



PRIZE PROMOTIONS AROUND THE WORLD

United Kingdom



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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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UNITED KINGDOM



Last modified 31 March 2019

GOVERNING LAW

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

Name	Law or Code?
The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing ('CAP Code') (12th edition)	Code
The UK Code of Broadcast Advertising ('BCAP Code')	Code
Consumer Protection from Unfair Trading Regulations 2008 as amended by the Consumer Protection (Amendment) Regulations 2014. ('CPRs') (or the Business Protection from Misleading Marketing Regulations 2008 for B2B promotions)	Law
The Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276)	Law
Gambling Act 2005	Law
PhonepayPlus Code of Practice (relevant where a premium rate telephone number is used as the method of entry for example)	Code
Privacy and Electronic Communications (EC Directive) Regulations 2003 (as amended, "PECR")	Law
Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011	Law

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EU General Data Protection Regulation ((EU) 2016/679) ("GDPR") and the Data Protection Act 2018	Law
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Note: Prize promotions on broadcast media (TV and radio) are subject to significantly fewer rules (under the BCAP Code) than on non-broadcast media (under the CAP Code). This booklet reflects the more detailed requirements relating to non-broadcast media; a careful approach would be to seek compliance with these for broadcast ads as well.

EXTRA-TERRITORIALITY

Do national regulators enforce rules against entities operating abroad?

The CAP Code does not apply in relation to prize promotions which are published in foreign media (e.g. in a US newspaper).

If the promotion targets UK consumers, but is promoted from a non-UK website or in direct marketing from outside the UK, then:

- If the promoter is based in a country which operates a cross-border complaint system that the ASA considers suitable, the ASA will leave it to the relevant authority in that other country. The ASA is a member of the European Advertising Standards Alliance and considers most EU countries to operate suitable systems.
- If the promoter is not based in such a country, the ASA will do what it can to take action, but in reality such action is likely to be limited and the ASA is unlikely to prioritize such cases.

The BCAP Code only applies to promotions on TV services licensed by UK media regulator Ofcom.

SKILLS COMPETITIONS

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

Yes, but ensure:

- The winner is determined on the basis of skill not chance, particularly if the entrant pays to enter.
- The skill element requires entrants to exercise skill or judgement or to display knowledge as part of requirements which either prevent a significant proportion of potential entrants from taking part or prevent a significant proportion of entrants from receiving a prize. (If this level of skill is not met, it could be categorized as a promotion determined on the basis of chance and as such if payment is required, this would be a lottery, giving rise to criminal liability if the appropriate license is not obtained).

Note: Asking one question the answer to which is widely known is unlikely to qualify as sufficient

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exercise of 'skill, knowledge or judgement'.

and

- Terms are notified to entrant before purchase is made.

If a multiple choice format is used:

- There must be significant plausible alternatives to the correct answer, and
- The correct answer must not be obviously given close to the question

Note: Be ready to provide evidence of work undertaken to ensure sufficient level of skill is required.

PRIZE DRAWS

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

This would be unlawful (potentially deemed an illegal lottery in the absence of a license), unless participants do not pay to enter or to claim/ receive prize.

'Payment' includes: where the only route of entry is a premium rate phone line; paying more than usual rates for delivery of the prize; paying to discover whether a prize has been won or to collect a prize; and paying for goods and services at an inflated rate which reflects the opportunity to take part in the promotion (but a purchase requirement where the price of the product purchased is not inflated does not amount to a "payment to enter"). As a general rule, the provision of data does not amount to payment, but a requirement to provide a large quantity of data could amount to payment, especially if the promoter intended to sell such data to third parties (note that requirements to provide data separately raise various GDPR issues).

Note: In Northern Ireland (which is part of GB but not the UK), a genuine, no-purchase route to entry must be provided. This is not a requirement in the UK, but it can be a good way to avoid the risk of there being a payment.

SELECTION OF WINNERS

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

Promoters must ensure promotions are conducted under proper supervision, make adequate resources available to administer them and allow enough time for each stage eg judging rounds.

Prize draws must be selected by a computer process producing verifiably random results, or by (or under supervision of) an independent person.

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Prize winners should receive their prizes normally within 30 days of the closing date. It is no longer a requirement, but advisable, if possible, to let winners know when they can expect their prize if not within 30 days.

Winners should be informed individually.

Promoters are required to publish or make available information that indicates an award of prize(s) took place – usually prize winner(s)' surname(s) and county/counties. The promoter must warn entrants of their intention to do so, and give entrants the opportunity to object to or reduce the information made available.

JUDGES

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

Skill competitions where the selection of winning entries is open to subjective interpretation must be judged by a demonstrably independent judge or a panel with at least one independent member. Those judging must be competent.

The criteria and mechanism for judging entries must be made known before, or at time of, entry.

PRIZES

Are there any restrictions on the prizes awarded?

Prizes awarded must be as described in their marketing communications, or reasonably equivalent to that description.

Participants in instant-win promotions must get their winnings at once or must know immediately what they have won and how to claim without delay, unreasonable costs or administrative barriers.

REGISTRATION REQUIREMENTS AND FEES

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

Registration Requirements

There are no requirements to register prize promotions.

Fees/Taxes payable

The tax consequences must always be considered, in particular VAT and income tax/corporation tax and specialist advice should be sought. All will depend on the facts. Tripartite arrangements tend to be particularly complicated.

Generally, if publicity, advertising or some other form of consideration is received in return for incurring the cost of the prize, the promoter may deduct the cost of the prize for corporation tax purposes but must account for VAT on the supply of the prize and the promoter may claim input VAT on the cost of the prize.

If the prize is a true gift, the promoter only needs to account for VAT where the value of that prize

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exceeds £50 (approx. US\$64) under the business gift rules but then will be entitled to claim input VAT on the cost of the prize. The promoter will not generally be able to claim a deduction for the cost of the prize for corporation tax purposes unless the promotion is open to the general public and the prize is one of the promoter's products.

OTHER LOCAL REQUIREMENTS

Are there any other key local requirements?

Promoters must conduct prize promotions fairly and efficiently, and must 'avoid causing unnecessary disappointment', e.g. by changing the terms (to be avoided if at all possible) or stopping the promotion.

Significant conditions, or information which, if omitted, is likely to mislead, must be included on all marketing communications regarding the promotion. Examples of significant conditions include: restrictions on entry (e.g. age, geographical), how to participate, costs of participating, start and close dates, proof of purchase requirements, details of prizes, IP assignment, any post-event publicity requirement.

Note: Where there are space limitations e.g. Twitter or banner ads, you must communicate as much information as possible and direct the entrant to where all significant terms are stated.

A promoter's name and address must be stated unless it is obvious from the context.

The CPRs (which carry potential criminal liability for breach) specifically prohibit claiming to offer a prize without awarding it, and creating a false impression that a consumer has won a prize.

Promoters should be mindful of the extensive obligations (and hugely significant sanctions- see Penalties for Non-Compliance section) now imposed by GDPR, which can impact on prize promotions in various ways, such as:

- If a promoter wishes to use winners' or entrants' personal data (e.g. photographs) for publicity or other purposes beyond simply administering the promotion, it must carefully consider what lawful basis it can rely on under GDPR. Consent may not be an appropriate basis unless it can be refused (GDPR requires "unbundled" consent so it cannot generally be a condition of entry); legitimate interests may be appropriate, but this requires an assessment to be undertaken of the competing interests;
- GDPR-compliant data processing notices must be given to entrants;
- It is difficult to run a compliant consumer-targeted prize promotion that requires as a condition of entry that the consumer agrees to receive electronic direct marketing from the promoter;
- Particular care must be taken where child data is to be processed.

TIMING

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

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No, although time should be allowed to deal with data protection issues (see [Other local requirements](#)).

TRANSLATIONS

Are the terms required to be translated by law?

No legal requirement for translation.

PENALTIES FOR NON-COMPLIANCE

What are the penalties for non-compliance?

The ASA has limited sanctions, the main one being publicizing adjudications that a company breached the CAP/ BCAP code (which can lead to negative press coverage).

The majority of offences arising under the CPR's are punishable by a fine, which used to be set at a maximum of £5,000 (approx. US\$6,440). However, this statutory maximum has now been disapplied so there is flexibility to impose a higher fine. For more serious cases, an (unlimited) fine or a prison term of up to 2 years or both can be imposed. For example, a fine was levied on a retailer of £300,000 (approx. US\$386,400) for misleading advertising in breach of the CPRs. Sanctions are proportionate to the breach and routinely commence with requests to amend or stop non-compliant promotions. Immediate compliance often prevents more severe sanctions. In addition, the amendments made to the CPRs in 2014 provided consumers with a direct right to redress (in addition to actions that can be brought by the regulators), and this includes possible remedies such as damages.

Sanctions under GDPR for breaching data protection law can be very high indeed (fines could reach the higher of €20 million (approx. US\$22.4m) or 4% the global turnover of the infringing company / its group, in the most serious cases). Criminal prosecution under and class action consumer damages claims are also possible under GDPR.

RESTRICTIVENESS OF REGULATIONS

How restrictive are the legal obligations applicable to prize promotions?

The CAP rules set out quite detailed requirements, but are based on common sense and are not unduly onerous (there are no registration or other formality requirements, and most prize promotion mechanics are allowed so long as it is not a lottery). Compliance with the CAP rules will generally result in compliance with the (less detailed) CPRs. The steps necessary to avoid falling into the category of 'lottery' under the Gambling Act 2005 are (while important) not very restrictive.

GDPR imposes significant restrictions on the data aspects of running prize promotions (eg. use of submissions including personal data, winner publicity, etc.).

REGULARITY OF SANCTIONS

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

Fines and prison sentences have rarely been imposed. However, the introduction of GDPR in May 2018 raises the possibility of more regular fines for breaches of data protection law by promoters.

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It only takes one complaint for the ASA to investigate a promotion, and adverse ASA adjudications are very common (5-15 a week). But while an adverse ASA adjudication can cause bad publicity, it does not carry a monetary sanction.

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