

## Announcement of price reductions and reference price

Less is more: January 2016



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In order to comply with European Directive 2005/29 of 11 May 2005 concerning unfair business-to-consumer commercial practices<sup>1</sup> as interpreted by the Court of Justice of the European Union, the French rules regarding the announcement of price reductions have been modified<sup>2</sup> several times, most recently by a Decree dated 11 March 2015<sup>3</sup>, that entered into force on 25 March 2015.

Under the provisions of this Decree, when a price reduction is announced in retail establishments, in addition to the reduced price, retailers must display or mark the reference price determined by the person announcing the reduction on the basis of which said reduction is announced.

Also according to said provisions, displaying the reduced price is not mandatory when the announcement of a price reduction involves a uniform rate (for example -40%) and concerns clearly identified goods and services, it being understood that the discount is calculated based of the reference price.

The Decree of 11 March 2015, revoking the Decree of 31 December 2008, was issued following a decision by the Court of justice on the validity of Belgian rules concerning the announcement of price reductions<sup>4</sup>.

Like French rules, Belgian legislation included conditions for determining the reference price. It required that any announcement of a price reduction mention the lowest price applied throughout the month prior to said reduction. The Court held that national rules placing a general prohibition on

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<sup>1</sup> [Directive 2005/29/EC of 11 May 2005](#)

<sup>2</sup> [Decree of 31 December 2008 revoking Decree n°105/P of 2 September 1997](#)

<sup>3</sup> [Decree of 11 March 2015 regarding announcement of price reductions](#)

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<sup>4</sup> [CJEU, Judgment 10 July 2014, in case C-421/12](#)

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practices other than those listed in Annex I of Directive 2005/29 are not permitted.

Consequently, the Decree of 11 March 2015 revoked, in particular, the very strict former rules for determining the reference price, for example: the requirement that the price not exceed the lowest price applied by the retailer during the 30 days preceding the launch of the advertisement or the manufacturer's or importer's suggested price; these **conditions for determining the reference price** being in violation of Directive 2005/29.

The Decree, however, still fails to comply with EU law.

In a case in which a French Court submitted questions to the Court of Justice regarding the validity of the French rules, the Court of Justice ruled by reasoned order, i.e., without a public hearing where the answer to the question can be clearly deduced from existing case-law, that national rules **requiring the display of a price reference** are not permitted by Directive 2005/29<sup>5</sup>.

The Court has held that Directive 2005/29 carries out a complete harmonization at the EU level of the rules concerning unfair commercial practices of undertakings vis-à-vis consumers. Accordingly, Member States may not maintain or adopt more restrictive national measures than those laid down in said directive, even when such measures are designed to ensure a higher level of consumer protection

In its Annex I, Directive 2005/29 establishes an exhaustive list of 31

commercial practices which are regarded as unfair 'in all circumstances'.

Consequently, only these commercial practices can be deemed to be unfair without proceeding to a case-by-case assessment.

Practices consisting in the announcement towards consumers of a price reduction without displaying the reference price are not referred to in Annex I of Directive 2005/29 and, therefore, cannot be deemed to be unfair 'in all circumstances'.

The general prohibition of an announcement of a price reduction without providing a reference price maintained by the Decree of 11 March 2015 is inconsistent with Directive 2005/29.

Penalties in the form of fines that would be imposed on a retailer in the event of an announcement without indicating a reference price can be challenged.

For marketing purposes, it is up to the retailer to display a reference price or not. In any event, should the reference price be mentioned or not, in case of inspection, the retailer should be in a position to justify the announcement of a discount by providing, for example, the price applied for a significant period of time prior to the reduction.

Failure to do so would then expose the retailer to fines established for deceptive commercial practices, the amounts of which were significantly increased by French law n°2014-344 of 17 March 2014 (law "Hamon").

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<sup>5</sup> [CJEU, Order 8 September 2015, in case C-13/15](#)