



GAMING AND GAMBLING

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# Small Win for Product Promotions, But No Giveaways

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## **New rules for promotional lotteries – what does this mean for larger value prizes?**

The Gaming and Lotteries (Amendment) Act 2019 (2019 Act) was signed into law on 21 December 2019 and will come into operation from 1 December 2020. This is an interim reform measure, to amend and update the Gaming and Lotteries Act 1956 (1956 Act), pending the future comprehensive reform of the licensing and regulation of gambling in Ireland.

Brand owners and marketing agencies will welcome a new exemption from the statutory prohibition on unlicensed lotteries, where the promotion of a lottery is in conjunction with the sale or marketing of a product. However, this exemption is not available for promotional schemes with total prize values in excess of €2,500. Also, locality and other restrictions associated with lottery permits and licences mean that many corporate promoters are likely to continue the practice of structuring their promotions in a manner intended to fall outside the regulatory regime.

Below is a brief analysis of the new product promotion exemption and some of the obstacles faced by promoters of larger value lotteries.

### **What is a lottery?**

The narrow definition of a 'lottery' under the 1956 Act has been clarified by case law over the years, which identifies three limbs to a lottery: (i) there is a distribution of a prize; (ii) which is by means of chance; and (iii) there is a contribution or payment to enter the lottery. In practice, this definition generally covers prize draws, sweepstakes, raffles and bingo. The 2019 Act has not changed the statutory definition for a lottery and so this three limb test remains valid.

### **Product promotion exemption**

The 1956 Act has long been considered outdated and an obstacle to modern promotional marketing practices. This has resulted in promoters applying to the District Court through various charities to obtain lottery licences subject to the 1956 Act or to structure promotional schemes in a manner intended to fall outside the definition of a 'lottery'.

Promoters attempting to have their scheme fall outside the regulatory framework have generally done so by providing a means to enter the promotion that does not require buying a promotional product or introducing an element of 'skill' into the promotion mechanic (e.g. requiring the correct answer to a relatively simple question as a gate to the chance of winning a prize). However, these practices were not without risk of scrutiny and prosecution. For this reason, the new product promotion exemption is welcome news for lower prize value lotteries.

This exemption allows the lawful promotion of lotteries, without having to obtain a lottery permit or licence,

where the lottery is conducted in conjunction with the selling or marketing of a particular product and where:

1. the total value of the prizes is not more than €2,500; and
2. there is no charge for taking part in the lottery other than the purchase of the product concerned (if this is required) and there is no additional charge for the redemption of a prize.

## Products

For the purpose of this exemption, the 2019 Act defines 'marketing' and to 'sell'. However, the term 'product' is not defined and so it is unclear whether the exemption is intended to be limited to the selling or marketing of physical goods, to the exclusion of services, or whether the term 'product' should be interpreted in the same way as under Irish consumer laws, which defines a 'product' as covering goods or services.

## Prize limit

The €2,500 limit for all prizes available under a lottery will preclude many larger promotional schemes from relying on this exemption. It may be possible to structure a promotion to have multiple prize draws, each falling within the €2,500 prize value limit. However, this approach may carry risk given the uncertain wording of the exemption.

## No charge for taking part

Irish case law has long settled that the distribution of prizes by chance will be a lottery if a "*substantial number*" of participants pay to enter and that the purchase of a promotional product constitutes a contribution or payment for the chance to win a prize. Therefore, if a substantial number of persons buy a promoter's product in order for the chance to win a prize, the overall promotion would generally be considered a lottery even if there is a means to enter without payment or any other form of contribution. The new product promotion exemption deals with this aspect.

However, the requirement that there be no additional charge for the redemption of a prize is uncertain. Unlike the UK Gambling Act 2005, the 2019 Act does not set out certain permitted participant costs (e.g. sending a letter by ordinary post, standard rate telephone calls or SMS).

## Lottery permits and licences

The 2019 Act provides greater clarity to the licensing and permit regime for lotteries and sets the minimum age of participation at 18 years.

The condition that the holder of a lottery permit cannot personally profit from the lottery has been removed. Therefore, non-charitable organisations can apply to a Garda Superintendent of its local district for a lottery permit for which the total value of prizes is limited to €5,000. A lottery permit only covers a specific locality and therefore is unsuitable for country-wide promotional schemes.

Periodic lottery licences can be obtained for lotteries with prize value limits of: (i) €360,000 if a single lottery is held during a year; and (ii) €30,000 if more than one lottery is held during a week. The licence holder is prohibited from profiting from the lottery and so it remains the case that only a charity or some philanthropic venture can apply for a licence. However, the 2019 Act introduces a number of new measures which appear to be intended to put a stop to non-charitable bodies using charities as a front to a licence application. For example, the District Court judge, when considering an application for a licence, is now obliged to enquire into the purpose of the lottery. This new jurisdiction conferred on the District Court will likely result in the refusal of applications where it is apparent to the judge that the charity is not the main beneficiary under a licence application.

## Offences

A person found guilty of an offence under the general prohibition against the promotion of lotteries (Section 26) or the conditions for permits (Section 27B) and licences (Section 28), is liable on summary conviction to a maximum fine of €5,000 and/or up to 6 months' imprisonment, or on conviction on indictment to a maximum fine of €50,000 and/or up to 2 years' imprisonment. Officers of an offending corporate body may also be prosecuted in certain circumstances. A court may suspend or revoke a permit or licence upon

conviction for an offence.

## **What's next for larger value lotteries?**

While the new product promotion exemption is a helpful update to the law, it does not assist promotions which offer the chance to win one or more prizes valued above €2,500. The locality restrictions for permits and licences, together with the new rights conferred on the District Court in respect of licence applications, will likely result in some promoters of larger value lotteries structuring their schemes to fall outside of the regulatory regime.

The much anticipated Gambling Control Bill has yet to be published. This will replace the General Scheme for a Gambling Control Bill 2013, which together with the opposition-led Gambling Control Bill 2018, do not take into account the current nature of the gambling industry. However, it is unlikely that the Gambling Control Bill will make life any easier for larger value lotteries.

A report issued by the Government appointed Inter-Departmental Working Group on Future Licensing and Regulation of Gambling recommended that relevant reforms provided under the 2019 Act should be reflected in the future Gambling Control Bill. Also, the report recommends that applicants for gambling permits and licences should be intensively investigated by the proposed gambling regulatory authority to ensure their suitability and propriety before the grant of a licence. These recommendations do not suggest that flexibilities will be introduced for larger value promotions.

A period of public consultation is expected once the new Gambling Control Bill is published, which will give stakeholders the opportunity to have their say. Any new legislation will be subject to significant pre-legislative scrutiny and debate. However, given the already significant delays in reform, the 2019 Act is likely to be a longer stop-gap than one would hope.

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*LK Shield's [Gaming and Gambling](#) team offer specialist advices in the regulatory, licensing, consumer, advertising, IP, privacy and contractual aspects of gambling.*

## About the Author