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Bonus sales, tie-in sales and advertising lotteries where a purchase is necessary are now legal so long as they are not unfair.

The Act of May 17, 2011 for the "simplification and improvement of the quality of the law" modified French consumer law in order to bring it into line with EU law (1.), thus confirming recent case law that had ended the outright ban on bonus sales, tie-in sales and promotional lotteries where a purchase is necessary (2.).

1. The new provisions of the French Consumer Code

French law used to ban bonus sales, promotional lotteries where a purchase is necessary and tie-in sales, save for some restrictively defined exceptions. The reform of May 17, 2011 modified the provisions of the French Consumer Code on commercial practices in order to make said practices lawful in principle.

Regarding bonus sales, section 1 of Article L.121-35 of the French Consumer Code now provides that "it is prohibited to sell or offer for sale any products or goods or to provide any service or make any service offer to consumers entitling the consumer, free of charge, immediately or in the future, to a bonus consisting in products, goods or services unless they are identical to those being sold or provided when the practice in question is unfair within the meaning of Article L.120-1."

Regarding promotional lotteries where a purchase is necessary, section 1 of Article L.121-36 of the French Consumer Code now provides that "written advertising operations which aim to arouse hope of a gain for each of the participants, regardless of the conditions in which the draw will be made, may be implemented only when they do not require any financial consideration or expense whatsoever from the participants. When a purchase is necessary for entry into such operations, the practice is considered unlawful only when it is unfair within the meaning of Article L.120-1."

Regarding tie-in sales, section 1 of Article L.122-1 of the French Consumer Code now provides that "it is prohibited to refuse to sell a product or provide a service to a consumer without a legitimate reason or to tie the sale of a product into the purchase of an imposed quantity or to the simultaneous purchase of another product or another service or to tie the provision of a service into the provision of another service or the purchase of a product when such tie-in qualifies as an unfair commercial practice within the meaning of Article L.120-1"

These commercial practices are thus lawful from now on, provided that they are not unfair within the meaning of Article L.120-1 of the French Consumer Code. A commercial practice is deemed unfair under said Article "when it is contrary to the requirements of professional diligence and materially distorts or is likely to materially distort the economic behaviour of a reasonably well-informed and reasonably observant and circumspect consumer, with regard to any particular goods or services." In principle, unfair commercial practices are the misleading commercial practices defined in Articles L.121-1 and L.121-1-1 and the aggressive commercial practices defined in Articles L.122-11 and L.122-11-1 of the French Consumer Code.

These new provisions confirm recent case law which applied EU law.

2. The courts had already brought France into compliance with EU law

The former provisions of French law were in breach with the Unfair Commercial Practices Directive no. 2005/29 EC of May 11, 2005 as they prohibited, in principle, bonus sales, tie-in sales and promotional lotteries requiring a purchase, whereas these practices were not included among the practices prohibited by said Directive (practices regarded as unfair in "all circumstances").

On this basis, the European courts had opened up a breach in French consumer law, both as regards bonus sales and tie-in sales (CJEU April 23, 2009, case C-261/07 and C-299/07) or lotteries (CJEU January 14, 2010, case C-304-08 and November 9, 2010, case C-540-08) which was followed by the national courts (e.g. Court of Appeals of Paris, 5th Chamber, May 14, 2009, no. 09/03660; upheld by the Cour de cassation, Commercial Chamber, July 13, 2010, Jurisdata no. 2010-011628; or Cour de cassation, Commercial Chamber, November 15, 2010, Jurisdata no. 2010-021425). Pursuant to these decisions, insofar as these practices are not prohibited in principle by the Directive, they cannot be censured unless they are carried out unfairly according to the meaning of this term as provided in the Directive. Any legislation seeking to prohibit this type of practice generally is considered by the courts as non-compliant with EU law.

It was precisely because French law contained such outright bans that the French State had been warned by the European Commission to modify its legislation in order to ensure a correct implementation of the abovementioned Directive. It had been difficult for the Government to accept this position, and it had even considered requesting a



review of the Directive (Tardy answer no. 63029, Official Journal of May 4, 2010, AN p. 4996). On December 13, 2010, an amendment was eventually proposed to the bill for the simplification and improvement of the quality of the law, in order to rule out any risk of a European condemnation.

The reform has therefore brought French law into compliance with EU law, which is obviously a good thing. However, by replacing clear rules (an outright ban) with a case-by-case analysis of whether or not a commercial practice is unfair, the reform might generate some legal insecurity that can already be sensed in recent case law.

This is why some countries (France and Germany in particular) have already spoken up to ask the European Commission to review the text of the Directive. Indeed, during the debates on the amendment submitted to the Senate on December 13, 2010, the French Government announced that "France firmly intends to request" a review of the Unfair Commercial Practices Directive "to get out of the current impasse and ensure a high level of protection for consumer interests."

For the time being, in any case, these practices are lawful in principle. Economic players are therefore free to implement them, but at their risks and perils, as it is difficult for the moment to say with any certainty what the French courts will consider as being unfair.

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