address the potential commercial exposure from offering bonus funds by seeking to place restrictions on the withdrawal of any unspent deposit funds. This might take the form of an express prohibition on withdrawing such funds. Alternatively, there may be indirect restrictions, for example where a consumer's deposit is used to purchase a 'fund', comprising funds contributed by the consumer and the operator, and that fund is subject to withdrawal restrictions.

The underlying principles

In a similar manner to our concerns about the restriction on withdrawing deposit winnings, we are concerned that restrictions on withdrawing unspent deposit funds are likely to place consumers in a less favourable legal position than would ordinarily apply. In our view, the consumer retains a proprietary right in their deposited funds until the point at which a bet is made, and is not obliged to place a wager.

Any attempt to disturb this position risks creating a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. This is particularly the case where a customer is prevented from withdrawing any unspent deposit at all, irrespective of the size of the deposit.

We consider that such terms are contrary to the requirements of good faith, contravene professional diligence and are unfair. This assessment is informed by the fact that such terms:

- fail to respect consumers' legitimate interests in stopping play at the time of their choice and retrieving the balance of their funds
- do not appear to have any legitimate justification, as operators can protect any legitimate interest they have to manage their potential commercial exposure from the offering of bonus funds in a much less restrictive way
- are likely to be contrary to the principles of the licensing regime

administered by the GC

What do operators need to do?

To address these concerns, the CMA considers that operators need to:

- stop imposing restrictions on withdrawing unspent deposit funds
- ensure that terms clearly and prominently articulate the right to withdraw deposit funds
- ensure that consumers can clearly distinguish between play with bonus funds that are subject to restrictions and play with their own money which is not.

(4) Fairness and transparency of play restrictions

The issue

In addition to our general concern that significant conditions are not adequately communicated to consumers, we are also concerned about the fairness and transparency of specific terms which purport to set out restrictions on particular types of gameplay. Some of the more specific examples of such terms seek to prevent consumers from placing wagers above a certain maximum bet size. However, more nebulous and uncertain terms talk more broadly about consumers not engaging in 'low risk betting strategies' or otherwise behaving in a manner which the operator considers to amount to an 'abuse' of the promotional terms. In circumstances where there is nothing to stop consumers inadvertently engaging in such behaviours, and operators may exercise their discretion with serious consequences for the consumer (including forfeiting winnings and unspent deposit funds) the CMA considers such terms are not fair or transparent.

The underlying principles

The CMA has a particular concern where such terms could be used to apply sanctions to consumers' own deposited funds, as appears commonly to be the case in the promotions we have seen. Such promotional terms operate to prohibit and sanction play that would otherwise be permitted and legitimate when the consumer plays outside the promotion, including placing bets above a particular threshold.

Whilst there is no overarching 'right to bet', once an operator accepts a bet there is a binding contract and the winnings constitute an enforceable debt. A term that seeks to legally reserve an operator's position to avoid liability under such bets on the basis of play restrictions would cause a significant imbalance by departing from the legal position that would otherwise apply. Applying such terms is also likely to be unfair, given:

- the vague language used by operators to define play restrictions
- the extent of the discretion afforded to operators to determine that there has been a breach of such restrictions after the event
- the disproportionate sanctions that are brought to bear on the consumer when operators exercise such discretion

What do operators need to do?

To address these concerns, the CMA considers that operators need to:

- ensure that promotional play restrictions do not apply to consumers' deposits or the winnings therefrom, save where operators can ensure that invalid wagers cannot be placed
- clearly outline all prohibited types or patterns of play, with no discretion reserved to the operator after the event
- distinguish terms relating to gameplay restrictions from other terms which set out (valid) restrictions connected with allegations of fraud, collusion, use of multiple accounts, manipulation of software, exploitation of loopholes or other technical forms of abuse or other behaviour which amounts to deliberate cheating
- provide full explanations to consumers where the application of gameplay restrictions results in the loss of (bonus) winnings

(5) Withdrawing free bets or reducing their value

The issue

Although we have not considered sportsbook free bet offers in general as part of our investigation, we extended the scope of our investigation to examine 2 particular issues that we encountered relating to the offer of such free bets:

- Where operators may remove a consumer's entitlement to a free bet, despite the customer having placed all or some of the necessary qualifying bets required under that promotion.
- Where consumers are informed, after placing all or some of the qualifying bets, that a restriction is being imposed on them which may either (i) make it harder to complete the remaining qualifying bets or (ii) reduce the value of the free bet they ultimately receive.

The underlying principles

The legal principles underlying our concerns in this area are particularly straightforward, as they purport to give operators a one-sided right to change the terms of a deal after the consumer has already acted on a particular understanding of that deal and its value. The CMA considers that such broad variation terms are unfair under the CRA and contrary to the requirements of professional diligence under the CPRs, and particular concerns arise where customers may have been directly encouraged to participate in the promotion (as a result of targeted marketing) and they are unaware that an account restriction has been applied to their account.

Whilst operators are free to change the terms of their free bet promotions (on a prospective basis) and to look to appropriately manage their financial exposure to individual gamblers, it is not appropriate to unilaterally remove or alter their obligations to provide the substantive benefits promised under the contract. For the avoidance of doubt, the CMA is not suggesting that operators are required to pay out free bets in cases where fraud, cheating or

other clearly inappropriate conduct is suspected.

What do operators need to do?

In order to address these concerns, the CMA considers that operators should ensure that they are not seeking to enforce account restrictions that would either remove a consumer's entitlement to a bet, or reduce its value, where a customer has already placed all or some of the qualifying bets under the promotion.

Operators need to ensure they honour the deals that they make available to consumers (particularly where they have been directly targeted by marketing activity), ensuring that they meet expectations and treat their customers fairly. This is best and most clearly achieved by not seeking to enforce account restrictions that would either remove a consumer's entitlement to a bet, or reduce its value, where a consumer has already placed all or some of the qualifying bets under the promotion. So this is the approach we think operators should generally adopt to address this concern.

(6) Compulsory publicity

The issue

The final issue that we have considered as part of this phase of our work relates to terms and conditions which purport to allow operators to use consumers' names, photos, locations and other personal data for promotional purposes without seeking their specific consent to do so.

The underlying principles

The CMA's view is that such terms are unfair and lack transparency. That view is informed by the position under the Data Protection Act 1998 (DPA), which requires personal data to be processed fairly and lawfully and only where one of the legal conditions for processing in the DPA is satisfied. Further, fair processing requires that data subjects be provided with certain information about the proposed processing before personal data is collected from them, including the purposes for which such personal data is intended to be processed and any other information necessary to render the processing fair.

The CMA has considered the likely expectations of consumers entering into these arrangements as to the use of their personal data, and notes that the processing in question is not necessary for the performance of the online gambling contract, or for the provision of an online account. Rather, the processing is solely for the operator's commercial benefit of publicity and is likely to be contrary to consumers' expectations and their legitimate interests in personal privacy.

What do operators need to do?

It is clear from what I've just outlined that operators must not use, enforce or seek to rely on such terms in their contracts.

Next steps

I hope that's provided a helpful overview of some of our key concerns as a matter of consumer law. As I mentioned earlier, we view today as an important opportunity to highlight these concerns, so that all operators can start the process of reviewing and, where necessary, revising their terms and practices. To that end, the GC and CMA will publish this speech online, and further details of our common expectations will be released once this phase of the CMA's enforcement activity has concluded.

Paul's team intends to pick up directly on the CMA's work in this area, and he'll be talking about this shortly. As I've mentioned, the CMA plans further activity in this market, including in connection with issues connected with withdrawals. The CMA is looking more broadly to support GC as it looks to implement its new strategy, and to assist in identifying and remedying unfair terms as part of its ongoing compliance and enforcement work.