

## **Law 23 December 2016 on end-of-season sales and sidewalk sales and misleading and comparative advertising**

(Mém. A 2016, No 267)

We Henri, Grand-Duke of Luxembourg, Duke of Nassau,

Having heard our State Council;

With the consent of the Chamber of Deputies;

Having regard to the decision of the Chamber of Deputies of 13 December 2016 and that of the State Council of 23 December 2016 that a second vote is not required;

*Ordered and order:*

### **Chapter 1 - End-of-season sales and sidewalk sales**

#### **Article 1**

(1) Any sale offer or any sale at a reduced price made by a retailer during sales periods shall be deemed to be an “end-of-season sale”.

(2) It shall be forbidden to advertise or undertake a sale by using the term “sales” (*soldes*) alone or in combination with other words, or any other wording or presentation which suggests end-of-season sales outside the cases and conditions provided for in this Article.

(3) End-of-season sales shall take place on the premises where the goods in question are generally sold.

The prices of the goods on sale shall be materially lower than the usual prices charged by the seller for the same goods.

(4) End-of-season sales can only take place twice a year and each sales period cannot exceed one month.

A grand-ducal regulation shall set annually the opening and closing dates for the two end-of-season sales periods.

#### **Article 2**

For the purposes of this Law, “sidewalk sale” means the retail sale, in a public area, outside a fixed place of business.

The mayor of each commune shall be in charge of authorising professionals holding a business permit to organise sidewalk sales.

The Minister responsible for Economy shall be informed in writing of the dates chosen.

## **Chapter 2 - Misleading and comparative advertising**

### **Article 3.**

For the purposes of this Law, “advertising” means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.

### **Article 4.**

Any advertising that encourages acts that contravene the provisions of this Law shall be prohibited.

### **Article 5**

(1) Any misleading advertising shall be prohibited. For the purposes of this Law, “misleading advertising” means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.

(2) In determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning:

1. the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;
2. the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;
3. the nature, attributes and rights of the advertiser, such as his/her identity and assets, his/her qualifications and ownership of industrial, commercial or intellectual property rights or his/her awards and distinctions.

### **Article 6**

(1) For the purposes of this Law, “comparative advertising” means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.

(2) Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:

1. it is not misleading within the meaning of Article 5;

2. it compares goods or services meeting the same needs or intended for the same purpose;
3. it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
4. it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;
5. it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor;
6. for products with designation of origin, it relates in each case to products with the same designation;
7. it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
8. it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

#### **Article 7.**

Solely the advertiser of the advertising under investigation may be accused of failure to comply with the provisions of Articles 4, 5 and 6.

However, in the case where s/he is not domiciled in the Grand Duchy of Luxembourg or has not designated a responsible person having his/her domicile in the Grand Duchy of Luxembourg, the action for injunction may also be brought against the publisher, printer or distributor of the advertising under investigation, as well as against any other person who helps to produce its effects.

### **Chapter 3 – Sanctions**

#### **Article 8.**

The judge presiding the *Chambre du tribunal d'arrondissement* (Chamber of the District Court) sitting in commercial matters, may order, at the request of any person, professional group, organisation referred to in Article L. 313-1 et seq. of the Consumer Code, the Minister responsible for Economy, the Commission de Surveillance du Secteur Financier or the Commissariat aux Assurances, the cessation of the acts contrary to the provisions of Articles 1 to 6 of this Law, even in the absence of evidence of a loss or real damage or intention or negligence by the advertiser.

The order may take place regardless of the initiated public prosecution. The measure ordered by the judge presiding the *Chambre du tribunal d'arrondissement* sitting in commercial

matters, however, shall end in case of an acquittal decision by the criminal judge, which has acquired the force of *res judicata*.

The action for injunction shall be initiated according to the procedure applicable before the *Tribunal des référés* (Summary Court). The judge presiding the *Chambre du tribunal d'arrondissement* sitting in commercial matters shall decide on the merits of the case. The deadline for appeal shall be 15 days.

Articles 2059 to 2066 of the Civil Code shall also be applicable.

In case of misleading advertising or unlawful comparative advertising, the judge presiding the *Chambre du tribunal d'arrondissement* sitting in commercial matters, may:

1. require the advertiser to provide evidence as to the substantive accuracy of factual claims in advertising if, taking into account the legitimate interest of the advertiser and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case and in the case of comparative advertising, require the advertiser to provide such evidence in a short period of time;
2. consider factual claims as inaccurate if the evidence demanded in accordance with point (a) is not provided or is deemed insufficient.

The decision may be displayed inside or outside the sale facilities of the offender and at his/her expense. The decision shall specify the length of the display and may also order the whole or partial publication in newspapers or through other means at the offender's expense.

The display and publication may only take place under a court decision which has acquired the force of *res judicata*.

#### **Article 9.**

Any breach of the injunctions or prohibitions arising from a decision that has acquired the force of *res judicata* and was ordered under Article 8 shall be fined between EUR 251 and EUR 120,000.

The same penalties may be imposed on:

1. those who did not comply with the provisions of Article 1;
2. those who did not comply with the provisions of Articles 3 to 7.

The persons, professional groups and representative consumer associations referred to in Article 8 shall be eligible to bring an action as civil party before the Criminal Courts as regards facts damaging their individual or collective interests.

#### **Article 10.**

In the event of a conviction, the Courts may order the insertion or display of the decision in the newspapers. In case of an acquittal decision, they may order the publication or display at the State's expense.

#### **Chapter 4 – Repeal**

##### **Article 11.**

The Law of 30 July 2002 regulating certain commercial practices, penalising unfair competition and transposing Directive 97/55/EC of the European Parliament and of the Council amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising shall be repealed.