



GALA
GLOBAL ADVERTISING LAWYERS ALLIANCE

Sweepstakes & Contests: A Global Legal Perspective





ABOUT GALA

The Global Advertising Lawyers Alliance (GALA) is the leading network of advertising lawyers in the world. With firms representing about 90 countries, each member has the local expertise and experience in advertising, marketing and promotion law that will help your campaign achieve its objectives, and navigate the legal minefield successfully.

GALA is a uniquely sensitive global resource whose members maintain frequent contact with each other to maximize the effectiveness of their collaborative efforts for their shared clients. GALA provides the premier worldwide resource to advertisers and agencies seeking solutions to problems involving the complex legal issues affecting today's marketplace.

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INTRODUCTION

We are very pleased to share with you the Global Advertising Lawyers Alliance guide to conducting sweepstakes and contests around the world. With the ever-increasing importance of social media for advertisers and marketers, sweepstakes and contests continue to be an important way to engage with consumers globally. We hope that this book – the most comprehensive ever published on the subject -- will help make that job a bit easier.

In this book, we present key issues for advertisers and marketers to consider when conducting sweepstakes in more than fifty-five countries, across six continents. We cover topics such as which types of games are legally permissible, which countries require registration, restrictions on the types of prizes that may be offered, disclosure requirements, and many others.

While this book is no substitute for consulting counsel in the relevant markets, it should help you begin to consider the myriad of issues that need to be faced when conducting sweepstakes and contests around the world.

Special thanks to Catherine Bate from Miller Thomson, GALA's Canadian member, for editing this book. We also want to thank Stacy Bess, GALA's Executive Director, for all of her work in helping us to publish this.

FRANCE

Are chance-based games (i.e., random draw promotions, instant win games) generally permissible?

Commercial operations based on chance are submitted to different rules depending on whether they are offered to consumers or professionals.

When they are offered to consumers, they are licit *per se* (under Section L121-1 and seq. of the consumer Code : “promotional lotteries”) provided that they do not constitute an unfair commercial practice.

In such type of promotions, the reimbursement of the connection fees as well as the filing of the set of Rules with a process server (*huissier*) are not compulsory requirements.

When they are offered to professionals, they are submitted to Sections L322-1 and seq. of the French Interior Security Code, which prohibits the commercial operations meeting the four following criteria (“lotteries”):

- A public offer,
- The hope of a gain,
- The element of chance (draw), and
- A payment or a financial sacrifice.

And according to Section L322-2-1 of the Interior Security Code, a financial sacrifice exists even when a reimbursement of a payment is offered to the participant.

Games of chance destined to professionals are thus more strictly regulated in France than games of chance/commercial lotteries destined to consumers.

Are skill-based contests (i.e., essay contests, photo contests, user-generated content contests) generally permissible?

As mentioned above, Section L322-1 of the Interior Security Code prohibits the public offer, upon payment (or with any other form of financial contribution) of games based on chance which create the hope of a gain¹.

According to Section L322-2-1 of the Interior Security Code, this prohibition covers games based on the skills of the players (the “General Rule”). The implementation of the General Rule in France has led to different interpretations from practitioners as briefly detailed below :

- **Interpretation n° 1** (*broad interpretation of the scope of Section L322-2-1 of the Interior Security Code*): the General Rule prevents the organization of any type of contests/skill-based games (including photos contests, user generated content contests...etc.) when same are subject to a payment, irrespective of the fact that a reimbursement is offered at a later stage (such as the reimbursement of the internet connection fees or the reimbursement of the stamp used to enter the contest);
- **Interpretation n°2** (*restrictive interpretation of the scope of Section L322-2-1 of the Interior Security Code*): the General Rule only aims at prohibiting paid-for games based on chance in which skill is also necessary to win (such as the paid-for offers of poker tournaments), since the General Rule has been implemented in a Section of the Security Interior Code dedicated to “games of chance, casinos and lotteries” (not referring to “contests”).

The background of the implementation of the General Rule can also be used to confirm this interpretation. the General Rule has been implemented in opposition against a court of appeal

¹ Commercial promotions/games of chance offered to the consumers are allowed in France, under conditions, as set by Sections L 121-1 and seq. of the consumer Code.

decision (Court of appeal of Toulouse, March 17, 2014) which decided that poker paid-for online tournaments are not prohibited *per se* under Section L322-1 of the Interior Security Code because skills plays a role in the determination of the winner; *i.e.*; the court of appeal of Toulouse, considering that poker tournaments are not only based on chance (skills is also necessary to win), has held that the paid-for poker tournaments were not subject to the general prohibition of paid-for games of chance, as set by Section L322-1 of the Interior Security Code.

The French legislator thus decided to have Section L322-2-1 of the Interior Security Code added in order to confirm the fact that when paid-for games of chance do need the recourse to skills, same are prohibited under Section L322-1 of the Interior Security Code.

A recent decision of the Court of appeal of Paris dated January 28, 2016 can be interpreted as confirming the **interpretation n°2**², so that one can argue that contests (games based on skills only, such as photos contests, user generated content contests) are licit *per se* provided that certain general principles are complied with (*e.g.*, prohibition against misleading advertising and unfair commercial practices; prohibition against offering certain prizes, such as alcoholic beverages; etc.).

Is any type of registration or filing required to offer a chance-based game and/or a skill-based contest? If so, what are the costs and deadlines associated with such registration or filing?

For Games of Chance: since December 20, 2014, this type of promotion is no longer subject to registration or filing requirements. While the filing of the Rules with a *huissier* is no longer required by French law, such a filing is recommended in order to have an “official” version of the Rules filed with a process server, to the benefit of the proper information of the consumer, but also to have official evidence of the Rules in the event a dispute is brought by a consumer.

For Contests: the filing of the set of Rules has never been a compulsory requirement, even if recommended, for the reasons set forth above.

Are promotions (chance-based or skill-based) in which someone is required to purchase the product in order to enter permitted? If a purchase is required, must a non-purchase method of entry be offered?

For Games of Chance destined to consumers: since December 20, 2014, this type of promotional operations is no longer subject to requirements such as the reimbursement of the stamps or the connection fees. As a result, the implementation of an alternate method of entry is no longer required. But, where the promotion operates through a purchase, the value of the prize should be reasonable *vis-à-vis* the product purchased in order not to “*substantially distort the economic behavior of the average consumer*” as stated in the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (implemented by French law).

When chance-based games target professionals (not consumers), same must be free (the offer of the reimbursement of the connection fees or of the stamp used to enter does not prevent the games from being deemed an illicit paid-for lottery under Section L322-1 of the Interior Security Code).

For Contests: based on the Interpretation n°2 detailed above, the requirement to make a purchase to enter the contest is not prohibited.

Are there other forms of “consideration” which are prohibited in connection with entry into a chance-based game (e.g., posting a photo on Instagram, tweeting a response to a call-to-action, completion of a survey, taking a quiz and be required to answer questions correctly to be entered, watching a short video)?

² According to the Court of appeal of Paris, « Section L322-2-1 of the Interior Security Code only aims at reiterating that paid-for games of chance using the skills of the players are prohibited *per se* ».

There are no specific restrictions, provided that data protection principles are complied with (if applicable), and that the commercial practice is not deemed unfair or misleading, or otherwise contrary to applicable law.

Are promotions in which the winner(s) are determined in whole or in part by public voting permitted?

Yes.

If a chance-based game or skill-based contest is open to residents of several countries, must the random draw/winner determination process occur in your country or can it be conducted in another country? If the selection process must occur in your country, is there an exception for promotions taking place solely online?

The random draw/winner determination can be conducted in another country.

If a chance-based game or skill-based contest is open to residents of several countries, is it permissible to combine all entries from all countries to determine the winners for a single prize pool or must there be a separate prize pool for residents of your country?

Yes, it is permissible to combine all entries from all countries to determine the winners for a single prize pool, but this must be clearly explained in the Official Rules made available to the entrants at the time of the entry.

Are there any restrictions on the type, nature or value of the prizes (e.g., travel outside country of residence, cash) awarded in a chance-based game/skill-based contest?

There are no specific restrictions, except the prohibition against offering certain type of items prizes (e.g., alcoholic beverages, tobacco products, drugs, etc.).

Is there a tax liability associated with prizes? If yes, who is responsible for the taxes, winner or sponsor? Are there any other costs or fees, such as duties and customs fees, imposed on prize awards?

There are no tax implications for a sponsor in connection with the organization of a prize draw/contest in France. The sponsor does not have to pay any tax in connection with the organization of a prize draw/contest (no tax is assessed on the value of the prize offered).

Further, as a general rule under French tax law, the prizes/gains awarded to the winner in a game of chance are not taxable.

Finally, where the prize is sent from abroad by the sponsor to the winner located in France, there may be customs rules (and fees) payable by the Sponsor. This will depend on the nature and on the value of the prize at stake.

For skill-based contests, is it generally permissible for the sponsor to own the entries submitted and/or obtain a broad grant of rights (i.e., in any and all media, now or hereafter devised, worldwide in perpetuity)? Can such ownership exist in perpetuity? Can copyright be transferred electronically or must the transfer occur in writing?

The assignment of copyright in the content submitted by the entrant is possible, provided that certain requirements are met. In particular, moral rights cannot be waived and the assignment of the patrimonial rights cannot be perpetual. The assignment of the copyright must be for a limited duration. Typically, the rules might state "for the duration of the copyright" (i.e., as a general rule 70 years from the death of the author).

In addition, while the assignment of copyright is generally made in writing, this can be carried out electronically. In such cases, consider a specific pop-up window, containing, either: (i) the rules with a specific assignment clause, or (ii) a dedicated assignment clause appearing at the time of the registration, in addition to a box to be ticked by the entrant. This aims at evidencing the clear and informed consent of the entrant to the assignment of the copyright in the submission materials.

Is it generally permissible to require that a winner sign a liability and/or publicity release in order to receive a prize?

Such a document could raise issues, in particular as regards the limitation of liability. Under French law, criminal and tort liability cannot be limited contractually. In addition, a French consumer will have the choice of the jurisdiction if he/she wants to bring an action against the sponsor. Further, the sponsor must bring an action before French courts in a case of dispute against a French consumer.

Moreover, as a general principle, a French consumer who entered into a contract with a foreign entity should not be deprived from the protection of the mandatory provisions of French law, notably of French consumer protection law, if this consumer has his habitual residence in France and if he has been reached in France by the foreign entity to enter into the agreement.

Finally, as regards publicity releases, French judges have held that linking the acceptance of a prize with the use of the winner's personal information, such as a photograph, is an abusive clause which should not be enforced.

Must the Official Rules and advertising materials (including website) be provided in the native language? Or must the Official Rules and website only be provided in the native language if the promotion is advertised/promoted in that language (e.g., if all advertising is in English, can the Official Rules and website only be in English)?

The *Loi Toubon*, requiring the presentation of the any advertising, made in France/towards French people, in the French language, is likely to apply to any promotion targeting French people, so that the Official Rules/Terms and Conditions of such a promotion should be translated into the French language.

Are there restrictions on the use of personal information collected from entrants?

Yes. The use of the personal data collected in connection with a promotion must be limited to the purposes described to the data subjects, in the form used to collect the data, or in the Official Rules made available at the time of the entry (administration of the promotion, direct canvassing by e-mail, if the entrant opted-in...etc.).

In addition, several other items of information must be provided to the data subject at the time of the data collection; *i.e.* :

- 1- the name of the data controller, who is in charge of the processing of the data,
- 2- the purpose of the processing of data,
- 3- whether or not the answer to the questions is compulsory (*e.g.*, through the use of an asterisk), and the consequences, if any, of a lack of answer to the questions,
- 4- the recipients of the data,
- 5- the duration of the retention of the data (or the criteria used to determine such a duration),
- 6- right of access to and rectification of their data,
- 7- right to oppose the collection of their data for legitimate purposes,
- 8- the name of the person or the service where such right can be exercised,
- 9- the consequences of the death on the personal data, must be provided to the data subject at the time of the data collection, and
- 10- whether their data are going to be transferred outside the European Union.

A filing with the French data protection agency may also be required if the data is deemed collected/processed in France.

If the chance-based game or skill-based contest is solely online and no promotion takes place in your country, is it subject to the laws of your country?

As far as personal data is concerned, it should be noted that the French data protection agency considered that :

“Where the data controller organizes the means used for the collection and processing of the data, whether through a form - already filled in or not - or via an e-mail message to be answered by the participant, the data controller controls such processing means destined to deliberately collect personal data ;

Consequently, the collection form (whether to be filled in, or already filled in) or the fact that the personal data are sought from the data subject via an e-mail message, qualifies as processing means and as such the data controller located outside the EU must comply with Section 5-1.2° of the law of January 6, 1978, i.e., appoint a representative in France who will perform on its behalf the necessary filing”.

This analysis leads to the conclusion that, where a data controller located outside France does reach/ask (i.e., does carry out specific acts towards) people located in France to have same provide the data controller with personal data, the French personal data agency is likely to consider that a data collection/processing is carried out in France (so that French data protection law would be deemed applicable).

Are there key cases and/or regulatory decisions involving promotions of which a company should be aware?

A clause which limits the right of the consumer to bring a legal action, or limits the consumer’s grounds of action, or which imposes an alternate dispute resolution solution (such as an arbitration), is listed as a clause presumed abusive (“*clause présumée abusive*”) and is therefore not enforced if declared abusive by French judges.

These principles have been enforced by the first degree Tribunal of Paris, on March 5, 2015, against Facebook Inc. whose Terms of Use provided that Californian Courts have jurisdiction. This clause has been deemed to impose excessive costs on the consumer. It has been deemed all the more unfair/excessive towards the consumer that Facebook Inc. does have human and financial resources in France, allowing Facebook Inc. to be easily represented in France.

Such a decision should be taken into account for the Official Rules/Terms and Conditions applicable to a promotion targeting French consumers.

Are there any other important issues a company should consider or be aware of when structuring a chance-based game/skill-based contest that will be open to residents of your country?

Personal data issues (specific information to be delivered to the data subjects, filing with the French data protection agency, where applicable...etc.) are very important and should not be left aside while organizing a promotion targeting France.