



PRIZE PROMOTIONS AROUND THE WORLD

France



Downloaded: 28 Oct 2020

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ABOUT

Welcome to the fourth edition of DLA Piper's popular Guide to Prize Promotions Around the World. Prize promotions remain a popular marketing tool used globally by businesses to attract customers. The internet and various social media platforms make this an attractive, cost efficient means of reaching a large, multi-jurisdictional customer base; but it is not without its legal challenges.

This handbook is designed to equip our clients with a useful tool to assist them with the management of the early development stages of a promotion, and to bring potentially problematic issues to their attention as soon as possible.

NEW FEATURES AND TRENDS

In response to client demand, this fourth edition of the Guide has been expanded to cover 39 jurisdictions which count among the most significant for our clients, with the addition of Denmark, Hungary, Nigeria and Turkey.

As our interactive map shows, the extent of regulation and sanctions in this area is on the rise, with the most noticeable change being brought about by the introduction of GDPR across the EU. GDPR extends obligations around handling promotion entrants' personal data (eg for winner publicity, use of promotions to generate marketing leads and use of UGC entries containing personal data), and introduces the possibility of huge fines for breaches of those obligations.

ABOUT OUR GLOBAL ADVERTISING AND MARKETING TEAM

The DLA Piper global advertising and marketing team is well-versed in handling complex, frequently multi-jurisdictional compliance projects. This includes advising on compliance aspects of international prize promotions, which we are often asked to clear across large numbers of jurisdictions, while working to short deadlines.

More broadly, our global advertising and marketing team is able to support the full range of advertising-related work, from copy clearance to dealing with advertising regulators and litigation, to negotiating advertising and sponsorship deals, to e-privacy issues and ad-tech. Our advertising and marketing lawyers offer deep understanding of the advertising and media industries, and combine this with a sophisticated approach to cross-border working.

DISCLAIMER

This Guide is not a substitute for legal advice. Nor is it intended to be an exhaustive guide to all rules and regulations relating to promotions in the jurisdictions covered, or to cover all aspects of the legal regimes surveyed, such as specific sectoral requirements. Rather, it aims to simplify what are often complex provisions into a more manageable summary and to highlight areas of potential concern to promoters. It is current as at the last modified date stated in each section.

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Last modified 10 January 2019

GOVERNING LAW

What are the main applicable governing laws or codes for prize promotions?

Name	Law or Code?
May 21, 1836 law, prohibiting lotteries, codified under articles L. 322-1 et seq of the Internal Security Code, as modified by March 17, 2014 law	Law
Article L. 121-20 of the Consumer Code deals with promotional lotteries (loteries publicitaires). Unfair / misleading / aggressive commercial practices are governed by articles L. 121-1 et seq. of the Consumer Code.	Law
Recommendations of French advertising self-regulatory organization (ARPP) and the International Chamber of Commerce (ICC) Code on Advertising and Marketing Communication Practice	Code
Decree No. 92-280 of March 27, 1992 regarding broadcast advertising	Law
Regulation (EU) 2016/679 of April 27, 2016 on the protection of natural persons with regard to the processing of personal data (GDPR)	Law
Law No. 78-17 of January 6, 1978 on 'Information Technology, Data Files and Civil Liberties' (data protection act), as amended	Law

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Article L. 34-5 of the French Post and Electronic Communications Code regarding electronic direct marketing	Law
Recommendations of the French data protection authority (CNIL) and of the EDPB and WP29	Code

EXTRA-TERRITORIALITY

Do national regulators enforce rules against entities operating abroad?

If the promotion targets French consumers, then French consumer and data protection laws apply.

In order to determine whether the promotion targets French consumers, the regulator may take into consideration factors such as the eligibility criteria, advertising in local media, language, etc.

SKILLS COMPETITIONS

Can a prize promotion be run that is based on skill?

Yes, although the law is unclear and skill competitions could be risky in a B2B context.

For B2B skill competitions, ensure:

- The winner is picked on the basis of skill alone (e.g. quality, accuracy, originality) not in any way by chance; and
- Criteria for awarding prizes are clear, objective and precisely defined.

Articles L. 322-1 et seq. of the Internal Security Code et seq. prohibit any and all operations (including skill competitions) offered to the public under any name whatsoever, that create an expectation of gain and the outcome of which is determined, even in part, by chance and for which a financial contribution from the participants is required by the organizer.

Article L. 322-2-1 adds that the prohibition includes games the functioning of which relies on the player's know-how. This could be interpreted as prohibiting skill competitions. However, there might be an argument that it means that the prohibition of chance-based games also applies when know-how is a factor in the determination of the outcome of the contest.

That being said, Article L. 322-2-2 provides that this prohibition does not apply to promotional lotteries mentioned in article L. 121-20 of the Consumer Code, which is why the risk that the skill competition be considered as unlawful is lower in a B2C context.

For B2B, if the competition is totally skill-based and based on clear and objective factors that show that chance is not a factor, the competition would be lawful. If there is doubt as to whether chance is a factor, it would fall within the general prohibition of lotteries, except if participation is totally free. If reimbursement of the financial contribution is offered in the terms and conditions, this is not sufficient to make it lawful.

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PRIZE DRAWS

Can a prize promotion be run where there is an element of chance in the selection of the winner?

Unlawful, unless:

- No financial contribution from the participants is required by the organiser (irrespective of whether reimbursement of the financial contribution is offered in the terms and conditions); or
- It is a promotional lottery as mentioned in Article L. 121-20 of the Consumer Code that is not an unfair commercial practice under Article L. 121-1 (which means in particular that entry conditions must at all times be clear, express and transparent).

Under Article L.121-20 of the Consumer Code, a chance-based prize draw consisting of a promotion organized by professionals to consumers is lawful to the extent it is not an unfair commercial practice.

Unfair commercial practices are either:

- Misleading practices (deemed – there is a list of 22 practices that are deemed misleading; or proven, under Articles L.121-2 et seq of the Consumer Code). For example, a promotional lottery would be deemed unfair if the prize or reasonable equivalent is not actually awarded, or if the promotion is presented as 'free' when in fact the consumer must pay anything other than the inevitable costs related to the response to the commercial practice and to taking possession of delivery of the item.
- Aggressive practices (deemed – there is a list of 8 practices that are deemed aggressive; or proven, under Articles L.121-6 et seq of the Consumer Code). For example, repeated solicitations, physical or moral constraint and certain other practices are deemed aggressive.
- 'Simply' unfair: when the practice is:
 - Contrary to professional diligence (not defined but see eg, recommendations of ARPP, ICC Code on Advertising and Marketing Communication Practice); and
 - Substantially alters the economic behavior of a reasonably careful and informed customer in respect of a good or service, under article L. 121-1 of the Consumer Code.

These criteria leave it to the discretion of the French consumer protection authority (DGCCRF/DDPP) and of the courts, to determine whether the practice is unfair;

or

- It is a charity raffle (Article L. 322-3 of the Internal Security Code) or a traditional lottery, if organized for a limited amount of people and for a social, cultural, scientific, educational, sports or social activity purpose (Article L. 322-4), or within a funfair (Article L. 322-5).

SELECTION OF WINNERS

Are there any requirements for the selection of winners and award of prizes?

The conditions for the awarding of the prizes must be transparent for participants.

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JUDGES

Are there any particular requirements in relation to judges or judging for skills competitions?

No, although it is recommended that judges have sufficient capability to judge a skill competition and more generally be independent from the participants and objective.

PRIZES

Are there any restrictions on the prizes awarded?

The following cannot be awarded as prizes:

- Weapons (article 5, July 12, 1985 Law).
- Tobacco-related products (article L. 3512-4 of Public Health Code).
- Anything contrary to public order or anything the distribution of which is prohibited or regulated (e.g. drugs).

The trademark owner may object to its trademarked goods being offered as prizes if the organizer is not an authorized reseller. It may also be considered unfair competition.

REGISTRATION REQUIREMENTS AND FEES

Are there any registration requirements, or any fees/taxes payable?

No.

OTHER LOCAL REQUIREMENTS

Are there any other key local requirements?

No, although it is recommended to:

- File the terms and conditions in the office of a court official, generally a bailiff (huissier de justice).
- Obtain the express, opt-in acceptance of terms and conditions and all related documentation as a condition for entry or receiving a prize.
- Include some of the terms and conditions governing the promotion in any advertising presenting the promotion. This extract of the full length terms and documents should include a short description of the prize and the conditions of participation in the promotion. The extract should also indicate where and how the full length of terms and conditions can be obtained by the participants.

TIMING

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Is time required to ensure compliance (other than reviewing the terms and conditions)?

Time should preferably be allowed to file the terms and conditions in the office of a bailiff, which may take a few hours or up to a couple of business days.

Time should also be allowed if the organizer has not yet made the appropriate steps towards becoming compliant with the GDPR and French data protection act requirements as regards the management of the personal data collected and processed in connection with promotional operations, including, without limitation, the creation and maintenance of a record of data processing activities, appropriate information notices provided to data subjects, and formal processes implemented in order to enable the latter to exercise their rights (i.e. access, rectification and erasure, data portability, objection, restriction of processing, the right to digital legacy).

Where the processing of personal data in the context of promotional operations is likely to result in high risks to the rights and freedoms of natural persons (e.g. where such data is used to profile participants), the organizer must also proceed with a Personal Data Impact Assessment.

In France, since the entry into force of the GDPR on May 25, 2018, the general principle is that each processing purpose for which personal data is processed must be evidenced with a record of data processing activities. Therefore, it is not a requirement to make a record entry for each promotional operation, but to have one record entry encompassing the management of the personal data collected and processed in the course of such operations (provided that means of processing and data processed are similar). If personal data is transferred outside of the European Economic Area, it is necessary to 'ensure that the recipient is located in a country recognized by the European Commission as ensuring an adequate level of personal data protection, or that a proper transfer mechanism is implemented (e.g. binding corporate rules, European Commission model clauses).

In addition, the organizer shall allow time to implement 'Privacy by Design' and 'Privacy by Default' principles to any further processing of personal data in the context of promotional operations (i.e. ensure that appropriate technical and organizational measures are implemented to meet the requirements of the GDPR and that, by default, only the personal data that is necessary for the purposes of promotional operations is collected and processed).

TRANSLATIONS

Are the terms required to be translated by law?

Yes, into French (August 4, 1994 Law).

PENALTIES FOR NON-COMPLIANCE

What are the penalties for non-compliance?

General prohibition of lotteries

- Up to 3 years' imprisonment and a fine up to €90,000 (approx. US\$100,800) for individuals and €450,000 (approx. US\$504,100) for legal entities (or up to 7 years' imprisonment and a fine up to €200,000 (approx. US\$224,000) for individuals and €1,000,000 (approx. US\$1,120,280) for legal entities, if committed in an organized group).
- Additional sanctions for individuals:

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- Loss of civil rights (eg right to vote and/or be elected to a public office);
- Confiscation of the means used to commit the offense;
- Publication of the decision;
- Closing down of facility used to commit the crime, permanently or for up to 5 years; and
- Prohibition from exercising certain activities.
- Additional sanctions for legal entities:
 - Dissolution;
 - Closing down of facility used to commit the crime, permanently or for up to 5 years;
 - Confiscation of the means used to commit the infraction;
 - Publication of the decision; and
 - Prohibition for up to 5 years from obtaining or maintaining the license required to operate online gambling activities.
- A fine up to €100,000 (approx. US\$112,000) for individual ticket sellers, or for those individuals advertising the lottery and up to €500,000 (approx. US\$560,100) for legal entities such as companies. The court may raise fine to four times the amount spent to advertise the lottery.

Promotional lotteries constituting misleading commercial practices

- Up to 2 years' imprisonment and a fine up to €300,000 (approx. US\$336,000) for individuals and €1,500,000 (approx. US\$1,680,400) for legal entities such as companies.
- The fine may be set, for individuals, at up to 10% of the average annual turnover during the three preceding financial years or 50% of the cost of the practice constituting the offense.
- The fine may be set, for legal entities, at up to 50% of the average annual turnover during the three preceding financial years, or 250% of the cost of the practice constituting the offense.
- Possible additional sanctions for individuals: prohibition from any or all of the following for up to 5 years:
 - Exercising the activity in the context of which the violation was made;
 - Exercising a commercial or industrial profession;
 - Managing or controlling a commercial/industrial business or a commercial company.
- Possible additional sanctions for legal entities:
 - Prohibition for up to 5 years from:

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- Operating a business;
- Operating one or more establishments involved in the violation;
- Issuing securities to the public;
- Submitting public procurement bids;
- Issuing checks or using credit cards.
- Placement under judicial control for up to 5 years;
- Confiscation of the means used to commit the offense; and
- Publication of the decision.
- In addition, a Court may order the cessation of the misleading practice.

Promotional lotteries constituting aggressive commercial practices

- Up to 2 years' imprisonment and a fine up to €300,000 (approx. US\$336,000) for individuals and €1,500,000 (approx. US\$1,680,400) for legal entities.
- The fine may be set, for individuals, at up to 10 % of the average annual turnover during the three preceding financial years.
- The fine may be set, for legal entities, at up to 50 % of the average annual turnover during the three preceding financial year.
- Possible additional sanctions for individuals: prohibition from exercising a commercial business activity for up to 5 years.
- Possible additional sanctions for legal entities:
 - Prohibition for up to 5 years from:
 - Operating a business;
 - Operating one or several establishments involved in the violation;
 - Issuing securities to the public;
 - Submitting public procurement bids;
 - Issuing checks or using credit cards.
 - Placement under judicial control for up to 5 years;
 - Confiscation of the means used to commit the offense; and

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- Publication of the decision.
- In addition, a Court may order the cessation of the aggressive practice.

Promotional lotteries constituting simply unfair commercial practices

No specific criminal sanctions set forth in the Consumer Code.

Civil sanctions

Damages in case of unfair competition / parasitism claims.

Breach of data protection rules

Administrative sanctions

In case of non-compliance with the GDPR and/or French data protection act requirements, the French data protection authority (CNIL) may impose the following sanctions:

- If the processing activities are likely to infringe the GDPR or the French data protection act:
Formal warning (optional).
- If the data controller or processor infringes the GDPR or the French data protection act, but the processing operations may be brought into compliance: Formal order, within a specified period (which may be set at 24 hours in cases of extreme urgency), to:
 - comply with a data subject's requests to exercise his or her rights;
 - comply with applicable data protection provisions;
 - rectify or erase personal data or restrict the processing and notify such actions to recipients to whom the personal data have been disclosed.

The CNIL may decide to make the order public.

- Other sanctions, after a formal warning or in addition to a formal order:
 - Reprimand;
 - Injunction to comply with applicable data protection requirements or to comply with a data subject's request to exercise his or her rights, subject to a daily penalty of up to EUR 100 000 (approx. US\$112,000) per day of delay;
 - Temporary or definitive limitation of processing, ban on processing or withdrawal of an authorization previously granted;
 - Withdrawal of a certification, or order to a certification body not to issue or to withdraw a certification;
 - Suspension of data flows to a recipient in a third country;

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- Total or partial suspension of the decision approving binding corporate rules;
- Administrative fines - two thresholds:
 - up to EUR 10 000 000 (approx. US\$11,202,800), or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher, for certain categories of infringements (Note: these sanctions will apply e.g. in case of violations of the obligation to keep a record of the data processing operations that are implemented); and
 - up to EUR 20 000 000 (approx. US\$22,405,600), or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher (Note: these sanctions will apply e.g. in case of a failure to comply with the rights of the data subjects or in case of a violation of the rules governing data transfers outside of the EEA).

Note: the CNIL's president may refer a case to the CNIL's restricted committee, per an emergency procedure when (i) a violation infringes human identity, human rights, privacy, public, or individual liberties; or the CNIL's president considers an intervention is urgent.

Criminal sanctions

Criminal sanctions of up to 5 years of imprisonment and a fine of up to EUR 300,000 (approx. US\$336,000) for natural persons or up to EUR 1 500 000 (approx. US\$1,680,400) for legal entities may also be imposed. In addition, companies may be subject to the following additional criminal sanctions:

- Order that the data processed unlawfully be deleted;
- Prohibition from (i) operating a business, (ii) operating one or several establishments having been involved in the violation, (iii) issuing securities to the public, (iv) submitting public procurement bids, (v) issuing checks or using credit cards;
- Placement under judicial control;
- Confiscation of the means used to commit the infraction;
- Publication of the decision.

Civil liability

Any person who has suffered material or non-material damage as a result of an infringement of the above-mentioned rules has the right to receive compensation from the data controller or data processor for the damage suffered.

When several individuals who are in a similar situation suffer a loss resulting from such a violation, a class action may be filed before a civil or administrative court having jurisdiction. Data protection class actions may only be brought by:

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- Associations that have been duly registered for at least 5 years and whose statutory purpose is the protection of privacy and personal data; and
- Consumer protection associations recognized at national level and approved in accordance with Article L. 811-1 of the French Consumer Code, when the personal data processing affects consumers.

Individuals are not able to bring such class actions by themselves through their attorney.

Class action litigants are entitled to both seek injunctive relief and claim compensation for their material and moral losses. However, litigants may only claim compensation if what caused the loss occurred before/after May 24, 2018.

RESTRICTIVENESS OF REGULATIONS

How restrictive are the legal obligations applicable to prize promotions?

French rules have recently been simplified with respect to prize promotions, with less requirements, which are not unduly onerous (there are no registration or further formality requirements, and most prize promotion mechanics are allowed so long as it is not a prohibited lottery). The steps necessary to avoid falling into the category of prohibited lottery are (whilst important) not very restrictive. However, GDPR has introduced various obligations around processing personal data which have significant application to prize promotions (e.g. use of submissions including personal data, winner publicity, etc.).

REGULARITY OF SANCTIONS

How frequently does the regulator impose serious sanctions for non-compliance?

Enforcement is high. However, in practice, the risk of actual sanction is remote in that the French consumer protection authority (DGCCRF) would typically first request the sponsor who would be a first time infringer to comply with the law. If the organizer does not comply, then the DGCCRF would draft a report and send it to the public prosecutor. In case of successful prosecution, sanctions may be severe.

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