

The Black Balloon Limited

Legal Classification Advice

1 INTRODUCTION

- 1.1 We have been asked to advise The Black Balloon Limited (“you” and “your”) on the legal classification, under the Gambling Act 2005 (the “2005 Act”) of your proposed product, Virtual Balloon Race (“VBR”) and, if applicable, the ways in which VBR may be amended so as to fall outside the definition of gambling under the 2005 Act.
- 1.2 In preparing this legal opinion, we have reviewed the following:
- a) an introductory email from you dated 22 September 2020 which included a link to your website, <https://balloonrace.com>;
 - b) email from you dated 7 October 2020 timed at 18:36 in which you provide an explanation of the product and links to twelve games (the “Games”) which you proposed to add to VBR;
 - c) email from you dated 8 October 2020 timed at 14:50 in which you provided a link to a test race with Games, <https://www.balloonrace.com/test123>;
 - d) email from you dated 8 October 2020 at 16:18 which provided sample questions and answers relating to the Games;
 - e) email from you dated 9 October 2020 at 19:04 which included further information about VBR and the Games;
 - f) email from you dated 29 October 2020 at 11:07 regarding a printed PDF as a proposed method of free postal entry route.
- 1.3 We also attended calls with you on 30 September 2020 and 15 October 2020 in which we discussed VBR and, in the latter call, possible options for amending it to take it outside the definition of gambling.
- 1.4 Please note that The Black Balloon Limited is our client. Our work in preparing this legal opinion has been undertaken on the basis of information and instructions received from you. If you choose to disclose this legal opinion to third-parties, they cannot place reliance upon it and the legal opinion cannot in any way act as a substitute for their own legislative and regulatory analysis. Any such provision of the legal opinion to a third-party must be

for their information only and we shall not owe or accept any duty, responsibility or liability to any third-party, whether in equity, contract, tort or otherwise, in respect of the legal opinion or in respect of any information contained in or derived from the legal opinion. In addition, such third-parties, as a condition of such disclosure, must agree to preserve the confidentiality of the advice and acknowledge that any disclosure cannot be relied upon by them as a partial or full waiver of privilege.

1.5 We have structured our advice as set out below:

1. [Introduction](#)
2. [Description of VBR](#)
3. [Gambling law in Great Britain](#)
4. [Legal classification](#)
5. [Licences required](#)
6. [The operating licence applications](#)
7. [Obligations of being licensed](#)
8. [Potential amendments to VBR](#)
9. [Your proposed method for altering VBR](#)
10. [Conclusion](#)

2 DESCRIPTION OF VBR

- 2.1 You have developed a product in which entrants can buy a virtual balloon and take part in a virtual balloon race.
- 2.2 Your customers are charities, school PTAs and similar organisations (“Fundraisers”) which run balloon races for fundraising purposes. The Fundraisers pay you £20 plus VAT to set up a race.
- 2.3 You build a designated VBR webpage for the Fundraisers and send them admin access to their microsite so that they are able to tailor their race to suit their requirements, for example the length of a race, price of balloons, and prizes available.
- 2.4 Generally, the price of a balloon is around £3, and prizes, which are determined by the Fundraiser and are either donated or deducted from ticket sales, are small value items such as Amazon vouchers which are often awarded for first, second and third places.

- 2.5 The Fundraiser sets a duration for the race and sells balloons to entrants over a set period of time, usually around three weeks.
- 2.6 Entrants buy a balloon or balloons and set up a login to the microsite so they can follow their balloon throughout the race.
- 2.7 When the race starts, the balloons start to move and keep moving until the race ends. The algorithm is random, therefore the balloons move at a random distance every hour, with the leading balloons pulling the lower balloons forward, and the lower balloons pulling the leading balloons back.
- 2.8 At the end of the race, the balloons stop moving and prizes (usually first, second and third places) are awarded according to the balloons that have travelled the furthest.
- 2.9 You developed VBR around 12 years ago, and at that time asked a third-party to develop the Games. You were considering adding a “daily game” to VBR which could be played by entrants to boost their balloon forward according to how well they scored in the Game. You have sent us the following example Games to test:
- a) **Go Kart** – this is a top trumps style game which is played against the computer with randomly presented cards.
 - b) **Beach** – a sequence memory game.
 - c) **Fairground** – a shooting game whereby the entrant must shoot the colour balloon that matches the random card presented.
 - d) **Higher or Lower** – a higher-or-lower style game with randomly presented cards.
 - e) **Castle quiz** – a multiple choice general knowledge quiz game.
 - f) **Movie quiz** – a multiple choice Disney quiz game.
 - g) **Plane** – a shooting game where the player has to hit as many targets as possible with water balloons dropped from a plane.
 - h) **Scarecrow** – a spot the difference game.
 - i) **Horse concentration** – a pairs memory game with randomly presented cards.
 - j) **Sports quiz** – a multiple choice sports quiz game.
 - k) **Secret garden** – a Pacman-style game where the player directs a penguin to collect coins whilst avoiding being frozen by an enemy.
 - l) **Harbour** – a logic thinking game where the player must transport a wolf, a goat and a cabbage to the other side of the harbour.
- 2.10 We understand that the Games have never been added to VBR, but that you have recently been considering adding the Games to allow entrants to boost their balloons forward and thus increase their chances of winning the race. If added, the Games would be optional, and the underlying algorithm would remain in place, meaning that in the event that two

people competing in a race achieved exactly the same scores in all the daily games, the winner would still ultimately be determined by the random algorithm.

- 2.11 On our call on 15 October 2020, we discussed the Games and you confirmed that you would prefer to keep VBR as a simple, random balloon race, without adding the Games. For the purpose of this advice, we will therefore focus on the legal classification of the simple balloon race, but will briefly cover the classification of the Games for completeness.

3 GAMBLING LAW IN GREAT BRITAIN

- 3.1 Laws relating to gambling in Great Britain are set out in the 2005 Act. The 2005 Act defines “gambling as:

- a) Gaming;
- b) Betting; and
- c) Participating in a lottery.

- 3.2 If VBR constitutes gambling within the meaning of the 2005 Act, this will give rise to specific obligations pursuant to the Act, including acting in accordance with a licence issued by the Gambling Commission (the “Commission”). Under Section 33 of the 2005 Act, a person or entity who provides facilities for gambling to customers located in Great Britain without holding an operating licence from the Commission will be committing a criminal offence. A person or entity also commits a criminal offence under section 330 of the 2005 Act if they advertise gambling in the United Kingdom which would require a licence under the 2005 Act to take place lawfully, but does not hold such a licence. Section 33 also needs to be read in conjunction with section 36 of the 2005 Act because the VBR services relate to remote services. Section 36(3) provides that a person is only regarded as providing facilities for remote gambling insofar as: (a) one piece of remote gambling equipment used in the provision of such facilities is located in Great Britain; or (b) no such equipment is located in Great Britain, but the facilities are used there.

- 3.3 In order to determine whether VBR constitutes gambling, we need first to consider whether it meets the definition of a lottery, betting or gaming; in other words, if it comprises a gambling product. If it does not, it can lawfully be offered to customers in Great Britain and advertised in the United Kingdom without a licence from the Commission.

4 LEGAL CLASSIFICATION

Betting

- 4.1 Pursuant to section 9 of the 2005 Act, the term “betting” means making or accepting a bet on:
- a) the outcome of a race, competition or other event or process;
 - b) the likelihood of anything occurring or not occurring; and
 - c) whether or not anything is true.
- 4.2 In our view, VBR does not satisfy the definition of betting. Users are not predicting the outcome of an event or process, the likelihood of anything occurring or not occurring, or whether or not anything is true.

Gaming

- 4.3 “Gaming” is defined in section 6 of the 2005 Act as “playing a game of chance for a prize”. There are therefore three components to this definition:
- a) playing a game;
 - b) game of chance; and
 - c) A prize.
- 4.4 You provided us with a link to the Games on 7 October 2020 and we have tested each game. There is no definition of “playing a game” within the 2005 Act, but it would be hard to argue that persons were not playing a game if they were to participate in the Games listed above at 2.9.
- 4.5 An arrangement is a “game of chance” if it is:
- a) a game that involves both an element of chance and an element of skill;
 - b) a game that involves an element of chance that can be eliminated by superlative skill;
or
 - c) a game that is presented as involving an element of chance (even if it does not).
- 4.6 In our view, many of the Games include random elements and thus an element of chance. Only if the game is pure skill (no element of chance affects the result) would it fall outside the definition of gaming.

- 4.7 Section 6(5) of the 2005 Act defines a prize as meaning money or money's worth. We understand that VBR prizes are usually Amazon vouchers. The Commission has set out its position on what it considers to be "money's worth" in its August 2016 Discussion Paper [Virtual currencies, eSports and social gaming](#) and its March 2017 position paper, [Virtual currencies, eSports and social casino gaming](#). "Money's worth", in the Commission's view, is "something which has a financial value to the player" and includes, but is not limited to, "anything convertible to or tradeable for money". The Commission then goes on to state that operators should consider:
- a) whether the prizes on offer can be converted to money via third parties;
 - b) whether prizes on offer are tradeable with others to obtain goods and services; or
 - c) whether prizes can be used as virtual currencies to pay for goods or services.
- 4.8 In our view, vouchers clearly have a financial value to entrants of VBR as they can be sold or traded with third parties in exchange for money, goods or services.
- 4.9 As we have determined that entrants would be playing a game for a prize, those of the Games that include an element of chance will fall within the definition of gaming under the Act and would require a remote casino operating licence from the Commission.
- 4.10 You have, however, confirmed that you would prefer not to provide the Games, which were always intended to be ancillary to the balloon race itself. If the Games do not form part of VBR, a remote casino operating licence will not be required.

Lottery

- 4.11 Pursuant to section 14 of the 2005 Act, an arrangement will constitute a "simple lottery" if:
- a) persons are required to pay in order to participate in the arrangement;
 - b) in the course of the arrangement, one or more prizes are allocated to one or more members of a class; and
 - c) the prizes are allocated by a process which relies wholly on chance.
- 4.12 Section 14 also includes a definition of a "complex lottery" where:
- a) persons are required to pay in order to participate in the arrangement;
 - b) in the course of the arrangement one or more prizes are allocated to one or more members of a class;

- c) the prizes are allocated by a series of processes, and
 - d) the first of those processes relies wholly on chance.
- 4.13 As entrants must purchase a balloon to enter a race, VBR would satisfy the first element of a lottery arrangement.
- 4.14 VBR also satisfies the second element of a lottery arrangement, as an entrant is purchasing a balloon for the opportunity to win a prize with real world value, for example, an Amazon voucher.
- 4.15 You have confirmed that the algorithm used to determine the winner is random, therefore it is our view that the winner is determined wholly by chance, therefore VBR would be classed as a lottery, for which a gambling licence would be required.
- 4.16 Lotteries are an exception to the general offences under section 34 of the 2005 Act which prohibit providing facilities for gambling without holding the appropriate licences. However, under sections 258 and 259 of the 2005 Act, it is a criminal offence to “promote” or “facilitate” a lottery in Great Britain unless it is an “exempt” lottery or it is run pursuant to the appropriate licences from the Commission or local authority. Exempt lotteries are considered further at section 5 of this advice but include, for example, raffles at fairs and private society lotteries.
- 4.17 If you promote or facilitate a lottery that is not exempt and does not hold the correct licence, you would be committing an offence under section 258 or 259 of the 2005 Act. The maximum penalty for these offences is up to 51 weeks imprisonment or an unlimited fine. The Commission has a remit to prosecute offences under the 2005 Act, although we consider it very unlikely that the Commission would proceed with a prosecution without first writing to the operator of an arrangement, giving them the opportunity to explain why they do not consider an offence has been committed and, if it disagrees, giving an opportunity for the offending website to be closed.
- 4.18 We provide a summary of the requirements, restrictions and costs for operating a licensed lottery at section 5, 6, and 7 below, so that you can consider the option of operating VBR as a licensed lottery.

5 LICENCES REQUIRED

Lottery

- 5.1 Should you wish to run VBR in its existing format and operate it under a licence, the licence requirements to operate a lottery in Great Britain are as follows:

- 5.1.1 **Large society lottery licence (“LSLOL”):** Non-commercial or charitable organisations (“Society”) which are to benefit from a proportion of ticket sales must hold a LSLOL issued by the Commission. Non-commercial societies are those that are established and conducted for charitable purposes, for the purpose of enabling participation in, or of supporting, sport, athletics or a cultural activity, or any other non-commercial purpose other than that of private gain.
- 5.1.2 **External lottery manager operating licence (“ELMOL”):** An ELMOL authorises the operation of lotteries on behalf of charities or other non-commercial societies which hold a LSLOL. An External Lottery Manager (“ELM”) may be a profit-making company, but it would be necessary that the Society and the ELM are separate and independent organisations, for example not sharing the same officers, shareholders and employees. In contrast with a Society, an ELM is permitted to make commercial profits. However, under section 254(2)(b) of the 2005 Act, the fees that may be paid by the society to the ELM are restricted solely to deductions made from ticket sales (“proceeds”) for prizes and for costs “reasonably incurred” in organising the lottery. The remainder of the proceeds are “profits” and under section 260 of the 2005 Act it is an offence to misuse profits for any purposes other than the stated fundraising purposes for the Society.
- 5.2 **Prize level restrictions:** These are applicable to both the LSLOL and the ELMOL as follows:
- a) a maximum of £5 million proceeds (ticket sales) in any single lottery;
 - b) a maximum of £50 million aggregate proceeds (ticket sales) in successive lotteries per calendar year; and
 - c) a maximum prize of £25,000 or 10% of the proceeds (gross ticket sales) if greater, up to a maximum prize of £500,000. If the prizes are items rather than cash, it would be the market value of the items that must not exceed these limitations.
- 5.3 **Requirement to make charitable donations:** Under section 99(2) of the 2006 Act, a minimum of 20% of the proceeds must go to the purposes for which the society is conducted.
- 5.4 **Exempt lotteries:** Lotteries may be operated without an operating licence if they fall within the limited types of “exempt” lotteries set out in Schedule 11 to the 2005 Act. These are as follows:
- 5.4.1 **Private society lotteries:** A lottery may be operated without a licence for the benefit of a private society. The society must be organised for purposes other than gambling, so if there is no genuine purpose to the society other than members being able to enter VBR

competitions, this would not be of assistance. There is nothing to prevent profits being made from a private society lottery, however it may only be promoted for one of the purposes for which the society is conducted (for example if the society was a cricket club, to raise funds for a new clubhouse). The lottery may only be advertised on society premises.

- 5.4.2 **Other exempt lotteries:** The other types of exempt lotteries are work lotteries, residents' lotteries and customer lotteries. Each of these lotteries are subject to the restriction that no profits may be made for private gain.
- 5.4.3 **Small society lotteries:** It is also possible to operate a "small society lottery" under a registration by a non-commercial society with the local authority in the area in which the principal premises of the relevant society are situated. Like large society lotteries (operated under a licence from the Commission as discussed above) small society lotteries must give at least 20% of their proceeds to the non-commercial society on behalf of whom they are operated. They are subject to restrictions on prize value (no more than £25,000 value for any prize) and ticket sales (no more than £20,000 per lottery – otherwise it is a large society lottery – and no more than £250,000 per year). As with large society lotteries, only an ELM licensed by the Commission can make commercial profit from the arrangements.

Remote gambling software

- 5.5 Section 41 of the 2005 Act provides that a person commits an offence if "in the course of a business he manufactures, supplies, installs or adapts gambling software unless he acts in accordance with an operating licence".
- 5.6 "Gambling software" is widely defined at section 41 of the 2005 Act as "computer software for use in connection with remote gambling" but narrowly interpreted by the Commission to capture gambling software as the term is understood within the industry and in accordance with Commission guidance, rather than any computer software used by an operator. The purpose of gambling software licensing is to ensure that those who are manufacturing software which can impact on the fairness of remote gambling, do so in a regulated environment. The Commission has produced an advice note, [What is gambling software?](#), which helps operators to distinguish between gambling software and non-gambling software.
- 5.7 As we have established that VBR, in its current format, would be considered gambling under the 2005 Act, we must consider whether you are manufacturing, installing or adapting gambling software. If you are, you will need a gambling software operating licence from the Commission.

- 5.8 The Commission's guidance states that it considers any software which is designed for use in connection with remote gambling (including online gambling), that is intended to be used or is used by a gambling operator, to be gambling software. That includes any gambling-specific application, such as software used in:
- a) virtual event web pages;
 - b) virtual event controller;
 - c) bet capture/matching;
 - d) settlement;
 - e) random number generator ("RNG");
 - f) gambling records showing detailed results of games.
- 5.9 Gambling software can be both remote (i.e. software supplied via methods of secure file transmission such as Dropbox or made available for download from the manufacturer's server) and non-remote (i.e. the manufacture, supply, installation or adaptation of gambling software through means of non-remote communication, such as by uploading to CD or memory stick). Both remote and non-remote gambling software require a Commission licence.
- 5.10 Plainly, VBR includes gambling software, as there are virtual event web pages, which are pages that present virtual events on which people may gamble, and a virtual event controller which determines the result of a virtual event based on an RNG output. If you are manufacturing, supplying, installing or adapting gambling software, you will need to hold a remote gambling software operating licence; if any of these activities are being performed by a third party, the third party must hold the remote gambling software operating licence, otherwise you will be committing an offence.

6 THE OPERATING LICENCE APPLICATION

- 6.1 If you were to apply for an operating licence, in our experience, operating licence applications take at least 2 months to prepare to the point of submission. The Commission generally advises that licence applications take approximately 16 weeks to process. The Covid-19 pandemic means that applications are likely to be processed more slowly than usual.

Licence fees

- 6.2 Operating licences are subject to an application fee and an annual fee payable to the Commission. The first annual fee is payable within 30 days of a licence being granted.
- 6.3 The fees for an ELMOL would be as follows, based initially upon the projected annual lottery proceeds for the first year of operation. The licence must be varied to a higher category if higher revenue is projected in the future.

Remote ELMOL					
Fee category	F1	G1	H1	I1	J1
Annual proceeds	Less than £0.5m	£0.55m - £2.5m	£2.5m - £5.5m	£5.5m - £10m	£10m+
Application fee	£879	£1,464	£1,691	£2,050	£2,217
Annual fee	£6,795	£19,063	£24,372	£37,006	£48,893

- 6.4 The fees for a remote gambling operating licence would be as follows, based upon the annual gross value of sales for the first year of operation. Where there are no external sales of gambling software, this must be calculated by alternative means, for example an internal cost allocation for the development of the gambling software. The licence must be varied to a higher category if higher sales/cost of development is projected in the future.

Remote gambling software operating licence					
Fee category	F1	F2	G1	H1	H2
Annual gross value of sales	Less than £200k	£200k or greater up to but excluding £550k	£550k or greater, up to but excluding £6.6m	£6.6m or greater, up to but excluding £30m	£30m or greater
Application fee	£5,711	£5,711	£11,716	£14,647	£14,647
Annual fee	£3,748	£5,798	£17,803	£28,867	£49,219

Application Requirements and Assessment Criteria

- 6.5 The Commission assesses licence applications on the basis of the suitability of the applicant to carry out the licensed activities, and whether the licensing objectives are likely to be compromised. The licensing objectives are:

- a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime,
- b) ensuring that gambling is conducted in a fair and open way, and
- c) protecting children and other vulnerable persons from being harmed or exploited by gambling.

6.6 When considering whether an applicant is suitable to carry out the licensed activities, the Commission will have regard to the following factors:

- a) the identity and ownership of the applicant and the identity of any person(s) relevant to the application, including key management personnel and the ultimate individual owners;
- b) the past and present financial and other circumstances of the applicant and any associated person(s), in particular whether there are sufficient resources to carry out the licensed activities;
- c) the integrity, honesty and trustworthiness of the applicant and any associated person(s);
- d) the competence (including experience, expertise, qualifications and history) of the applicant and any associated person(s); and
- e) any criminal record of the applicant and associated person(s).

6.7 In relation to the licensing objectives, the Commission will consider the policies and operating procedures of the applicant company, how these propose to uphold the licensing objectives, any evidence that the objectives will be met and the applicant's understanding of the legislation and the Commission's Licence Conditions and Codes of Practice.

7 OBLIGATIONS OF BEING LICENSED

7.1 The compliance obligations which result from being licensed by the Commission are wide-ranging, and should you choose to apply for a licence from the Commission, we would be able to advise in detail on the various obligations. We include a very high-level list of some compliance obligations below, but please note that this is not comprehensive:

- a) Compliance with the Commission's [Licence Conditions and Codes of Practice](#);
- b) Compliance with the Commission's [Remote Gambling and Software Technical Standards](#);

- c) Submission of regulatory returns, which include details of your proceeds; and
- d) Key individuals involved in the management of a licensee must hold an individual licence, known as a Personal Management Licence (“PML”) (unless the below exemption at paragraph 7.2 applies). This licence application involves consideration of the applicant’s experience, personal and financial circumstances and criminal record. For ease of reference, the key management positions are:
 - overall strategy and delivery of gambling operations;
 - financial planning, control and budgeting;
 - marketing and commercial development;
 - regulatory compliance; and
 - gambling related IT provision and security.

“Small scale operator” exemption

7.2 If you have no more than three individuals in key management positions, you may be able to take advantage of the small scale operator (“SSO”) exemption. This means the three or fewer individuals in the positions listed at 7.1(d) above do not need PMLs, rather they would need to complete an Annex A application. This requires the same information as a PML application and follows the same application process, but it means the individuals are not licence holders themselves. The £370 application fee which is payable for a PML every 5 years would not apply and there would be no licence for the Commission to review or revoke if anything went wrong. However, if, in the future you decided to employ a fourth person in a “key position”, all four of you would need to apply for PMLs, although the original three would have three years in which to obtain their PML.

8 POTENTIAL AMENDMENTS TO VBR

- 8.1 As an alternative to obtaining the required licences, you have confirmed that you would consider altering VBR to take it outside the definition of a lottery. To do this, you must remove one of the three characteristics of a lottery. For ease of reference, these are:
- a) persons are required to pay in order to participate in the arrangement;
 - b) in the course of the arrangement, one or more prizes are allocated to one or more members of a class; and
 - c) the prizes are allocated by a process which relies wholly on chance (or by a series of processes, the first of which relies wholly on chance).

8.2 Clearly, you would not wish to remove the prize element of the concept, (b). The options are therefore either to remove the requirement for payment to enter, (a), by offering a free entry route, or to ensure that the winner is determined by a process which does not rely wholly on chance, (c). Ensuring the process does not rely wholly on chance is achieved by introducing an element of skill, judgement or knowledge to the process, for example by requiring entrants to answer questions correctly or complete a puzzle. This would then be known as a “prize competition”.

Free entry route

8.3 Providing a free entry route to prevent an arrangement from requiring persons to pay to participate involves offering a way to enter the competition that does not involve making a payment of money or money’s worth. Schedule 2 to the 2005 Act sets out the definition of “payment to enter” in relation to a lottery. As well as requiring no fee to participate in VBR, there must be no requirement for winners of prizes in VBR to pay in order to discover whether they have won a prize, or in order to take possession of a prize.

8.4 A requirement to pay does not include the cost of sending a free entry by ordinary post, making a telephone call, or using any other method of communication.

8.5 **Postal free entry:** One option is for the competitions to have an entry cost equivalent to the price of an ordinary first or second class stamp (currently 76p and 65p respectively) and offer the alternative of sending in an entry by post knowing that, for the same price, participants would rather simply pay than go to the trouble of sending a letter. This is a legitimate free entry route which would take such a competition outside the definition of a lottery (although perhaps not within the spirit of the law), however if you would like the cost of entries to your races to be significantly higher than the price of a stamp, you may find that many participants take advantage of the free entry route rather than choose to pay to participate.

8.6 **Timing for postal entries:** It would be necessary to allow sufficient time for free postal entries to be received after paid entries to a balloon race close and before the balloon race starts so that those entering for free by post have a genuine chance of winning. We would recommend that you allow at least 48 hours after paid entries close for postal entries to be received before the race begins.

8.7 **Limited free entries:** Another possible option would be a free entry route limited to one per person per race or, as you have suggested, one free entry per unique email address. In our view this would be sufficient to mean there is no requirement to pay in order to participate in the arrangement, as it is possible for any person to participate for free. However, we consider that the free opportunity to participate must be meaningful. For

example, if each balloon in VBR cost 1p and the expectation or reality is that each entrant will purchase hundreds of balloons, giving one free balloon per person would not represent a meaningful opportunity to participate without paying. This is because the chance of a free balloon winning in these circumstances would be so small as to be meaningless, and such a race would, in our view, be classified as a lottery.

- 8.8 **Product promotions:** There is a type of free entry lottery which is known as a “product promotion”. This is where a customer buys an item or service and with it receives a free entry into a race to win a prize. It is necessary that the customer does not pay for the item or service at a price which reflects the opportunity to enter the race, as such a cost would be treated as a payment to enter a lottery. Therefore you would need to be able to demonstrate that the item or service is being sold at the expected price. If the Commission suspected that the product being sold along with a race entry was merely an attempt to circumvent the restrictions on commercial lotteries, it would write to the organiser requiring an explanation.
- 8.9 **Publicising the free entry route:** Paragraph 8(c) of Schedule 2 of the 2005 Act requires that the choice of a paid for or free entry be publicised in such a way as to be likely to come to the attention of each individual who proposes to participate. It would therefore be unacceptable to offer a free entry route only in small print in the terms and conditions. If the free entry route was not properly publicised, the product would fall within the definition of a lottery.

Prize Competition

- 8.10 A prize competition is where a skill/judgement/knowledge element (the “Test”) is used to take the race outside the definition of a lottery, on the basis that the winner is not determined wholly by chance. Under section 14(5) of the 2005 Act, the Test must **reasonably be expected** either to:
- a) prevent a significant proportion of entrants from receiving a prize; or
 - b) prevent a significant proportion of persons who wish to participate from doing so.
- 8.11 It is acceptable for a winner to be picked at random from those entering and passing the Test. Simply put, the Test must be difficult enough that a significant number of entrants either fail to pass it, or are put off from entering in the first place. The Commission has issued a helpful guidance document, [Prize competitions and free draws: the requirements of the Gambling Act 2005, December 2009](#).
- 8.12 **“Significant proportion”:** Neither the legislation nor the Commission’s guidance offer any definition of what is a “significant proportion”, with the Commission only suggesting

that the phrase should be given its “ordinary, natural meaning”. If you were to operate VBR as a prize competition, rather than with a free entry route, you would therefore need to form a reasonable view on what a “significant proportion” means in the context of your competition. You would need to strike a balance with the commercial reality that Fundraisers will want to encourage as many people as possible to enter, rather than deterring them, in order to gain the maximum proceeds and ensure that the value of the prize is covered. Whilst this figure is not definitive as it has never been tested, and there is scope for different views to be reached, our view is that around 20% or more represents a significant proportion.

- 8.13 **Level of skill, judgement or knowledge required:** In its guidance, the Commission indicates that competitions such as crosswords or number puzzles would certainly qualify as prize competitions, due to the level of skill required. At the other end of the scale, competitions that ask just one simple question, the answer to which is widely and commonly known or is blatantly obvious from the material accompanying the competition, would be classed as a lottery. We agree with the Commission that any competition where the answer is given in the accompanying material would be legally classified as a lottery.
- 8.13.1 The Commission’s view is that the more questions that must be solved, the more likely it is that a competition is a prize competition. We do not consider that including only one question will necessarily mean that the competition is a lottery, provided the question is difficult enough, however this is subject to the fact that, particularly with online competitions, the answer to almost any question can easily and quickly be discovered using a search engine such as Google. The Commission does not think a particular question or clue fails to qualify as involving skill or knowledge just because the answer can be discovered by basic research, whether on the internet or elsewhere, however the legal requirement is not met where the answer to the question “can be found easily on the internet” (see paragraph 3.6 of the Commission’s guidance linked to at 8.11 above). In our view, the question(s) must at least require interpreting the results of an internet search, selecting between different results and/or clicking through to read web pages to discover the correct answer.
- 8.13.2 Whether the requirement will deter a significant number of people from entering a competition depends to a certain extent on the value of the prize on offer. People will obviously go to more trouble to discover the correct answer in order to enter a competition to win a prize worth £10,000 than they would for a prize worth £10. A more difficult Test will therefore be necessary to deter people from entering a competition for higher value items than for lower value items.
- 8.14 **Reasonable expectation:** It is only necessary that you **reasonably expect** the Test will deter people from entering or prevent them from winning a prize. Whilst this is a subjective

test, if it was concerned about a competition, the Commission would expect to see evidence to show why you came to the conclusion that the Test was difficult enough. If you did not have evidence, the Commission would question how you formed a reasonable expectation, so you will therefore need to be able to justify your subjective views.

- 8.14.1 You only need to expect the Test **either** to deter a significant number of entrants **or** to prevent a significant number from winning a prize. You do not need to meet both parts of the requirement, although it is likely that a Test difficult enough that a significant proportion of entrants fail it will also be difficult enough to deter a significant proportion of potential entrants from taking part.
- 8.14.2 It can be difficult to prove how many potential entrants were deterred by the difficulty of the Test, as all you could show are figures for how many viewed the relevant webpage and then did not proceed with the entry. We therefore recommend that, should you choose to operate VBR as a prize competition, you focus on using the Test to prevent a significant proportion of entrants from winning a prize – i.e. by failing the Test so that they cannot proceed to entering the race. This means presenting the Test to entrants after they have committed to the balloon purchase. You should, however, ensure entrants are aware, before they commit to the purchase, that they will need to complete a Test, what the Test will entail, and that failing the Test means that their balloon will not be entered into the race.
- 8.14.3 We advise that you record figures to demonstrate how many people failed the Test for each competition and therefore were unable to proceed to the race. Once you have begun operating VBR as a prize competition, you will be in a position to produce these figures to the Commission if questioned. However, before you run each new competition you will need to form a reasonable view that you expect its Test will meet the legal requirements. It is likely to be difficult to predict in advance how many entrants will fail a Test so we recommend that you carry out and document the results of some market research testing of the proposed Tests on a sample of people who represent your target customers.
- 8.14.4 As you continue to operate VBR, you will need to keep the difficulty of the Tests under review and adjust the difficulty as necessary to ensure a significant proportion of entrants continue to fail, bearing in mind the value of each prize and the fact that regular customers may become more adept at passing the Tests.
- 8.15 **Multiple entries:** If the same Test is applied each time an entrant wishes to enter an VBR race, it would cease to be effective at preventing entrants from winning a prize on subsequent occasions, for example they will have time to discover the correct answer, find out that they were successful in a previous attempt and replicate that answer. You will therefore need to use a different Test for each competition.

- 8.15.1 Further, entrants should only be able to enter each competition on one occasion, because otherwise they will have seen the Test and have time to research the correct answer(s) before entering again or (for multiple choice questions) simply enter once for each answer to guarantee success. If you permit an entrant to enter a competition more than once, you will need to devise a system where repeat entries are identified and a different Test displayed.
- 8.15.2 However, our view is that on each “entry occasion” entrants could be permitted to purchase multiple balloons to enter into the race, provided they have committed to the total purchase before finding out whether they have been successful at the Test. The Test will have served to prevent a significant proportion of persons who chose to participate from receiving a prize because, for those who answer incorrectly, none of their entries will proceed to the balloon race.

Example prize competition formats

- 8.16 We set out below some prize competition formats which have been used or tried by other operators and discuss the level of difficulty required to comply with the law and how that can be evidenced. As advised above, in each case we recommend that the Test is presented to entrants after they have committed to purchase their balloon(s), so that you have data to demonstrate how many failed to proceed to the race due to the difficulty of the Test.
- 8.16.1 **Crosswords and number puzzles:** As these are given as examples of qualifying tests in the Commission’s guidance, crosswords and number puzzles such as sudoku are good examples of formats which are very likely to ensure a competition is not a lottery. We would, however, recommend that you nevertheless carry out market research on a sample of people to ensure the puzzles are sufficiently difficult that a significant proportion are unable to complete them, or at least indicate that they would be unwilling to complete such a puzzle for the chance to win a prize.
- 8.16.2 **Quizzes:** It is our view that, given the ease with which entrants could google the answers to most quiz questions, you should impose a time limit which means that at least around 20% of people, on average, will fail to discover the correct answers in the time available. Additionally:
- a) in light of the Commission’s guidance note we would not recommend having only one question; at least two questions should be used and the fewer questions you ask, the shorter the time limit should be;

- b) to determine the appropriate time limit, we suggest you carry out research to see how long it would take a sample of people to google the answers to the proposed questions and then set the time limit where around 20% of the test subjects would have failed. You should document the results of this test, ready for production to the Commission if required. In our view, this process would create a “reasonable expectation” in your mind that a significant proportion of entrants will fail to answer correctly and therefore be prevented from winning the prize;
- c) the questions must only be displayed to entrants once they have purchased their balloon(s) and the clock has started running, otherwise they will have unlimited time to carry out the necessary research to provide the correct answers; and
- d) a test with only one question is more likely to raise concerns from the Commission as to whether it complies with the 2005 Act. However, it is possible that a Test comprising only one question would meet the requirement, if the question is sufficiently difficult and a short amount of time is given to answer. As above, we recommend that you satisfy yourself through research/surveys that the question and time limit used are sufficiently challenging to prevent a significant proportion of participants from answering correctly.

8.16.3 **Guessing competitions:** Some competitions use a “guessing” format, for example asking participants to guess the number of jelly beans in a jar. Whilst this would serve to prevent a significant number from winning the prize (in fact most participants would fail to guess correctly) there is a risk that it would fall under the definition of a “betting prize competition”, which is a sub-type of betting under which a participant is required to guess at any of the matters in 4.3 (a) to (c) above, and if his guess is accurate, or more accurate than other guesses, he either wins a prize or enters a draw to win a prize. A betting prize competition requires a gambling licence. We would therefore recommend that you avoid Tests where the skill element involves customers trying to make the most accurate guess at the outcome of any event or process, whether something will occur or whether something is true.

8.16.4 **Spot the ball competitions:** It is generally considered that a significant level of skill is required in spot the ball competitions in order for the competition not to be considered a lottery. As with guessing competitions, there is a risk that this type of Test could fall within the definition of betting, with the Commission stating on its website that *“if you structure your spot the ball scheme so that participants are expected to guess, or judge, whether anything is true or not, it is likely to be betting. For example, if the aim is to choose which of a number of pre-selected positions corresponds to the actual position of the ball in the photograph, it is likely to be betting.”* However, the Commission goes on to give an example of a spot the ball competition which it considers would be more likely to be a prize competition, in which *“a panel of judges determine the position of the ball and participants have to apply judgment, skill or knowledge to match their own decision of where the ball is with that of the panel”*. It would be acceptable for a number of customers

whose guess is closest to the location chosen by the expert panel to be entered into the balloon race, provided a significant proportion have been prevented from proceeding to this stage due to the fact that their guess was not accurate enough.

- 8.16.5 **Skill games:** Where the Test takes the form of a game, there is a risk that it could fall within the definition of gaming (see section 4.3 above) and therefore requires a gambling licence from the Commission. Whether participants would consider that they are “playing a game” when taking part is key here. Any element of chance within a game would mean that a gaming licence is required, even if that element of chance can be effectively eliminated by skilful play (for example as is the case in poker). We would therefore recommend that you avoid Tests which take the form of a game, unless you can be sure that the winner is determined entirely by skill and there is no element of chance (for example in a deal of cards, roll of dice or randomised location of game elements).

9 YOUR PROPOSED METHOD FOR ALTERING VBR

- 9.1 You have confirmed that you wish to provide a free entry route, and have proposed two possible free entry methods:
- a) a web-based free entry route whereby a person can enter for free online by clicking a free entry button and entering their email address and name. You will allow one free entry for each unique email address; and
 - b) a postal free entry route whereby a person can enter for free by clicking a “Register free entry by post” button on the webpage, entering their name and email address in a webform and generating a PDF document to be printed and posted to the Fundraiser’s address.
- 9.2 In relation to the proposed online entry route in 9.1(a), in its guidance note on free draws, the Commission discusses at [paragraph 4.6\(ii\)](#) different methods of free entry and provides guidance that where a free entry route requires a person to enter a draw via the web, then “*potential participants who do not have home web access need sufficient time to gain web access elsewhere*”. It should be noted that the guidance note was published in 2009 when access to the internet would not have been as prevalent as it is today, but if you were to proceed with a web-based free entry, this should be considered when determining the length of time during which balloons are available for sale before the race starts.
- 9.3 In relation to the proposed postal entry in 9.1(b), you confirmed by email on 29 October 2020, that you had designed a free postal entry route which you had added to www.balloonrace.com/beta. This requires entrants to complete an online form which allows them to generate a PDF document which they print and post to the Fundraiser.

This free entry route is effectively a hybrid of a web-based entry (as it requires a form to be completed online) and a postal entry (as the entrant must then post the form to the Fundraiser).

- 9.4 The 2005 Act clearly allows for the possibility of methods other than a postal entry to be used for the free entry route, as paragraph 5(1) of Schedule 2 allows “any other method of communication”. However, paragraph 8(1) of Schedule 2 adds that that method of communication must be “neither more expensive nor less convenient than entering...by paying”.
- 9.5 Whilst we consider that the computer-generated PDF is helpful in that it provides a document containing the entrant’s information and the Fundraiser’s address ready for printing and posting, the reality is that not everyone owns, or has access to, a printer. In our view, therefore, if entrants wishing to enter for free are *required* to print and post this document, there is a risk that this is “less convenient” than participating in the prize draw by paying.
- 9.6 Whilst it would be possible to include the printed PDF as one of the permitted methods of free entry, we consider that you must also include an option for people to post a letter that they have prepared themselves, so that your free entry method is no “less convenient” than paying to enter.

10 CONCLUSION

- 10.1 VBR, in its original form, would be considered a lottery and would require that you hold a remote ELMOL and, if you are responsible for manufacturing, installing or adapting the gambling software, a remote gambling software operating licence. If you were to add the Games to VBR to allow entrants to boost the distance that their balloons travel, you may also require a remote casino operating licence.
- 10.2 You have confirmed that will not be adding the Games to VBR, therefore VBR does not require a remote casino operating licence.
- 10.3 In our view, VBR could be structured in such a way as to take it outside the definition of a lottery either by:
- a) introducing a free entry route; or
 - b) by introducing a requirement for participants to exercise skill, judgement or knowledge.



- 10.4 You have confirmed that you do not wish to operate VBR as a licensed lottery and instead have chosen to add a free entry route which you have advised will be added to the product in such a way that it cannot be removed by the Fundraiser.
- 10.5 We consider that if the free entry route is structured so that it:
- a) offers a meaningful opportunity to enter for free with a genuine chance of winning;
 - b) is properly publicised so that it is “likely to come to the attention of each individual who proposes to participate”; and
 - c) is no “less convenient” than paying to enter,
- and if the Games are not added to VBR, then VBR will not require a gambling licence.

Harris Hagan
29 October 2020