



THE LEGAL FRAMEWORK OF SALES PROMOTIONS IN COLOMBIA

IMPORTANT DISCLAIMER: This publication has been prepared for clients of **DG&A – Abogados**. While every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused.

The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases. If advice concerning individual problems or other expert assistance is required, the services of a competent professional advisor should be sought. Unless otherwise indicated, the law is as stated on May 2009.

GENERAL REMARKS

According to the National Constitution of Colombia, the purpose of all Laws and Decrees related to the quality of goods and services offered in the Colombian territory, as well as the promotion and information related to them, aim towards the protection of the consumer. In other words, the legal structure of Sales Promotions encourages that all participants of commercial and industrial activities be aware of the fact that their activities and that the information given to the consumers must be accurate, verifiable, sufficient and should not induce the public into error or mistake in order to avoid confusion among consumers of the products and services being offered.

In general, we can say that Decree 3466 of 1982 defines all the legal aspects related to promotions and the protection of the consumers. Additionally, Law 643 of 2001 and Decrees 350 of 2003 and 493 of 2001, and the External Circular 11 of 2002 of the Superintendence of Industry and Commerce, all refer in their articles to the different genres of sales promotions, which in some cases need a special authorization from a national authority for it to be legally offered by merchants, distributors, retailers and producers. There is also a Self-Regulatory Colombian Code of Advertising elaborated by national advertisers and associations related to this type of activity which is more of a soft law being that it is not legally enforceable but must be taken into account when advertising and doing promotions.

We can establish that according to article 1 of Decree 3466 of 1982 a Sales Promotion is defined as the advertisement made to the public to promote or induce the acquisition or use of a determined good or service, with or without the indication of its qualities, characteristics, or uses, through any mass media, such as radio, television, newspaper, sign, or in general, any system of advertising.

It is very important to understand the scope Article 16 of the aforementioned decree to comprehend the effects of Promotions that aim to incentive consumers to obtain a certain good or service. This article sets forth the general rule by which all producers are accountable for their promotions. In light of the above, anyone who promotes any type of goods and/or services by way of raffles, coupons, pictures, figures, posters, images, or any other representation of people, animals, or things, or the offer of money or any other kind retribution, shall be held liable for such promotions in the following cases:

1. When the promotion does not correspond to reality or is untrue.
2. Whenever the promotion induces or is susceptible to induce consumers in a mistake with respect to the price, quality or suitability of the respective good or service.

For the effects of the general rule previously defined, the promotion must indicate the exact date up to which it will be valid. In addition to the definition of sales promotions, the External Circular 11 of 2002 of the Superintendence of Industry and Commerce established in numeral 2.1.2.1. that promotions are advertisements made to the public, offered temporarily, to commercialize products and services in conditions more favorable than those habitually offered, that can be offered by any system of communication, with the purpose to induce or make more attractive the acquisition of a determined product of service.

By understanding the definition of promotions, we can now describe de different types of promotions. It is important to say that all promotions or information given to consumers about the products or services must be certain, verifiable, sufficient and must not induce consumer into mistake.

DISCOUNTS

There is not a legal definition of discounts in the Colombian legal system, but we can easily say that discounts are a type of promotions offered to the public in which the price of the product or service is reduced in a specific percentage or amount. According to the External Circular 11 of 2002 of the Superintendence of Industry and Commerce it is mandatory that the amount or percentage discounted must be expressed, except in cases in which discounts vary or apply to various products in which case the amount or percentage of the discount can be determined by a minimum and/or maximum amount granted to buyers.

As a result we can conclude that discounts must comply with the conditions of veracity, sufficiency and the non induction to mistake. The producers, distributors or retailers in their promotions by way of discounts must keep in mind that they will be liable for all the information that induces consumers into mistake or is portrayed to be confusing. In addition, it is not necessary to obtain a permit in order to promote the sales of goods or services through discounts.

According to the aforementioned External Circular of the Superintendence of Industry and Commerce, it is presumed that a consumer is induced into making a mistake or an error: (i) when simultaneously with the promotion and during the six months after the withdrawal of the promotion the product or service promoted increases its price and (ii) when promotions are offered within the next month in which the price of the promoted product or service is increased.

GIFTS AND PREMIUMS

There is not a legal definition that explains the concept of gifts and premiums in the Colombian Legislation, but we can say that gifts or premiums are additional retributions in kind or in cash offered to the public in order to make the acquisition of a product or service more attractive. The difference between the two concepts is that gifts are offered and given independently of the obligation a consumer has to purchase a determined good or service; on the other hand, if the gift is linked to the acquisition of a product or service we will be in the scenario of a premium. Gifts and premiums follow the same rules regarding the conditions of veracity, sufficiency and the non induction of the consumer into mistake, but there are special rules related to the use of

images. The images used for the promotion must correspond exactly to the products offered as a gift or premium and the quantity of the product that appears in the promotion must correspond effectively to the content of the package promoted as a free gift or premium. It is also important to underline that it is not necessary to obtain a permit from the Colombian authorities to hold these type of promotions.

PROMOTIONAL CONTESTS

Promotional contests are defined in article 4 of Decree 350 of 2003 as any type of event in which one or several individuals put in play their knowledge, intelligence, skills, and ability in order to achieve a demanded result, aiming to become creditors of a title or prizes in cash or in kind. Promotional contests need a special authorization or permit in order to be held. This means that anyone interested in obtaining authorization for a promotional contest must file the following information before the District's Secretary Government:

1. Form of request established by the Secretary of Government.
2. Certificate of existence of the legal entity or identification of the person interested in the authorization.
3. Mechanics of the game duly detailed with the prize plan.
4. A bond that guarantees the delivery of the prizes.
5. Certificate of property of the goods that are to be given as prizes according to the plan of prizes.
6. Payment of the correspondent taxes.

Once the interested party has obtained the authorization, it can now hold he promotional contest. Furthermore, Article 7 of Decree 350/2003 states that The District's Secretary of Government is the competent entity that decides on petitions to hold public spectacles, contests, and skill based games.

PROMOTIONAL GAMES

Promotional games are regulated by law 643 of 2001 and Decree 493 of 2001. Article 1 of Decree 493 of 2001 points that whoever pretends to organize and/or operate promotional games must file for an authorization before the competent authorities as a general rule. As an exception to this rule, section 3 of article 5 of Law 643 of 2001 establishes that games held to drive or promote sales of commercial and industrial companies are excluded. Such exception is only for games based on random chance or luck not applicable to skill based

games such as contests. Hence, the competent entity that authorizes the promotional game is ETESA whenever the game is done through out the national territory.

In general terms, promotional games are games based on random luck or chance operated with the intent to promote or publicize goods or services, establishments, companies or entities, in which a prize is offered to the public, without the need for the participants to pay for their entry. As said before, the use of the exception of promotional games aiming to increase sales must have a previous waiver issued by ETESA for which the operator must establish the rules of the promotional game and certify that the prize will be delivered in a term no longer than thirty (30) calendar days. Finally, with exception of promotional games authorized by insurance and financial companies, the prize can not consist in money, which means that all prizes must be either real estate property, services or goods excluding credit instruments.

SPECIAL SALES

Special sales are related to specific products and services that because of their nature or its components may be harmful to someone's health or produce some type of side effect. The typical examples are nicotine products, alcoholic beverages and over the counter drugs. As a condition for their sale, the harmful or side effects must be clearly indicated with their characteristics and must be perfectly legible either on the label, package or in an annex, including the conditions and necessary indications for the proper use, as well as the contraindications for each case. There are special norms related to medications, tobacco, alcohol and other products that are deemed harmful, but all of them pretend that it be clearly stated on the label the possible effects that the product's use may cause to someone's health.

The promotions related to these kinds of products must warn in a clear manner of the harmfulness and the special need to consult the conditions and indications for the correct use, as well as the contraindications related to de use of the promoted product.

Another type of special promotions are the ones linked to perishable goods in which the expiration date must be indicated with no alteration and in a place visible to public, or in its brand, package if it applies.

Due to recent legislation, there are certain products that can not be advertised by any type of media, in which case we can talk about tobacco advertising. By way of Law 335 of 2009 the advertisement of cigarettes by any means of communication is prohibited. Additionally, packaging of tobacco must have images or warnings regarding smoke related damages, occupying at least thirty percent of the face of the package. The important effect of this Law is that it forbids the promotion of tobacco by any means of communication.

PROMOTIONS ON INTERNET, MOBILES AND NEW TECHNOLOGIES

There are no special laws or regulations referred to promotions on Internet, mobiles or other new technologies. Some of the laws and decrees refer to promotions used in new technologies. For example, Law 643 of 2001 defines new games as any other type of luck games such as instant lottery, online lotto or any other modality of game done by electronic means, internet or any other mean which is held in real time that does not require the attendance of the participant. In spite of the definition, the same prohibitions and effects of the rules for sales, promotions and advertising are maintained for the promotion of these type of games, which means that all promotions must be certain, verifiable, sufficient and must not induce consumer into mistake.

OTHER RELEVANT ISSUES

The promotions that can affect other competitors can also be protected by law 256 of 1995 which is basically an antitrust law which protects trade and commerce by prohibiting acts or conducts of unfair competition, in benefit of all merchants. Its general prohibition states that all acts of unfair competition are forbidden and lists a series of acts which are presumed to constitute unfair competition. This means that the participants in commerce must act according to the principles of good faith in commerce signifying that any dishonest use in industrial property or any act aiming to affect the free decision of consumers or the functioning of the market will be severely punished by authorities. It is possible to use this figure in a case when, through a sales promotion, the competitors pretend to affect the free decisions of the market.

The aforementioned law identifies certain acts that are considered as acts of unfair competition. These acts among others are: acts of confusion, acts of disorganization, acts of diversion of clients, acts of deception, acts of discredit,

acts of comparison, acts of imitation, and in general any act contrary to commercial practice. The use of promotions can sometimes classify on the acts before mentioned and can cause damages to other competitors. The importance of this regulation is that it works as an instrument whenever a participant in the commerce results affected with a promotion that can be considered as an act of unfair competition.

As a general conclusion we can anticipate that Colombian laws are very strict in relation to the sales promotions due to the importance given to consumer rights and fair competition matters, which are the basis of the industrial and commercial activities. In Colombia, consumers are equipped with various legal mechanisms to protect their rights in the events of misinformation and illegitimate sales promotions.