

TRANSLATION

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UNFAIR COMMERCIAL PRACTICES

Law of 29 April 2009 on unfair commercial practices amending

- the amended Law of 30 July 2002 regulating certain commercial practices, penalising unfair competition and transposing Directive 97/55/EC of the European Parliament and of the Council amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising;
- the amended Law of 28 December 1988 governing access to occupations in craft trades, business and industry, and to certain liberal professions and amending Article 4 of the Law of 2 July 1935 regulating the conditions for obtaining the title and certificate of master craftsman;
- the amended Law of 16 April 2003 on consumer protection in respect of distance selling;
- the amended Law of 18 December 2006 on the distance marketing of financial services.

Law of 29 April 2009 on unfair commercial practices amending

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- the amended Law of 28 December 1988 governing access to occupations in craft trades, business and industry, and to certain liberal professions and amending Article 4 of the Law of 2 July 1935 regulating the conditions for obtaining the title and certificate of master craftsman;
- the amended law of 16 April 2003 on consumer protection in respect of distance selling;
- the amended Law of 18 December 2006 on the distance marketing of financial services.

We, Henri, Grand-Duke of Luxembourg, Duke of Nassau,

Having regard to the views of the Council of State;

In view of the assent of the Chamber of Deputies;

In view of the decision of the Chamber of Deputies of 23 April 2009 and the decision of the Council of State of 28 April 2009 to the effect that a second vote is not required;

Have ordered and hereby order:

Chapter 1. General provisions

Article 1. (1) This Law shall apply to unfair commercial practices involving consumers which affect their economic interests before, during and after products are offered for sale or sold.

(2) This law applies without prejudice to

1. contract law, in particular the rules on the validity, formation and effects of contracts;
2. Community or national provisions on product health and safety;
3. legislative, regulatory and administrative provisions on certification and an indication of the standard of fineness of articles made from precious metals;
4. conditions governing establishment, authorisation arrangements and codes of ethics or any other specific provisions covering regulated professions;
5. the amended law of 16 July 1987 on canvassing, street vending, displaying goods and seeking orders;
6. the amended Law of 30 July 2002 regulating certain commercial practices, penalising unfair competition and transposing Directive 97/55/EC of the European Parliament and of the Council amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising.

Article 2. The following definitions apply for the purpose of this Law:

1. "consumer": any natural person who, with respect to the commercial practices covered by this Law, is acting for purposes outside the scope of his trade, industrial, craft or professional activities;
2. "trader": any natural or legal person who, with respect to the commercial practices covered by this Law, is acting for purposes within the scope of his trade, industrial, craft or professional activities, and any person acting in the name of or on behalf of a trader;
3. "product": any goods or services, including immovable property, rights and obligations;
4. "commercial practices by undertakings with respect to consumers" (also "commercial practices"): all acts, omissions, courses of conduct or representation, commercial communications including advertising and marketing by a trader that are directly connected with the promotion, sale or supply of products to consumers;
5. "material distortion of the economic behaviour of consumers": use of a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;

6. "code of conduct": an agreement or set of rules not imposed by law, regulation or administrative provision which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;
7. "code owner": any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it;
8. "professional diligence": the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest commercial, industrial, craft or professional practice in the trader's field of activity;
9. "invitation to purchase": a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;
10. "undue influence": exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision;
11. "transactional decision": any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or exercise a contractual right in relation to the product; the consumer may decide to act or to refrain from acting as a result of such a decision;
12. "regulated profession": a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuing which, is conditional, directly or indirectly, upon possession of specific professional qualifications, pursuant to laws, regulations or administrative provisions;

Chapter 2. Unfair commercial practices

Article 3. (1) Unfair commercial practices shall be prohibited.

(2) A commercial practice shall be unfair if:

a) it is contrary to the requirements of professional diligence

and

b) if it materially distorts or is likely to materially distort the economic behaviour, with regard to a product, of the average consumer whom it affects or to whom it is addressed, or of the average member of the group when a commercial practice is directed at a particular group of consumers.

(3) Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

(4) In particular, commercial practices are unfair if they are misleading, within the meaning of Section 1, or aggressive, within the meaning of Section 2.

Section 1. Misleading commercial practices

Sub-section 1. Misleading acts

Article 4. A commercial practice shall be regarded as misleading:

1) if it contains false information;

or

2) if it, in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause the consumer to take a transactional decision that he would not otherwise have taken. These elements concern:

a) the existence or nature of the product;

b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;

c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;

d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;

e) the need for a service, part, replacement or repair;

f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;

g) consumer rights, in particular the right to replacement or reimbursement under Article 5 of the amended law of 21 April 2004 concerning the guarantee of conformity or the risks consumers may incur.

(2) A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not otherwise have taken, and it involves:

a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;

b) failure by the trader to comply with commitments set out in a code of conduct by which the trader has undertaken to be bound, where these commitments are firm and verifiable and the trader indicates that he is bound by the code.

Sub-section 2. Misleading omissions

Article 5. (1) A commercial practice shall be considered to be misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not otherwise have taken.

(2) A commercial practice shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not otherwise have taken.

(3) Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means must be taken into account in deciding whether information has been omitted.

(4) At the time of an invitation to purchase, the following information is considered to be material, provided that it is not already apparent from the context:

a) the main characteristics of the product, to an extent appropriate to the medium and the product;

b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;

c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable by the consumer;

d) the arrangements for payment, delivery, performance and the complaint-handling policy, if they depart from the requirements of professional diligence;

e) the existence of a right of withdrawal, where applicable.

(5) Information regarding commercial communications, including advertising and marketing, to be decided by Grand-Ducal Regulation, is also considered to be material.

Sub-section 3. Commercial practices that are misleading in all circumstances

Article 6. The following misleading commercial practices are regarded as unfair in all circumstances:

- 1) Claiming to be a signatory to a code of conduct when the trader is not.
- 2) Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.
- 3) Claiming that a code of conduct has an endorsement from a public or other body which it does not have.
- 4) Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not, or making such a claim without complying with the terms of the approval, endorsement or authorisation.
- 5) Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).
- 6) Making an invitation to purchase products at a specified price and then, with the intention of promoting a different product:
 - a. either refusing to show the advertised item to consumers,
 - b. or refusing to take orders for it or deliver it within a reasonable time,
 - c. or demonstrating a defective sample of it.
- 7) Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.
- 8) Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.
- 9) Stating or otherwise creating the impression that a product can legally be sold when it cannot.
- 10) Presenting rights given to consumers under legal and regulatory provisions as a distinctive feature of the trader's offer.
- 11) Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).
- 12) Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.

13) Promoting a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by that same manufacturer when it is not.

14) Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.

15) Without prejudice to Articles 6 to 11 of the amended Law of 30 July 2002 penalising unfair competition, claiming that the trader is about to cease trading or move premises when he is not.

16) Claiming that products are able to facilitate winning in games of chance.

17) Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.

18) Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.

19) Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.

20) Describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.

21) Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.

22) Falsely claiming or creating the impression that the trader is acting for purposes which are not related to his trade, business, craft or profession, or falsely representing oneself as a consumer.

23) Creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold.

Section 2. Aggressive commercial practices

Article 7. A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not otherwise have taken.

Article 8. In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of:

a) its timing, location, nature and persistence;

- b) the use of threatening or abusive language or behaviour;
- c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;
- d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;
- e) any threat to take any action that cannot legally be taken.

Article 9. The following aggressive commercial practices are regarded as unfair in all circumstances:

- 1) Creating the impression that the consumer cannot leave the premises until a contract is formed.
- 2) Conducting personal visits to the consumer's home without prejudice to legal or regulatory provisions with a view to enforcing a contractual obligation.
- 3) Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This provision is without prejudice to the amended Law of 2 August 2002 on the protection of individuals with regard to the processing of personal data and to Article 11 of the Law of 30 May 2005 on the protection of privacy in the electronic communications sector.
- 4) Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence in order to dissuade a consumer from exercising his contractual rights.
- 5) In an advertisement, directly exhorting children to buy advertised products or to persuade their parents or other adults to buy advertised products for them. This provision does not affect the amended Law of 27 July 1991 on electronic media.
- 6) Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer.
- 7) Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.
- 8) Creating the false impression that the consumer has already won or will win, either with or without the completion of one or more formalities, a prize or other equivalent benefit, when in fact either, i. there is no prize or other equivalent benefit, or ii. taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

Chapter 3. Penalties

Article 10. (1) The presiding judge of the chamber of the district court acting in commercial matters can, at the request of any person, professional group or organisation referred to in the amended Law of 19 December 2003 laying down conditions for the approval of organisations entitled to seek injunctions, of the Minister responsible for consumer protection, of the Financial Sector Supervisory Commission or of the Insurance Authority, order the termination of acts conflicting with Articles 1-9 and Article 11 of this Law, even without proof of actual loss or damage or of intention or negligence on the part of the advertiser.

The order can be issued independently of a public prosecution. The measure decided on by the presiding judge of the chamber of the district court acting in commercial matters shall, however, be lifted in the event of an acquittal being handed down by the criminal courts which has the authority of a final decision.

The prosecution is brought and ruled on by way of interlocutory proceedings pursuant to Articles 934 to 940 of the new Code of Civil Procedure.

Articles 2059 to 2066 of the Civil Code are also applicable.

In the case of misleading advertising or illegal comparative advertising, the presiding judge of the chamber of the district court acting in commercial matters can:

a) require the advertiser to furnish evidence as to the accuracy of factual claims in advertising if, taking into account the legitimate interest of the advertiser and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case, and in the case of comparative advertising to require the advertiser to furnish such evidence in a short period of time;

b) consider factual claims to be inaccurate if the evidence required in accordance with (a) is not furnished or is deemed insufficient.

Display of the decision may be ordered inside or outside the offender's sales facilities and at the offender's cost. The decision shall specify the duration of the display and may also order the publication, in full or in the form of extracts, in newspapers or any other form at the offender's cost.

Display and publication may only be initiated by virtue of a decision which has the authority of a final decision.

(2) Any failure to comply with an injunction or prohibition order made under a decision pursuant to paragraph 1 of this Article which has the authority of a final decision is punishable by a fine of €251 to €120 000.

Article 11. (1) Offences conflicting with the following provisions are punishable by a fine of €251 to €120 000:

- Articles 3 to 7;

- Article 9. (2) All clauses or combinations of clauses of a contract concluded in violation of this chapter shall be deemed to be invalid. However, invalidity for this reason can be invoked only by the consumer.

Chapter 4. Amending and final provisions

Article 12. Amending provisions

(1) Article 21(e) of the amended Law of 30 July 2002 regulating certain commercial practices, penalising unfair competition and transposing Directive 97/55/EC of the European Parliament and of the Council amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising is amended as follows:

"e) an advertiser who, in the design or presentation of the communication, creates the impression that the consumer has won a prize must supply the prize to the consumer."

(2) Article 2(5) of the amended Law of 28 December 1988 governing access to occupations in craft trades, business and industry, and to certain liberal professions and amending Article 4 of the Law of 2 July 1935 regulating the conditions for obtaining the title and certificate of master craftsman reads as follows:

"Where the interested party has failed to fulfil his professional legal obligations, in particular with regard to the right of establishment, or has evaded social contributions or tax imposed by his profession, authorisation can be refused or withdrawn. Authorisation may be refused or withdrawn at the request of the Joint Social Security Centre, the Direct Tax Authority or the Registration and Estates Authority. Authorisation can also be withdrawn where the interested party has been convicted under criminal law for infringing legal provisions in connection with unfair competition."

(3) Article 8 of the amended Law of 16 April 2003 on consumer protection in respect of distance selling is amended as follows:

"In cases of unsolicited supply of a product, the consumer shall be exempted from the provision of any consideration, the absence of a response not constituting consent."

(4) Article 10 of the amended Law of 18 December 2006 on the distance marketing of financial services is amended as follows:

"The following rule applies in cases of unsolicited provision of services:

In cases of unsolicited supply of financial services, the consumer shall be exempted from the provision of any consideration, the absence of a response not constituting consent.

The above provisions do not derogate from the rules applicable with regard to the tacit renewal of contracts."

Article 13. Reference to this Law

Reference to this Law may be made in all future laws and regulations in an abbreviated manner by using the terms "Law of 29 April 2009 on unfair commercial practices".

We require and instruct that this law be inserted in the *Mémorial*, so that it may be implemented and observed by all those concerned.