

CAREFUL ABOUT FALSE PRICE DISCOUNTS ON THE INTERNET AND IN STORES

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On February 23, 2017, the French competition watchdog, DGCCRF (Directorate General for Competition, Consumer Affairs and Fraud Control) presented the results of its oversight activities in 2016. Thousands of websites were examined to check their compliance with the rules on announcements of price reductions and a certain number of reports of infringement were issued. In 2015, the investigations carried out on the same topic (control of compliance with rules on announcement of price reductions during sales and promotional campaigns in the retail sector) also resulted in many warnings and injunctions being issued.

By targeting its investigations on the fairness of promotional practices on the Internet and in stores, the DGCCRF seeks to oversee fair competition between merchants and to ensure the protection of the economic interests of consumers.

When professionals announce a reduction in price (whether during or outside sales periods, in brick and mortar stores or on the Internet), they are required to comply with specific rules that are aimed in particular at protecting consumers from commercial practices inducing consumers to believe, wrongly, that the price of an item has dropped.

A commercial practice is unfair when it is contrary to the requirements of professional diligence and materially distorts, or is likely to materially distort the economic behavior of a reasonably well-informed and reasonably observant and circumspect consumer in relation to a product or a service. In the case of a misleading commercial practice, the consumer is induced to make a purchase decision that he or she would not otherwise have taken.

If a promotional campaign relies, for example, on indications or presentations that are false or of a nature to mislead the consumer in relation to the price or the manner in which the price is calculated, or the promotional nature of the price, that campaign can be sanctioned as a misleading commercial practice (SL 121-2 of the French Consumer Code).

The investigations and checks conducted by the DGCCRF in 2015 and 2016 identified the practice of illusory reference prices, entailing the display of fictitious price reductions and an erroneous perception of the offer by the consumer.

It should be borne in mind that while the advertiser is free to determine the reference price on the basis of which the announced price reduction is calculated, the advertiser must be able to evidence the reality and fairness of the reference price that was used as the basis for the calculation of the announced discount.

The investigations conducted by DGCCRF officials show that some merchants were unable to show the reality of the discounts offered, whether these be announcements of giveaways (i.e., freebies), discounts or specials (an inflated reference price enabling the display of a higher promotional rate than the actual rate).

Practices consisting of carrying out mass communication about special promotions of items when only a very small amount of the items sold were concerned were also sanctioned.

Misleading commercial practices are also punishable with a prison sentence of up to 2 years and a fine of up to €300,000 for individuals and of €1,500,000 for legal entities, which can be increased to 10% of average annual revenue, calculated over the past three years, or to 50% of the expenditures made to carry out the litigious advertising or practice. The courts can also order the display or the publication of the verdict, as well as the publication of corrected announcements.

The DGCCRF indicated that false discounts or illusory announcements of giveaways detected in 2015 were the subject of criminal prosecution. Settlements of an average amount in excess of €2 million were entered into with the websites concerned and the latter made commitments that they would act more transparently towards consumers and be fairer in their practices.

The DGCCRF also announced that it would remain vigilant and crack down harshly on companies which intentionally deceive their customers about the promotional nature of their offers.

Professionals should therefore be careful not to display an inflated or illusory reference price for which they lack legitimate justifications, that allows displaying a higher discount than the actual discount, and not to increase their prices just before the sales to make their promotion appear more attractive.
