

Proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market

(2002/C 75 E/02)

(Text with EEA relevance)

COM(2001) 546 final — 2001/0227(COD)

(Submitted by the Commission on 4 October 2001)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Whereas:

- (1) In accordance with Article 14(2) of the Treaty, the Internal Market comprises an area without internal frontiers in which the free movement of goods, services and the freedom of establishment are ensured; the development of the use and commercial communication of sales promotions within the area without internal frontiers is vital to promote the development of cross-border activities.
- (2) The use and communication of sales promotions are key to the growth and development of all businesses in the Community; they are particularly important tools for small and medium-sized enterprises who rely on such affordable practices as inputs and outputs to develop their cross-border activities; such promotions therefore stimulate competitiveness in the European economy and accordingly allow consumers to benefit from greater choice and competitive prices.
- (3) Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities offered by the use and communication of sales promotions; this Regulation therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for the use and communication of sales promotions.
- (4) The use and communication of sales promotions within the Community is hampered by numerous identified legal obstacles⁽¹⁾ to the proper functioning of the Internal

Market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to the use and communication of sales promotions; a relatively narrowly defined set of rules on sales promotions are giving rise to a multiplicity of Internal Market barriers affecting a wide range of businesses. The removal of these barriers will facilitate the free movement of goods associated with the sales promotion.

- (5) In the absence of uniform rules at Community level, obstacles to cross-border services and goods or the freedom of establishment might be justified in the light of the case-law of the Court of Justice as long as they seek to protect recognised public interest objectives and are proportionate to those objectives; in the light of Community objectives, of the provisions of the Treaty relating to free movement, of secondary Community law, and in accordance with the Commission's policy on commercial communications⁽²⁾, such obstacles can only be eliminated by establishing uniform rules at Community level and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the Internal Market; other restrictions have been identified as requiring replacement by less restrictive measures; remaining restrictions relating to the use and communication of sales promotions should be submitted to the principle of mutual recognition of national legislation.
- (6) Given the specific nature of the problems to be addressed, in particular, the need to tackle in a very targeted manner a small number of issues, which affect a wide variety of services, there is a need to establish through a Regulation a few precise, unconditional and uniform Community requirements. The use of a Regulation strengthens legal security, in particular, for customers and small and medium-sized companies.
- (7) This Regulation covers promotional contests or games where the purpose is to encourage the sale of goods or services, other than gambling activities, and where payments, if they arise, serve only to acquire the promoted goods or services. This excludes gambling activities, such as games of chance, lotteries and betting transactions, which involves wagering a stake with monetary value, from the scope of application.

⁽¹⁾ Green paper on 'Commercial communications in the Internal Market': COM(96) 192 final. 18 May 1996.

⁽²⁾ 'The follow-up to the Green paper on Commercial Communications in the Internal Market', Communication from the Commission, COM(1998) 121 final. 4 March 1998.

- (8) By dealing only with those specific identified matters which give rise to problems for the Internal Market, this Regulation is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality and the Commission's policy on commercial communications, which through the work of the Expert Group on commercial communications, has sought to apply this principle in as transparent and precise a manner as possible, the measures provided for in this Regulation are strictly limited to the minimum needed to achieve the objective of the proper functioning of the Internal Market; where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as sales promotions are concerned, the Regulation must ensure a high level of protection of objectives of general interest, in particular the protection of minors, consumer protection and in that context fair trading and the protection of public health.
- (9) This Regulation complements the Community acquis, which is applicable to the use and communication of sales promotions, which covers, in particular, Council Directive 84/450/EEC concerning misleading advertising and comparative advertising⁽¹⁾, Council Directive 89/552/EEC concerning the pursuit of television broadcasting activities⁽²⁾, Council Directive 92/59/EEC on general product safety⁽³⁾, Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁽⁴⁾, Directive 97/66/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the telecommunications sector⁽⁵⁾, Directive 98/6/EC of the European Parliament and of the Council on consumer protection in the indication of prices of products offered to consumers⁽⁶⁾, Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests⁽⁷⁾, Council Directive 92/28/EEC on the advertising of medicinal products⁽⁸⁾, Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees⁽⁹⁾, Council Recommendation 'Drinking of alcohol by children and adolescents'⁽¹⁰⁾ and Directive 2000/31/EC of the European Parliament and of the Council on electronic commerce⁽¹¹⁾.
- (10) For purposes of enforcement this Regulation has strong complementary links with Council Directive 84/450/EEC; non-compliance with the information requirements of this Regulation shall be considered as breaches of the ban on misleading advertising established by Council Directive 84/450/EEC.
- (11) This Regulation provides for a high level of consumer protection in order to enhance trust and confidence in the Internal Market for sales promotions by setting down a detailed number of information requirements; these provisions ensure that the commercial communications relating to sales promotions are transparent and that an individual interested in a communicated sales promotion will be able to easily obtain all the relevant information announced in that communication. In view of the need to protect minors and public health, it also makes the use and commercial communication of sales promotions subject to a number of harmonised targeted bans and precise restrictions.
- (12) The heightened protection that the Regulation provides by the establishment of these uniform rules allows for the removal of certain national bans or limitations. This removal is necessary to eliminate the barriers to establishment and the export of services as well as the substantial distortions of competition that they give rise to; other cross-border barriers to the use and commercial communication of sales promotions are submitted to the application of the principle of mutual recognition of national legislation; requirements at national level which are subject to mutual recognition cover only those relating to the use of sales promotions or references to them in commercial communications and not general requirements on advertising such as those relating to health and ethical claims, advertising for certain products and services, nor requirements relating to other marketing practices.
- (13) Without verifiable prior consent this Regulation, in order to protect the physical health of children and consistent with Directive 92/59/EEC, prohibits promoters of free gifts or premiums from dispatching promotional products to children unless the promoters ensure that the products dispatched are not of a nature, in view of their intrinsic qualities or their packaging (notably through reliance on child-proof packaging), that they could harm a child's physical health.
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- (1) OJ L 250, 19.9.1984, p. 17. Directive as amended by Directive 97/55/EC of the European Parliament and of the Council (OJ L 290, 23.10.1997, p. 18).
- (2) OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC (OJ L 202, 30.7.1997, p. 60).
- (3) OJ L 228, 11.8.1992, p. 24.
- (4) OJ L 281, 23.11.1995, p. 31.
- (5) OJ L 24, 30.1.1998, p. 1.
- (6) OJ L 80, 18.3.1998, p. 27.
- (7) OJ L 166, 11.6.1998, p. 51. Directive as amended by Directive 2000/31/EC (OJ L 178, 17.2.2000, p. 1).
- (8) OJ L 113, 30.4.1992, p. 13.
- (9) OJ L 171, 7.7.1999, p. 12.
- (10) COM(2000) 736 final.
- (11) OJ L 178, 17.2.2000, p. 1.

(14) In view of the recognised need for reasons of public health to prevent inciting children and adolescents to drink alcoholic beverages; given the objective underlying the use of sales promotions which is to encourage consumption of promoted products and services, this Regulation bans the offer of free alcoholic beverages as promotional gifts to minors.

(15) Commercial communications of sales promotions for tobacco products and restrictions thereon are addressed in the proposed Directive on advertising and sponsorship of tobacco products ⁽¹⁾.

(16) This Regulation lays down a number of obligations on promoters to ensure that, in the event of them breaching obligations relating to the use and communication of sales promotions, complainants will be able to identify the promoter and have easy access to in-house redress systems; the provisions of this Regulation will also encourage best-practice in the field of in-house customer complaint schemes as well as promote and facilitate the access to affordable out-of-court redress schemes,

HAVE ADOPTED THIS REGULATION:

Article 1

Object

This Regulation establishes rules concerning the use and commercial communication of sales promotions in order to ensure the proper functioning of the internal market.

Article 2

Definitions

For the purposes of this Regulation:

- (a) 'commercial communication': 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:
- information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address; and
 - communications relating to the goods, services or image of the company, organisation or person
- (b) 'sales promotion': a discount, a free gift, a premium or an opportunity to participate in a promotional contest or game;
- (c) 'promoter': a user of a sales promotion, meaning a company, organisation or person by whom or on whose behalf a sales promotion is undertaken;
- (d) 'customer': a company, organisation or person who purchases the good or service promoted by the promoter;
- (e) 'discount': the temporary offer of:
- a price reduction;
 - an additional quantity of the identical good or service purchased which is offered at no additional cost to the purchaser;
 - a coupon or voucher entitling a purchaser of a good or service to a reduction on the price of an identical good or service on a subsequent purchase;
- (f) 'free gift': the temporary offer to provide free of charge a good or service independently of an obligation to purchase a good or service of an identical type;
- (g) 'premium': the temporary offer to provide a good or service of a type which is not identical to the good or service with which it is offered for purchase;
- (h) 'promotional contest': the temporary offer to participate in a contest which may be subject to a prior obligation to purchase a good or service, in which the winner is designated primarily by means of skill;
- (i) 'promotional game': the temporary offer to participate in a game, in which the winner is designated primarily by chance and no fee is required to participate and where participation may be subject to a prior obligation to purchase. Such promotional games shall not include gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions;
- (j) 'child': a person under the age of 14 years;
- (k) 'alcoholic beverages': alcoholic beverages within the meaning of Articles 2, 8, 12, 17 and 19 of Directive 92/83/EEC;

⁽¹⁾ COM(2001) 283 final.

- (l) 'general prohibition on the use or commercial communication of a sales promotion': a prohibition that is not specific to a particular type of promoted good or service;
- (m) 'Non-public regulatory body': an organisation or association not governed by public law, exercising its legal autonomy to regulate in a collective manner economic activities; and
- (n) 'sale below cost': a discount consisting of a sale of a product or service below the net invoice price inclusive of carriage, insurance and other delivery costs as well as tax.

Article 3

The use and commercial communication of sales promotions

1. Member States or non-public regulatory bodies shall not impose:
- a general prohibition on the use or commercial communication of a sales promotion unless required by Community law;
 - a limitation on the value of a sales promotion except for discounts on books;
 - a prohibition on discounts preceding seasonal sales; or
 - a requirement to obtain prior authorisation, or any requirement having equivalent effect, for the use or commercial communication of a sales promotion.
2. Member States or non-public regulatory bodies shall neither restrict the freedom to provide services nor restrict the free movement of goods benefiting from the use of sales promotions on the grounds of the use of sales promotions and references to them in commercial communications.

Article 4

Information to be provided in respect of sales promotions

In addition to other information requirements deriving from Community law, the promoter shall ensure that the commercial communication of a sales promotion complies with the requirements set out in the Annex to this Regulation. All the information requirements set out in the Annex shall be provided in a clear and unambiguous manner. The information that the promoter must make available to the client on request must be available on the launch of the relevant sales promotion.

Article 5

Protection of children and adolescents

1. A promoter, when making a sales promotion, shall not collect personal data from a child without the verifiable prior consent from that child's legal guardian.

2. A promoter is prohibited from providing directly to a child a free gift or a premium if it is of a nature that could harm its physical health.

3. A promoter is prohibited from providing a free gift consisting of an alcoholic beverage to individuals under the age of 18.

Article 6

Redress

1. A promoter shall at the request of a court or administrative authority, provide evidence as to the accuracy of the information referred to in Article 4.

2. A promoter shall provide, free of charge, an address to which complaints can be directed to him. Where a promoter provides a telephone advice service in connection with a sales promotion, the promoter shall ensure that this is provided free of charge and that appropriate resources are dedicated to its operation.

3. A promoter shall respond to an initial complaint relating to a sales promotion, within six weeks of the promoter's receipt of that complaint. The initial complaint and the response shall be in writing, which may include by electronic means. The response shall be in the language of the communication of the sales promotion.

4. A promoter shall:

- indicate in the commercial communication relating to the sales promotion any out of court dispute settlement system or code of conduct that he/she subscribes to; and
- make available upon request information concerning any such dispute settlement system or code of conduct.

Article 7

Revision clause

Before the end of [. . .], the Commission shall submit to the European Parliament and the Council a comprehensive report on the application of the Regulation, accompanied, if appropriate, with a proposal for its revision.

Article 8

This Regulation shall enter into force on the [. . .] day following that of its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

ANNEX

INFORMATION TO BE PROVIDED IN RESPECT TO THE USE AND THE COMMERCIAL COMMUNICATION OF SALES PROMOTIONS

1. ALL SALES PROMOTIONS

1.1. Information to be provided in the commercial communication:

- an indication of the discount, free gift, premium, promotional contest or promotional game;
- the price (inclusive of taxes) of the promoted good or service and any additional costs associated with freight, delivery or postage;
- the promoter's identity;
- the duration of the offer including the start and end date; and
- where the offer is subject to conditions, an indication of where these conditions or any other information can be obtained.

1.2. Information to be made available on request unconditional on purchase of the promoted product or service:

- the name and geographic address of the promoter; and
- the terms and conditions relevant to the sales promotion.

2. DISCOUNTS

2.1. Information to be provided in the commercial communication:

- the exact amount of the discount represented as either a percentage or a unit cost; and
- an indication of a sale below cost.

2.2. Information to be made available on request unconditional on purchase of the promoted product or service:

- any conditions or limitations applicable to the discount; and
- the preceding price of the promoted good or service and the length of time (including dates) that this preceding price was applied.

2.3. Information to be made available on a coupon or voucher:

- the cash value of the coupon or voucher;
- any limitation on its use including its expiry date; and
- the goods or services against which the coupon or voucher may be redeemed.

2.4. Information to be made available on request of a manufacturer or a service provider from whom goods or services have been purchased:

- information of a sale below cost in conformity with prior contractual agreements.

3. FREE GIFTS AND PREMIUMS

3.1. Information to be provided in the commercial communication:

- the actual value of the free gift or premium; and
- any costs associated with obtaining the free gift or premium.

3.2. Information to be made available on request unconditional on purchase of the promoted product or service:

- any conditions or limitations applicable to the free gift or premium.

4. PROMOTIONAL CONTESTS AND PROMOTIONAL GAMES

4.1. Information to be provided in the commercial communication:

- the value and nature of the prize;
- the closing date for receipt of entries;
- any geographical or personal restrictions such as location or age;
- any requirements for proof of purchase;
- the need to obtain permission to enter from an adult or employer;
- any associated costs other than the purchase of the promoted good or service in the participation in the promotional contest or promotional game; and
- in the case of a promotional game, the actual or estimated odds of winning the prize.

4.2. Information to be made available on request unconditional on purchase of the promoted product or service:

- any conditions applicable to the promotional contest or game including any limitations on entries or prizes;
 - the number of prizes which may be won and the number of prizes of any one type if more than one type of prize is on offer;
 - the rules governing who is eligible to participate and the award of prizes;
 - whether a cash alternative can be substituted for any prize;
 - the criteria for judging entries;
 - the selection procedure for the award of prizes and, where the selection is made by jury, the composition of the jury;
 - the date of the results and the manner in which they are to be announced;
 - the means by which prizes may be delivered or collected and any associated costs;
 - the time period during which prizes must be collected;
 - any intention and conditions to use winners in post event publicity; and
 - details of prize-winning entries subject to the agreement of prize winners and data protection rules.
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