

Running an international prize promotion is an increasingly popular way for brands to engage with their consumers. Given the obvious benefits of the internet, brands, influencers and their advisers often seek to operate those promotions through third-party social media platforms, such as Facebook, YouTube, Instagram and Twitter, or on bespoke platforms.

While there are many benefits to engaging with consumers using an international prize promotion, the challenge for marketers is to do so without breaking the law.

This publication outlines some of the legal issues that should be considered when planning an international prize promotion, in particular where it is run through social media. Although we approach these issues mainly from the perspective of English law, we also consider examples of the issues brands typically face in other jurisdictions when running an international prize promotion.

Prize Draw or Prize Competition?

Although the precise nature of the mechanism and applicable terms may vary, prize promotions generally fall into one of two categories:

- **Prize draw** – The winners are chosen at random from a pool of qualifying entrants.
- **Prize competition** – The winners are selected by judges on the basis of the exercise of some skill or merit, for example, having submitted content (such as a photograph, social media post or written piece) or performed a task (typically answering questions or solving a puzzle).

Promoters sometimes operate schemes with a combination of the two mechanics, for example, a first round based on a skill competition, with the winners selected by chance in the second round. As will be seen, exactly how the mechanics of a promotion operate may be the difference between being lawful and not.

Gambling Law

Any international prize promotion must comply with local gambling laws. In general, UK gambling laws offer a fairly liberal approach to an area that has traditionally been restricted to state-operated lotteries (if permitted at all). Jurisdictions such as certain US states and Australia, for example, have a slightly more restrictive approach, although “sweepstakes” (as they are called in the US) remain a popular way of gathering consumer data and promoting a brand. The rules in territories such as Italy and the Philippines are more restrictive still. Certain countries prohibit the operation of prize draws where there is a payment to enter (for example, the Republic of Ireland and Northern Ireland), while prize competitions are usually less problematic.

It is because of the more permissive approach of English law, as well as the more liberal regulatory regime, that many businesses operating international prize competitions seek to do so on the basis of English law. In the UK, the key legislation to be aware of is the Gambling Act 2005 (Gambling Act), which does not regulate genuine prize competitions and permits prize draws so long as they are free to enter. The Gambling Act overhauled the law in light of the marketing industry’s desire to link prize promotions to the purchase of products and services.





Prize Draws

As noted previously, the usual mechanics for a prize draw involve a brand offering consumers the opportunity to win a prize by entering the draw and being chosen at random from all qualifying entrants. The Gambling Act, however, prohibits such schemes where there is a “payment to enter”.

Traditionally, conditioning entry on the purchase of a product counted as a payment to enter, as did premium rate phone calls or other payments to gain the opportunity to win a prize. If there is a payment to enter, unless it is an exempt scheme or the brand and its advisers hold a licence from the Gambling Commission, it will be an illegal lottery. Operation of a lottery is a criminal offence, with the ultimate sanctions of imprisonment and fines.

However, following the liberalisation of the law in Great Britain more than a decade ago, the Gambling Act says that entry to a prize draw promotion can be conditioned on the purchase of goods or services, provided that they are not paid for “at a price or rate which reflects the opportunity to participate in an arrangement”, the normal cost of purchasing a product or service required for entry into the promotion will not count as a payment to enter. Therefore, if a promoter wishes to increase the price of its goods or services required to be purchased to enter a prize draw, it must be able to justify those increases, for example, by reference to increases in supply costs. If possible, increases in costs should be avoided until the promotional period is over.

The Gambling Act now clarifies that payments to enter include charges to discover if the consumer has won or to collect a prize, and any charge that is more than the cost of a first-class stamp or normal rate telephone call. Therefore, promotions where premium rate calls feature as an entry requirement or part of the process for discovering if the consumer has won will be unlawful.

If a prize draw requires the consumer to make a payment to enter, promoters can avoid falling foul of the law by offering consumers an alternative free route to enter the promotion. The conditions to a free entry route are:

- Entrants via the paying route and the free route must be treated equally
- The consumer must have a choice about which method they use to enter
- The free entry route must be clear; it is not a good idea to hide the option in detailed terms and conditions; ideally, it should be publicised in the main promotional materials so that it is likely to come to the attention of consumers thinking about taking part in the prize draw

Prize Competitions

Regarding prize competitions, as noted previously, genuine competitions are not regulated by the Gambling Act. However, as also mentioned previously, some schemes combine elements of the traditional prize draw with a skill-based competition. Where an arrangement requires consumers to pay to enter and the first stage of the process for distributing prizes is random (even though later stages may be skill based to select the eventual winner), the arrangement will still be classed as an illegal lottery unless there is a genuine free entry route, as explained previously.

To avoid classification as a lottery, a prize competition must require the consumer to exercise skill to determine the winners. That skill must be sufficient to prevent a “significant proportion of persons” from either entering in the first place or from eventually winning the prize. There is no guidance on exactly what counts as a “significant proportion”, but it is generally thought that 50% would usually be enough. Therefore, where promoters pose very easy questions, they should consider carefully whether consumers will be deterred from entering the promotion due to the questions asked, or whether, after entering, enough people will get the questions wrong before the winners (or pool of potential winners) are chosen. Best practice is to maintain data and conduct surveys on the numbers of consumers who would and do enter a promotion, and to monitor those numbers throughout the operation of the promotion.

Other pitfalls where a competition scheme includes a payment to enter include:

- Questions that are so difficult that consumers tend to guess the answer; as this introduces a random element, it may be classed as an illegal lottery
- Schemes where the skill element is a game, as operating a game for a prize is also a regulated activity
- Promotions where consumers are required to guess the outcome of a future event (for example, a football match), as this is regulated under betting laws

CAP Code

Promotions operated in the UK must also comply with the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code), which applies to social media and a brand’s websites.

At its core, the CAP Code requires that the promotion be operated legally, decently, honestly and truthfully. Specific rules include that promoters should avoid causing unnecessary disappointment, conduct promotions equitably, promptly and efficiently, and deal fairly and honourably with consumers. Where advertising agencies or prize providers assist their brand clients with promotions, the CAP Code’s guidance is clear that all parties are responsible for ensuring that the promotion is operated and the prize is delivered in accordance with the spirit and the letter of the CAP Code. The corresponding contracts should, therefore, be clear as to who is responsible for ensuring that the promotion mechanics are lawful.



Other specific CAP Code requirements include making sure that all significant conditions are made clear to consumers. In practice, this means that the actual prizes, start date, end date and entry conditions cannot only be placed in detailed terms and conditions that consumers are unlikely to read. Instead, the “call to action”, whether it is a tweet, a post on social media or an advertisement, will need to state that key information. The CAP Code accounts for the often limited space available on social media (in particular on Twitter), and the Advertising Standards Authority (ASA) (which enforces the CAP Code) has shown some flexibility in its approach to rulings in this area. Nonetheless, such key terms must be made clear, and consumers should be made aware of how to obtain any supplemental terms that apply, which must be easily accessed throughout the promotion (for example, on the brand’s website), and in a form retainable by entrants.

In recent years, the CAP Code has published updated guidance on the selection, notification and announcement of winners. Therefore, the CAP Code is prescriptive about how promotions should be operated. For example, where a computer process is used in the selection of winners for a prize draw, on request, a promoter must be able to provide the ASA with evidence verifying that the process is random. Where a computer programme has not been used, an independent observer must monitor the selection of winners. Similarly, if the promotion has been structured as a competition, an independent judge is advisable, and certainly, the judges should be competent to judge the relevant skill. Judges’ names should be made available on request.

It is essential that every promotion has a comprehensive set of terms and conditions specifying the promotion mechanism, entry requirements, winner notification and any other promotion conditions to the level of detail required by the CAP Code. Failure to comply with the CAP Code can result in censure or sanctions by the ASA. If consumers are disappointed with a promotion that they have entered, they often make complaints directly to the ASA, and the ASA is often willing to investigate after only one complaint. ASA rulings are widely publicised and, therefore, a promotion banned by the ASA will lead to negative publicity for the brand.



Data Protection and Privacy (Including GDPR)

Prize promotions run through social media, or otherwise, invariably require (and, in some cases, rely on) the contribution of information from participants. Where this information relates to an individual who can be identified, directly or indirectly from that information, it will be considered personal data. The collection and use of personal data, such as a name, photo, address or email address, etc., is governed by the Data Protection Act 2018 (DPA) and the General Data Protection Regulation 2016/679 (GDPR).

Under the GDPR, a lawful basis is needed before personal data is processed. It is usual for a promoter to collect and use (or process) an entrant's personal data, based on their consent, when they enter. Alternatively, the promoter might be able to demonstrate that the lawful basis for such processing is that it was either in the promoter's "legitimate interests" to do so or necessary for the performance of the contract between the promoter and the promotion entrants (so long as the personal data is collected with best practice in the industry).

However, the personal data that a promoter can collect and use under the legal basis of legitimate interests is limited to information that is strictly necessary for them to use to run the promotion. For example, such necessary information would include the entrant's name, email address and, perhaps, telephone number, which would be used to contact a winner. Any personal data collected on this basis and without express consent cannot be used for any other purpose. If relying on this lawful basis, a legitimate interests assessment is also required to ensure that the promoter's interests are not overridden by the interests or fundamental rights and freedoms of the individual entrants.

If promoters wish to collect personal data for other means, such as promotional (electronic) marketing, they must obtain entrants' express consent. In very general terms, for consent to be valid, it must be a freely given, specific, informed and unambiguous indication of an individual's agreement. In practice, this will mean including an unticked box requesting consent by a clear affirmative action (such as ticking the box).

Promoters must use the personal data they collect fairly, which means that they will need to ensure that it gives entrants the required information about the collection and use of that information at the point of collection, and the details of this should be sufficiently set out in a privacy notice. In addition, under the GDPR, individuals have a clear right to withdraw their consent at any time.

Accordingly, careful thought needs to be given to the basis of lawful processing and ongoing use if permission to use material submitted as part of a promotion may later be withdrawn, rendering published material incorporating the user's submission unusable. Incidentally, there is also the risk that the requirement of excessively detailed information as a condition to entering a prize draw (for example, a very long survey with valuable consumer insight) may count as a payment to enter and, therefore, render a scheme an illegal lottery. Such requirements should, therefore, be avoided in favour of basic data collection, which is not problematic under the Gambling Act.

In compliance with the GDPR, the CAP Code requires that, at or before the time of entry, promoters are required to inform entrants of their intention to publish or make available the full name and county of major prizewinners. Promoters must give entrants the opportunity to object to their information being published or made available, or to reduce the amount of information published or made available. In such circumstances, the promoter must, nevertheless, still provide the information and winning entry to the ASA if challenged. In this way, such consent is likely to meet the GDPR standard of being truly freely given and fully informed.

To the surprise of some international organisations looking to move data around, specific rules apply with respect to the transfer of personal data outside of the EEA, whether internally, to a group company or to a third party for marketing purposes. The GDPR restricts the transfer of personal data outside the EEA unless the rights of the individuals in respect of their personal data are protected in another way, or one of a limited number of derogations applies. These issues are important aspects of the terms and conditions with consumers and should be covered in the privacy notice, as well as the internal and external contracts involving the data controllers and processors involved.

Cookies play an increasingly important role in social media campaigns, especially with targeted advertising. Specific rules now requiring that consumers consent by a clear affirmative action before cookies can be placed on a user's device may prove challenging for brands operating on social media platforms. The UK regulator (the Information Commissioner's Office) has recently produced updated guidance on the use of cookies and similar technologies, which contains helpful information on interpreting the existing law.

Intellectual Property and Third-party Rights

Many social media campaigns encourage consumers or influencers to create and submit content; this is known as user-generated content (UGC). In the context of a prize promotion, organisers need to consider the intellectual property (IP) rights in that UGC.

If the brand intends to use the UGC in its own marketing, it should ensure that any IP rights in it are licensed (or, ideally, assigned) to the brand and any necessary formalities for this have been followed. For example, assignments of copyright must be in writing. The best way to obtain such rights is to provide for assignments and licences in the promotion terms and conditions, which consumers should be required to accept before being permitted to take part in the promotion. Similarly, when engaging a celebrity brand ambassador or influencer, thought needs to be given to any IP rights in content they create that the brand may want to use and if this is dealt with in their terms of engagement. Depending on the mechanism for accepting the promotion terms and conditions (and the nature of the prizes), it may be necessary to have winning consumers sign additional documentation to complete such formalities or cover off additional risk (for example, if the prize is a driving experience, insurance and such matters will need to be dealt with).

Brands should also be aware that hosting or allowing UGC to appear on their social media space exposes them to the risk of liability if any UGC infringes third-party IP rights, is defamatory or is otherwise unlawful. The terms of the prize promotion should be specific about what content can and cannot be submitted, as well as require the entrant to indemnify the brand for any issues caused by the consumer's use of problematic UGC when they take part in the promotion. In reality, such indemnities offer little comfort, and most brands seek to police their social media through moderation and an effective takedown policy (i.e. content that is complained about is immediately removed for assessment, thus limiting exposure).



International Prize Promotions

Prize promotions run on social media are, by the very nature of those digital platforms, accessible globally. Terms and conditions should, therefore, specify who can enter a promotion, and consider technologies to limit accessibility. If entry is not restricted to UK residents, promoters need to consider compliance with the laws and rules in other territories to which the promotion is directed. Prize promotions in other jurisdictions face a number of hurdles, including:

- Requirements for the terms and conditions to be available and accessible in a local language (for example, Spain, Germany, Switzerland, France, Italy, Brazil and the province of Quebec in Canada)
- Significant variations in the rules governing a promotion in one country due to the differing federal laws in each state (for example, the US and Australia)
- Requirements to register the promotion, obtain a licence or provide a bond/deposit (for example, Australia, Brazil, Italy, certain US states, Hong Kong and the Philippines)
- Requirements to maintain a separate pool of national entrants (for example, Italy)
- Requirements to pay gambling taxes on the average total value of all prizes offered (for example, Austria)
- Restrictions on the maximum single prize value and the maximum total value of all prizes (for example, Japan and Brazil)

If a campaign is to be operated globally, organisers usually choose the law of one jurisdiction to govern the entire campaign and exclude consumers from problematic jurisdictions from entry. English law is ideal for this type of arrangement.

Compliance With the Social Media Platform

In recent years, there has been a significant increase in brands and influencers using competitions and prize draws on social media asking consumers to “Retweet to win” or “Follow and tag to win”. Brands, influencers and their advisers need to comply with the terms and conditions of the social media platform on which they will operate their promotion.

Facebook, for example, used to prohibit promoters from using the “Like” button function as the entry mechanism into a prize draw or competition. The platform relaxed the rules, but other restrictions apply (such as that personal timelines cannot be used to administer promotions, i.e. one cannot share on a timeline in order to enter). Promotions operated on this social media platform must also contain a full release of liability to benefit Facebook.

Each social media platform also has its own terms on the ownership and use of any UGC that consumers upload to the platform. It is important to ensure that plans for the use of such material are consistent with those terms. It is rare for the major platforms to transfer ownership of UGC from the consumer, but the typical non-exclusive, worldwide and perpetual licence that platforms usually hold will not sit well with a marketing team seeking exclusive territorial use of some material for a limited period of time.

Consumer Law

A final point to mention is that promotion terms must be compliant with local consumer law. Again, English law offers a relatively business-friendly approach. Even though there is increasing harmonisation throughout the EU, the approach of the UK courts and regulators is, overall, less restrictive. Key pieces of legislation in this field include those on unfair contract terms and misleading advertising. Compliance with the CAP Code will often help to ensure that the terms of promotions do not fall foul of the rules. However, drafting should always be checked with expert legal advisers to ensure enforceability, in particular regarding key issues such as liability and indemnities.

Operating an international prize promotion through social media is an exciting and common marketing technique. To do so under English law offers much more scope and flexibility than the law in some other jurisdictions, but it is important to consider any international elements and to comply with the UK rules to avoid criminal liability and potentially embarrassing media attention.

Contacts



Carlton T. Daniel

Partner, London

T +44 20 7655 1026

E carlton.daniel@squirepb.com

