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tion to which they are subject in the Member State in which they are established cannot be used by another Member State to justify less favourable treatment in tax matters given to recipients of services established in the latter State.¹⁷

57. In light of the foregoing considerations, the answer to the question submitted must be that Article 59 of the Treaty is to be interpreted as precluding a Member State's tax legislation from restricting or disallowing the deductibility for income tax purposes of contributions to voluntary pension schemes paid to pension providers in other Member States while allowing such contributions to be deducted when they are paid to institutions in the

first-mentioned Member State, if that legislation does not at the same time preclude taxation of the pensions paid by the above-mentioned pension providers.

Articles 6, 73b, 73d and 92 of the Treaty

58. In view of the answer given to the question submitted concerning Article 59 of the Treaty, there is no need to examine that question in the light of the other Treaty provisions cited by the referring court in its question. (...)”

¹⁷ See ECJ 26 October 1999 – C-294/97 – *Eurowings Luftverkehrs* [1999] ECR I-7447, para. 44.

INTERNATIONAL AND EUROPEAN COMMERCIAL AND COMPANY LAW

Sales promotion in the EU – The proposed Community Regulation

Sonia Cortés and Roger Marquilles***

I. Introduction

Sales promotions are key tools which may be utilised to market goods and services. Trade practices are changing rapidly thanks to the Internet and other new technologies that now allow for wide-ranging possibilities to promote products globally. This has raised concerns amongst EU legislators, who are confronted with the need to protect consumers whilst at the same time avoiding any hindrance of the free movement of goods within the Internal Market.

According to the EU Commission, the design, execution and communication of sales promotions accounted for well over one million jobs in the EU for the year 2000. Investment in nine of the Member States was estimated to total over 40 billion Euros. The Commission argues that sales promotions are essential for the development of cross-border trade in products and services within the Internal Market, particularly as regards small- and medium-sized enterprises, which play a major role in the achievement of service innovation and sustainable growth. The EU thus urgently needs a regulatory framework for the efficient cross-border use and commercial communication of sales promotions.

There have been a good number of legal initiatives within the EU, including several Green Papers on commercial communications,¹ the Directive on e-commerce of 2000,² the new

Green Paper on fair trading practices of 2 October 2001,³ and the very recent Communication from the Commission on sales promotion in the Internal Market proposing a Draft Regulation on this matter.⁴

II. The current situation in the EU

1. Legislation in force

After the completion of a two-and-a-half year analysis by a group of experts from the Member States, the differences in national regulations relating to sales promotions were identified. EU Members States regulate sales promotions in very different ways in their need to ensure consumer protection and the protection against unfair competition.

The Commission has identified numerous barriers to the free movement of goods and services that hinder cross-border activity and the commercial communication of sales promotions. As regards the freedom of establishment, different types of regulations of sales promotions restrict certain forms of business which are aimed at establishing an economic activity in each of the Member States. For instance, new entrant retailers wishing to establish themselves in another Member State with a marketing strategy that includes the implementation of

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¹ Resolution on the Commission Green Paper on Commercial Communications in the Internal Market (COM (1996) 192 – C4-0365/96) adopted on 15 July 1997 (OJ 1997 C 286, at 43) and the follow-up to the Green Paper on Commercial Communications in the Internal Market: Communication from the Commission (COM (1998) 121 final).

² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, published in OJ 2002 L 178, at 1-16 (Directive on electronic commerce).

³ Green Paper on European Union Consumer Protection (COM (2001) 531 final).

⁴ Communication from the Commission on sales promotions in the Internal Market, 2 October 2001 (COM (2001) 546 final). Proposal for a Regulation of the European Parliament and the Council concerning Sales Promotions in the Internal Market, OJ 2002 C 75, at 11.

a loyalty card will be impeded by laws restricting values of premiums or banning them altogether.

The diverging regulations on sales promotions affect several types of enterprises that are unable to export their services into the restricted markets, e.g. sales promotion design and advertising agencies. Media services (radio and press) as well as cross-border media planning and sales services risk running afoul of such restrictions upon crossing borders, not to mention additional restrictions on the establishment of national direct marketing operations and retail services.

Some restrictions distort competition, such as the prohibition of premiums in some Member States or the authorisation required in others for certain businesses, such as direct marketing. There are also restrictions on the use and communication of sales promotions that may particularly affect small companies seeking to enter into the markets of other Member States.

The complexity of certain regulations leads to legal uncertainty, which severely impinges upon operators and consumers alike when they provide or take advantage of cross-border sales promotions.

The following list provides a number of different restrictions in effect in Member States:

- bans on premiums;
- bans on sales below cost;
- prior authorisation;
- bans on discounts before seasonal sales and
- value limits on gifts, premiums or prizes

In the UK, for example, lotteries are lawful only if they provide for free participation.

In Germany, lotteries require authorisation and are prohibited if a stake is involved (including admission charges or the conclusion of a commercial contract). In the absence of a stake, the rules on unfair competition set the limits to those events. Lotteries may not:

- be misleading or against the *boni mores* of society;
- require the participant to make a purchase;
- place undue pressure on the participant to buy something from the organiser, e.g. by using the same application form for both the game and the purchase of products;
- cause an exaggerated attraction; or
- require the customer to enter the organiser's store in order to take part in the game or competition or to pick up the prize.

In Spain, gifts and premiums are acceptable as long as they are not misleading to the consumer. However, sales promotions involving free draws and any other kind of promotion involving lotteries, such as scratch cards, which depend on pure chance are subject to prior authorisation and payment of a 10 % excise tax. A 25 % withholding tax is also applicable. Spanish regions have jurisdiction to legislate and implement legislation on consumer protection. This fact has led to a very complex regulation on sales promotions in Spain.

A draft regulation on the protection of consumers and users in certain activities of promotions is being considered in Spain. This draft regulation requires that promotions not exceed the period during which the product is sold without a promotion and that there should be at least a two-month period in which no promotion takes place, where a product was being promoted for a year. Promotions to launch new products may last no more than three months. The promotion should state the number of tickets for the draw so that the consumer can estimate the odds of winning a prize. The rules of the promotion should be deposited with a notary public or a registered public or private organisation. As regards contests, the Spanish draft regulation requires promoters to give information as to the criteria that were used to choose the judges. The decision of such judges should furthermore be published.

2. Legislation in preparation: the proposed Regulation on sales promotions

The Commission has published a Communication on sales promotions in the Internal Market that provides for a proposal for a Regulation of the European Parliament and the Council concerning sales promotions in the Internal Market.⁵

a) Definition

Commercial communication is defined by the Draft Regulation as any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. The following do not constitute commercial communications according to the Draft Regulation:

- information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-email address and
- communications relating to the goods, services or image of the company, organisation or person complied in an independent manner, particularly when this is without financial consideration.
- the organisation of promotional contests or games when the promoter's real aim is not to promote, directly or indirectly, goods, services or the image of an undertaking, an organisation or a person with a commercial, industrial or craft activity or exercising a regulated profession, but to make a profit by running a gambling activity disguised as a sales promotion operation.⁶

Sales promotions include any kind of discount, free gift, premium or an opportunity to participate in a promotional contest or game with the aim of promoting goods or services. They are a key multi-faceted tool that can be adjusted to vari-

⁵ Ibid.

⁶ Amendment 20 to the Commission Draft Regulation by European Parliament (hereinafter: "EP") in the first reading of the co-decision procedure.

ous circumstances to break into new markets with innovative products, to encourage customer loyalty, to stimulate short-term competitive action, to rapidly respond to lost sales and to efficiently manage stocks.

b) Purpose

The purpose of this Draft Regulation is to ensure the proper functioning of the Internal Market by eliminating restrictions to free movement of services, ensuring freedom of establishment and eliminating appreciable distortions of competition. It also aims at establishing uniform rules, ensuring price transparency and strengthening legal security and responding to an urgent need for uniform rules since the introduction of the Euro. Finally, it seeks to remove uncertainty arising from different national interpretations and implementation of provisions.

The Draft Regulation pinpoints those areas requiring harmonisation whilst specifying provisions that will update existing national provisions by offering enhanced levels of consumer protection, protection of minors and protection of public health. It comes up with three types of provisions that have to be established at Community level: harmonisation of certain provisions concerning the use and communication of sales promotions; the replacement of certain restrictions and the application of mutual recognition.

It covers a wide variety of sales promotions, including: simple price reductions, quantity discounts, coupons and vouchers, free gifts, premiums after purchase, promotional contests (skill), promotional games with no conditions (chance), and promotional games with prior conditions (chance). Gambling is expressly excluded, however.

The Draft Regulation is based on the principles of removal of restrictions, consumer protection, protection of children and transparency, basically by providing for information requirements. Last but not least, it provides for a system of mutual recognition for sectoral bans. For instance, the Belgian requirement that consumers are entitled to buy the product for free in the event of a promotion based on "three for the price of two".

The Draft Regulation is complementary to the Green Paper on consumer protection in that the Draft Regulation represents a targeted action in the field of sales promotions, which ensures a high level of protection of public interest objectives including consumer protection.

This proposal covers promotional contests or games where the purpose is to encourage the sale of goods or services. Excluded from the scope of application are gambling activities such as games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value.

c) Prohibitions and requirements

i) General prohibitions on commercial communications

The Draft Regulation prohibits Member States to impose:

- a general prohibition on the use or commercial communication of a sales promotion unless required by Community law, without prejudice to the possibility for Member States or regulatory bodies to adopt specific measures which, in the interests of protecting consumers, supplier companies and competition, partially restrict the use and commercial communication of particular sales promotions such as sales below cost⁷;

- a limitation on the value of a sales promotion, provided that it is consistent with the value of the goods or services covered by the promotion, except for discounts on fixed-price products and sales below cost⁸;

- a requirement to obtain prior authorisation, or any requirement having equivalent effect, for the use of commercial communication of a sales promotion.

Besides these prohibitions, Member States are prevented from restricting the freedom to provide services or the free movement of goods, which benefit from the use of sales promotions, on grounds of the use of sales promotions and references to them in commercial communications.

ii) Information to be provided

A requirement to provide a very wide range of information is provided for in an attachment. This information should be provided in a clear and unambiguous manner. Some information is to be provided in the commercial communication, whereas other information is to be provided on purchase or on coupons/vouchers.

iii) Protection of children

Several provisions are aimed at protecting children. Children are said to be those under 14 years of age. It is forbidden to collect personal data from a child without the verifiable prior consent from the child's legal guardian and to provide a free gift or premium directly to a child if it could harm its physical health. It is forbidden to give free gifts consisting of alcoholic beverages to those under 18 years of age.

iv) Redress

The Draft Regulation provides for the reversion of the burden of proof in that the promoter of the sales promotion is responsible for the accuracy of information. Moreover, the promoter must provide, free of charge, an address for complaints. If a customer service number is offered, then appropriate resources must be provided.

The promoter should respond in writing to any initial complaint within six weeks. This reply can be sent by e-mail and in the language of the sales promotion. The commercial communication should give notification of any prescribed court dispute settlement system or code of conduct and information should be made available upon request.

⁷ Amendment 28 to the Draft Regulation by the EP. Sales or resales shall now be governed by national law (Amendment 32).

⁸ Amendment 29 to the Draft Regulation by the EP.

3. Spain: the position of the AUC⁹

Whereas the AUC, a non-profit organisation dedicated to the protection of citizens as users of communication media and services, has welcomed the Commission initiative, it has also put forward several points of concern.¹⁰

The AUC criticises the fact that, under the Draft Regulation, the Spanish consumer administration will no longer monitor promoters' activities in the market, since promotional activities in the future have to be assessed under the provisions of competition law, i.e. by the Spanish competition authorities (administrative bodies responsible for assessing mergers, abuse of dominant positions and concerted practices) and courts (having jurisdiction in unfair competition practices).

Up until now, consumer associations have brought consumer law infringements by promoters to the attention of the consumer administration by advising victims of unlawful promotion activities to file complaints. The Spanish consumer administration would subsequently conduct an investigation and decide whether to sanction infringing promoters. In practice, consumer associations do not carry the costs of bringing infringements to the attention of the consumer administration.

With the entry into force of the Draft Regulation, most promotional activities will fall under the scope of competition law and, in particular, under the provisions of the Unfair Competition Act.¹¹ Therefore, both consumers and consumer associations will incur higher costs in seeking legal relief against infringements of the Unfair Competition Act given that the Act requires competitors or anyone with a legitimate interest¹² to take legal action and enter into court proceedings.

The AUC also criticises the fact that the Draft Regulation is based on the concept of "consumer" as established in ECJ case law.¹³ According to the AUC, the concept of an informed and wary consumer is too narrow a formulation, taking into account that the average citizen hardly reads the terms and conditions and does not pay attention to the advertising to which he/she is subjected.

The AUC believes that the Draft Regulation should be modified to include other criteria such as: (i) the binding principle, requiring that the contents of the commercial communication be binding on the promoter; or (ii) the veracity principle, requiring that the information therein be true and complete.

III. Conclusion

We are living in a time of change in trade and commercial communication. The law needs to keep up with changes in order to allow for free trade and avoid any unnecessary restrictions, but consumer protection should never be undermined in the process.

ECJ 5 November 2002 – C-208/00 – Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)

Articles 43 and 48 EC – Company formed in accordance with the law of a Member State and having its registered office there – Company exercising its freedom of establishment in another Member State – Company deemed to have transferred its actual centre of administration to the host Member State under the law of that State – Non-recognition by the host Member State of the company's legal capacity and its capacity to be a party to legal proceedings – Restriction on freedom of establishment – Justification

Where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.

Where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A').

Facts: In October 1990, the plaintiff Überseering BV ('Überseering'), a company incorporated under Netherlands law, acquired a piece of land in Düsseldorf (Germany), which it used for business purposes. By a project-management contract dated 27 November 1992, Überseering engaged NCC to refurbish a garage and a motel on the site. The contractual obligations were performed but Überseering claimed that the paint work was defective.

In December 1994, two German nationals residing in Düsseldorf acquired all the shares in Überseering. Überseering unsuccessfully sought compensation from NCC for the defective work and

⁹ AUC is the abbreviation for "Asociación de Usuarios de la Comunicación" ("Communication Users Association").

¹⁰ Position Document published in the "Revista de la Asociación de Autocontrol" ("Self Control Association Review"), March 2002.

¹¹ Ley 3/1991 de Competencia Desleal (Spanish Unfair Competition Act), enacted on 10 January 1991.

¹² The Unfair Competition Act expressly entitles consumer associations to take legal actions against market operators exercising unfair competition practices.

¹³ See ECJ 16 July 1998 – C-210/96 – *Gut Springenheide and Others v Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I-4657; ECJ 13 January 2000 – C-220/98 – *Estée Lauder Cosmetics v Lancaster Group* [2000] ECR I-117 and ECJ 25 October 2001 – C-112/99 – *Toshiba Europe v Katun Germany* [2001] ECR I-7945.