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Belgium – Book VI: Economic Law Code



Full title and context: **Book VI of the Economic Law Code: “Market Practices and Consumer Protection”** (*Boek VI: Marktpraktijken en consumentenbescherming/ Livre VI: Pratiques du marché et protection du consommateur*) Entry into force: 31/05/2014

Implementing Act: Act of 21 December 2013 introducing Book VI of the Economic Law Code on Market Practices and Consumer Protection

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2013122123&table_name=loi (French)

Title of relevant section: Book VI; Title IV (Prohibited Practices); Chapter I – Arts 92-103 (Unfair Commercial Practices against Consumers); Chapter II – Arts 104-109 (Unfair market practices in relation to persons other than consumers); Chapter III – Arts 110-115 (Unsolicited Communications)

Definitions are contained in Book I, Chapter IV (Specific Definitions in Book VI) – Art. I. 8

Definitions (Art. I.8 – Book I; Chapter IV)

13. "advertising" means any communication for the direct or indirect purpose of promoting the sale of products, irrespective of the place or the means of communication used;

23. "invitation to purchase" means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;

Chapter I Unfair Commercial Practices against Consumers

Section 1 *Scope of application*

Article 92 This Section shall apply to unfair business-to-consumer commercial practices before, during and after the offer for sale and sale of products.

Section 2 *Unfair Commercial Practices*

Article 93 A commercial practice shall be unfair if:

a) it is contrary to the requirements of professional diligence and

b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer whom it reaches or to whom it is addressed, or if it is directed to a specific group of consumers, the economic behaviour of the average member of that group with regard to the product concerned. A commercial practice which is likely to materially distort the economic behaviour of a single clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the business could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

Article 94 Business-to-consumer commercial practices shall be unfair which:

1. are misleading as set out in Articles 97-100, or
2. are aggressive as set out in Articles 101-103

Article 95 Unfair business-to-consumer commercial practices shall be prohibited

Article 96 Any act or omission contrary to the laws protecting consumer interests shall also be prohibited – i.e. the Regulation mentioned in the Annex to Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws or the Directives also mentioned in that Annex, as transposed – that harms, or is likely to harm, the collective interests of consumers residing in a European Union Member State other than the Member State where the act or omission originated or took place, where the responsible business or supplier is established or where evidence or assets pertaining to the act or omission are to be found

Section 3 *Misleading commercial practices*

Article 97 A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer in relation to one or more of the following elements, even if the information is factually correct, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

1. the existence or nature of the product;
 2. the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out thereon;
 3. the extent of the business' commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the business or the product;
 4. the price or the manner in which the price is calculated, or the existence of a specific price advantage;
 5. the need for a service, part, replacement or repair;
 6. the nature, attributes and rights of the business or its intermediary, such as its identity and assets, qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or its awards and distinctions;
 7. the consumer's rights, including the right to replacement or reimbursement under the Consumer Protection on Sale of Consumer Goods Act of 1 September 2004 (*loi du 1er septembre 2004 relative à la protection des consommateurs en cas de vente de biens de consommation*), or the risks he may face.
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Article 98 A commercial practice shall also be regarded as misleading which, in its factual context, taking account of all its features and circumstances, causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, where it involves:

1. any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;
 2. non-compliance by the business with commitments contained in codes of conduct by which the business has undertaken to be bound, where:
 - a) the commitment is not a declaration of intent, but is firm and is capable of being verified and
 - b) the business indicates in a commercial practice that it is bound by the code.
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Article 99 § 1. A commercial practice shall be regarded as a misleading omission if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

§ 2. It shall also be regarded as a misleading omission when a business hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in § 1 or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

§ 3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the business to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

§ 4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

1. the main characteristics of the product, to an extent appropriate to the medium and the product;
2. the geographical address and the identity of the business, and, where applicable, the geographical address and the identity of the business on whose behalf it is acting;
3. the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
4. the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
5. where appropriate, the existence of a right of withdrawal or cancellation.

§ 5. Information requirements in relation to commercial communication including advertising or marketing, established by Community law, and especially the Articles of the Directives referred to in Annex II to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, shall also be regarded as material.

Article 100

Misleading commercial practices shall in all circumstances be considered unfair where they have as their object:

1. claiming to be a signatory to a code of conduct when this is not the case;
2. displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation;
3. claiming that a code of conduct has an endorsement from a public or other body which it does not have;
4. claiming that a business, including its commercial practices, or a product has been approved, endorsed or authorised by a public or private body when it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation;
5. making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the business may have for believing that it will not be able to offer for supply or to procure another business to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered;
6. making an invitation to purchase products at a specified price and then, with the intention of promoting a different product:
 - a) either refusing to show the consumer the product proposed;
 - b) or refusing to take orders for it or deliver it within a reasonable time;
 - c) or demonstrating a defective sample of it;

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7. falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice;
 8. undertaking to provide after-sales service to consumers with whom the business has communicated prior to a transaction in a language which is not one of the national languages and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction;
 9. stating or creating the impression that a product can legally be sold when it cannot;
 10. presenting rights given to consumers in laws or regulations as a distinctive feature of the offer by the business;
 11. using editorial content in the media to promote a product where a business has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer;
 12. making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product;
 13. promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not;
 14. establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived more from the introduction of other consumers into the scheme than from the sale or consumption of products;
 15. claiming that the business is about to cease trading or move premises when it is not, without prejudice to Articles 22 and following;
 16. claiming that products are able to facilitate winning in games of chance;
 17. falsely claiming that a product is able to cure illnesses, dysfunction or malformations;
 18. passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions;
 19. claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent;
 20. describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the offer and collecting or paying for delivery of the item;
 21. including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the promoted product when he has not;
 22. falsely claiming or creating the impression that the business is not acting for purposes relating to its professional activity, or falsely representing itself as a consumer;
 23. creating the false impression that after-sales service in relation to a product is available in a Member State of the European Union other than the one in which the product is sold.

Section 4*Aggressive commercial practices*

Article 101

A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

Article 102

In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of:

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1. the timing, location, nature or persistence of the commercial practice;
 2. the use of threatening or abusive language or behaviour;
 3. the exploitation by the business of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the business is aware, to influence the consumer's decision concerning the product;
 4. any onerous or disproportionate non-contractual barriers imposed by the business where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another business;
 5. any threat to take any action that cannot legally be taken.
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Article 103

Aggressive commercial practices shall in all circumstances be considered unfair where they have as their object:

1. creating the impression that the consumer cannot leave the premises until a contract is formed;
 2. conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return, without prejudice to the laws or regulations authorising this with a view to enforcing a contractual obligation;
 3. making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media, without prejudice to:
 - a) laws or regulations authorising this to enforce a contractual obligation;
 - b) Article 110 (Book VI)
 - c) Article XI (Book XII)
 4. requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights;
 5. including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them;
 6. demanding immediate or deferred payment for or the return or safekeeping of products supplied by the business, but not solicited by the consumer;
 7. explicitly informing a consumer that if he does not buy the product or service, the job of the person concerned or material resources of the business will be in jeopardy;
 8. creating the false impression that the consumer has already won, or will win, whether or not by accomplishing a formality, a prize or other equivalent benefit,
 - when in fact either there is no prize or other equivalent benefit,
 - or accomplishing any formality in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.
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Chapter 2**Unfair market practices in relation to persons other than consumers****Article 104**

Any act contrary to honest market practices by which a business harms or may harm the professional interests of one or more other businesses shall be prohibited.

Article 105

Without prejudice to other legislation or regulations, any advertising by a business shall be prohibited which:

1. taking into account all its features, in any way, including its presentation or the omission of information, deceives or is likely to deceive the person to whom it is addressed or whom it reaches, in particular with respect to:
 - a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, environmental impact, fitness for purpose, uses, quantity, specification, geographical or commercial origin, the results to be
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expected from their use, the results and material features of tests or checks carried out on the goods or services;

b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;

c) the nature, attributes, qualifications and rights of a business, such as its identity, assets, skills and ownership of industrial, commercial or intellectual property rights or its awards and distinctions; and which, for those reasons, is likely to affect his economic behaviour or which, for those reasons, injures or is likely to injure a business;

2. contains denigratory information in relation to another business, its assets, services or activity;

3. without legitimate reason, allows the identification of one or more other businesses;

4. promotes an act which must be considered as a failure to comply with this Act or as an infringement under Articles 83-86 (Book XV) and Article 126 (Book XV) (Criminal sanctions)

Article 106

Without prejudice to other laws or regulations, all advertising from a business shall be prohibited which:

1. includes an invoice or similar document seeking payment, which gives the impression that the goods or service have already been ordered, when they have not;

2. hides or provides in an unclear manner material information relating to the consequences resulting from the reply given by the addressee or which hides, provides in an unclear manner or fails to identify the commercial intent if this is not clearly apparent from the context.

Article 107

It is prohibited for any company to actively search for or scout (new customers), either directly or through a payment form, an order form, invoice, an offer, terms and conditions, a proposed correction or other similar document, via advertisers with a view to listing them in Guides, address lists, telephone directories / lists or similar files, without explicitly mentioning that the search or scouting constitutes an offer for contracted work that will be remunerated and without mentioning the details of the said contracted work, its duration and its price.

Article 108

It shall be prohibited for any business to send goods of any kind to a person without a prior request on his part, inviting him to acquire these goods against payment of the price, to put them in safekeeping or to return them to their sender, even free of charge.

It shall also be prohibited for any business to provide a service of any kind to another person without a prior request on his part, inviting him to accept this service against payment of the price.

The Minister may grant derogations to these prohibitions for offers made for a philanthropic purpose. In this case, the authorization number obtained and the following phrase/ statement: "The recipient shall be under no obligation regarding payment or return" shall be shown legibly, conspicuously and unambiguously on the documents relating to the offer.

Under no circumstances shall the recipient be obliged to pay for the service provided or the goods sent or to return the latter, since the absence of a reply from the recipient concerning the supply of goods or services shall not constitute consent.

Article 109

It shall be prohibited to establish, operate or promote a pyramid promotion scheme where a business gives consideration for the opportunity to receive compensation that is derived more from the introduction of other businesses into the scheme than from the sale or consumption of products.

Chapter 3**Unsolicited communications****Article 110**

§ 1. The use of automated calling systems without human intervention (automatic calling machines) and fax machines for the purposes of direct marketing is prohibited without the prior specific, informed and freely given consent of the recipient of the messages.

Consent may be withdrawn at any time by the person who gave it without having to give a reason for doing so and without the person becoming liable for any expense.

The burden of proof that the communication sent by a means referred to in this article, or determined in application thereof, rests with the sender.

The King may, by Royal Decree deliberated in the Council of Ministers, extend the prohibition referred to in Subpara. 1 to other means of communication, taking account of their technological development.

§ 2. Without prejudice to Art. 13 (Book XII) (which affects commercial communications which are part of or constitute an information society service, i.e. email) unsolicited communications for direct marketing purposes sent by means other than those referred to in Para. 1, or determined in accordance thereof, are permitted subject to compliance with the provisions of Articles 111-115 (below)

Article 111

§ 1. The operator offers to recipients the opportunity to oppose at any time the use of the phone number or phone numbers assigned to it for direct marketing purposes.

The recipient may exercise this right of opposition free-of-charge and can at minimum communicate this by phone, letter or e-mail.

At the conclusion of the contract, the operator expressly and particularly draws the attention of the subscriber to this right.

§ 2. The operator records the recipient's opposition, as referred to in § 1, within five working days in a file for that purpose and notifies the subscriber of the date of registration.

The operator makes available to tele-marketers the file that contains the phone numbers of those customers who do not want direct marketing calls.

An operator may delegate the performance of these obligations to a non-profit organisation with which it contracts to this effect.

Article 112

§ 1. Any telephone call for direct marketing purposes to a phone number that is listed in the file referred to in Article 111, § 2, is prohibited.

For any telephone call for direct marketing purposes, the caller must first check if the number in question is not in this file.

§ 2. The prohibition referred to in § 1 shall not apply to calls to telephone numbers of subscribers who have given their express consent to telemarketers or their agents to use their personal data for such purposes.

Article 113

1. Operators and telemarketers or their agents bear the burden of proof of compliance with this section.

Article 114

§ 1. The King may, after consulting the Commission for the Protection of Privacy, take steps to:

1. Determine the content, form and operation of the file referred to in Article 111, § 2; (the opt-out file or "Do-not-call me list")
2. Determine the terms and conditions of access to these files for telemarketers, including identification of those persons;
3. Maintain the means of communication of the subscriber referred to in Article 111, § 1, to be as simple as possible.

§ 2. The King may, after consulting the Commission for the Protection of Privacy, approve an association or organisation which includes the obligations of all operators referred to in Article 111.

This association or organisation may be approved only on the basis of eligibility criteria determined by the King and which offers at least the following guarantees:

1. Ease of use for the subscriber;
2. Exclusive rights of the customer to the use of the data file pursuant to Art. 111, § 1;

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3. The absence of any profit making association or organisation;
 4. Continuous and simple access to data, at a reduced price, for people who want to make telephone calls for direct marketing purposes;
 5. Compliance with the rules imposed under paragraph 1.
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Article 115

For the purposes of this Chapter, what is meant by "operator" and "subscriber", an operator and subscriber as defined in Articles 2(11)¹ and 2(15)² of the Law of 13 June 2005 on electronic communications.

¹ Art. 2(11): Operator: "a person who is subject to the obligation to make a notification in accordance with Article 9 (Art. 9 refers to the obligation to notify the provision or resale of electronic communications services or networks to BIPT). So "network operators" are persons who have to notify the provision or resale of an electronic communications network to BIPT, whilst "service operators" are those persons who have to notify the provision or resale of an electronic communications service to BIPT. See: <http://www.ibpt.be/public/files/en/21430/Obligation%20to%20notify.pdf>

² Art. 2(15): Subscriber: means any natural or legal person using an electronic communications service pursuant to a contract with an operator

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