

The OFT's investigation into 'Children's Online Games'

The Office of Fair Trading's (OFT) investigation into online and app-based games and how these games target children, for example through aggressive commercial practices, has particular relevance for the social gaming/gambling industry, especially given the Gambling Commission's concerns about the impact of social games on young people. David Clifton, Director at Clifton Davies Consultancy Limited, discusses the principles to guide game developers proposed by the OFT following its investigation, and how these relate to social gaming/gambling.

On 26 September, the Office of Fair Trading published its report entitled 'Children's Online Games' and announced a consultation until 21 November 2013 on eight fundamental principles for online and app-based games. Taken together, the principles are considered by the OFT to be the most beneficial way to tackle the potentially unfair commercial practices uncovered by its investigation and are intended to:

- act as a guide to a 'relatively new and highly innovative' industry on the OFT's view of obligations under current consumer protection law and;
- provide an indication of what practices may be the subject of subsequent enforcement action once the principles are finalised.

The principles have direct relevance to the social gaming/gambling industry, particularly the current 'hot topic' of whether it should or should not be the subject of formal regulation. In this respect:

- the Gambling Commission continues to monitor the

industry's practices to understand better whether the risks posed to the public, notwithstanding existing consumer protections, demand that regulation is imposed on the industry and;

- the industry is maintaining that responsible self-regulation by operators will ensure that adequate such protections are in place.

The Gambling Commission has expressed particular concern about the increasing exposure of under-age people to gambling or gambling style activity, marketing on social media, and the potentially increased difficulty of avoiding excessive gambling if the activity is embedded in social life online. Coupled with the Commission's concerns that consumers might be duped by rigged games or unscrupulous or incompetent operators, it seems clear that acceptance by games developers and hosting companies of, and operational compliance by them with, each of the principles is likely to have considerable influence on the Commission's ultimate decision as to whether self-regulation and better consumer education will provide adequate protection.

This is particularly so, bearing in mind the Commission's previously expressed view that features such as rapid and continuous play, frequent irregular rewards and winning large prizes early in a gambling career are all potentially associated with an increased risk of problem gambling. Some may seek to draw a link between the rapid rise of the social gaming/gambling industry in recent years and GamCare's current report that people aged 18-35:

- account for more than half of the 8,813 calls GamCare has received over the last 12 months and;
- have shown a 6.5% increase in seeking help for problem

gambling.

The principles for online and app-based games proposed in the OFT report are concerned with:

- provision of clear, accurate material information;
- identification of 'clear commercial intent';
- prevention of aggressive or exploitative commercial practices and;
- transparency and clarity to avoid unauthorised payments being made.

As such, they are clearly closely allied to two of the three licensing objectives set out in the Gambling Act 2005, namely:

- a) ensuring that gambling is conducted in a fair and open way, and;
- b) protecting children and other vulnerable persons from being harmed or exploited by gambling which explains why the Gambling Commission was involved with the OFT in the development of the principles and will continue to work closely with the OFT and other regulators via the Social and Online Games Regulators Information Group.

The principles can be summarised as follows:

1. information about the costs associated with a game advertised as 'free' (including in-game purchases in a 'freemium' type game) should be provided clearly, accurately and prominently up-front before the consumer begins to play, download or sign up to the game or agrees to make a purchase;
2. all material information (necessary to enable an informed decision to play) about the game should be subject to the same requirements as mentioned at (1) above;
3. in such information it should be made clear to the consumer who he/she should contact in case of queries or complaints and the business should be capable of

being contacted rapidly and communicated with in a direct and effective manner;

4. the commercial intent of any in-game promotion of paid-for content, or promotion of any other product or service, should be clear and distinguishable from game-play (so that operators do not mislead consumers to think that a purchase is necessary in order to progress further in the game);

5. a game should not mislead consumers by giving the false impression that payments are required or are an integral part of the way the game is played if that is not the case;

6. games should not include practices that are aggressive, or which otherwise have the potential to exploit a child's inherent inexperience, vulnerability or credulity (with younger children being particularly at risk in the sense that they may feel they are inferior or are letting down others - including characters in the game - if they do not make a purchase);

7. a game should not include direct exhortations to children to make a purchase (for example of in-game currency) or persuade others to make purchases for them;

8. in line with the OFT's principles for the use of a continuous payment authority, payments should not be taken from the payment account holder unless authorised by way of informed positive consent, with both the scope of the agreement and the amount to be debited made clear.

When publishing its report, the OFT:

- complimented the industry for the 'encouraging' manner with which it had worked with it and;

- remarked on some 'positive changes' to practices it had seen since the launch in April of the investigation leading to the report.

The Gambling Commission was

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quoted as saying: 'We have always said the risks in social gaming could potentially be managed by a combination of self-regulation and existing consumer protection powers and so we urge providers of gambling-style games to engage in the OFT's consultation.' The OFT itself was unequivocal, saying:

'These principles provide a clear benchmark for how games makers should be operating. Once they are finalised, we will expect the industry to follow them or risk enforcement action.'

It seems highly unlikely that the principles will be relaxed in any material manner and with the OFT:

- stating in its report that many of the games they examined already contain commercial practices that infringe existing consumer protection law (including the Consumer Protection from Unfair Trading Regulations 2008, the Unfair Terms in Consumer Contracts Regulations 1999, the Electronic Commerce (EC Directive) Regulations 2002 and the Payment Services Regulations 2009);

- making it clear that 'market participants' should 'implement changes to ensure full compliance with their legal responsibilities';

- warning of future targeted enforcement action (which could extend to court orders) against non-compliant operators in cases where a breach of the principles has occurred, and;

- stating its intention to share the principles with its international consumer protection counterparts to achieve consistency, as far as possible and where jurisdictional differences permit, in compliance and enforcement strategies

it will be difficult to maintain that the social gaming/gambling industry operates in an 'unregulated' environment.

It is instructive to recall in this

context the words of Philip Graf, Chairman of the Gambling Commission, in a speech delivered in January 2013, when he said: 'We certainly do not wish to regulate where we don't have to. If there are minimal risks to the public or those risks are being properly managed and mitigated, either by responsible providers and users or any existing mechanisms, for example the OFT or Ofcom, then there will be no need for us to act. Conversely if social gambling and use of social media appears to increase the risks of problem gambling or consumer exploitation, then we need to work with fellow regulators and governments to mitigate them. And we have the tools to do that.'

The OFT report, coupled with:

- existing e-commerce legislation, privacy laws and advertising codes that directly impact the industry and;

- the stated intention of the International Social Games Association to 'demonstrate it is addressing the concerns raised' by taking 'a proactive stance and leading the debate with political stakeholders'

points to significant movement in the direction mentioned by Philip Graf. However, in the absence of any single central regulatory body working independently from the social gaming/gambling industry, the question will nevertheless remain whether the myriad of different regulations, codes and principles that affects the industry means that such a regulator is still needed to ensure that consumers are properly protected.

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