

BELGIUM

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Is there case law or any statutory regulation governing advertising and promotion incentives? Are there any special consumer protection laws? What role do free gifts, tie-in offers, sweepstakes, rebates and other benefits, play in this context?

The Belgian 1991 Act on Trade Practices, Information and Protection of the Consumer - as last amended on 5 June 2007 when Belgium implemented the EU Unfair Business-to-Consumer Commercial Practices Directive 2005/29/EC (entered into force on 1 December 2007) – govern and restricts in detail advertising and promotion that has excessively persuasive effects.

A trade practice is qualified as aggressive if, in light of the factual context, the freedom of choice of the consumer is or runs de risk of being restricted by force, intimidation or inappropriate influence. Exploiting particular circumstances or bad luck to influence a decision, insistence at home, in unsolicited calls or in other media are explicitly qualified as an aggressive and unfair trade practice. Systematically declining requests for explanation also fall under the prohibited aggressive trade practices.

Consumers are protected against a long range of purchase requirements in the context of contests, games of chances, lotteries or sweepstakes. Free gifts and value coupons are generally permissible, as long as they do not give rise to a psychological obligation to buy and are not used to drive competitors from the market. Combined offers are generally prohibited, but a detailed list of exemptions is foreseen. Announcements of price rebates and other benefits are permitted, but strictly regulated as well. Street solicitation and door-to-door sales require a permission to be obtained. Provisions in respect of distance contracts, the Belgian Ecommerce law of 11 March 2003 and a code of conduct by the Belgian Direct Marketing Association (BDMA) are also important legal instruments to consider in the context of persuasive promotion practices and incentives.

In your jurisdiction, are there any industry sectors which are subject to special regulations for advertising and promotion incentives (for instance the health products and pharmaceutical industries in some countries)? Please name applicable statutes and self-regulatory codes.

Yes, particularly but not only in the health products and pharmaceutical industry. The Act of 25 March 1964 on Medicines and the Royal Decree of 9 July 1984 concerning Information and Advertisements for Pharmaceuticals regulate advertising for both prescription and over-the-counter pharmaceuticals in a very restrictive manner. Royal Decree of 7 April 1995 implemented the Council Directive 92/28/EEC of 31 March 1992 on Advertising for Medicines. It is allowed for pharmacies to grant rebates under strict conditions. Promotion through titles or small gifts is prohibited, as well as contests. Towards professionals, direct or indirect rebates or the free gift of objects of all kinds are not allowed. Only the distribution of small samples is, under strict conditions, permissible. The organisation of conferences is allowed on condition that the scientific level and purpose of such meetings remains predominant. A strict compliance regime is in force. A Code on Deontology as changed on 21 March 2008 is published by the General Association of Medicinal Industry. The Code deals with sponsoring, information on events, seminars, premiums, studies. Detailed procedures and sanctions are in place. The Act of 16 December 2004 on the combat of excesses in the promotion of medicines is also relevant. The industry organizations adopted an Advertising Code for Cosmetics and Hygienic Products and a Code on Medicinal Products and Medical Treatments. The Jury for ethical aspects of advertising has rules on the use of health claims. The Belgian pharmaceutical industry association imposes restrictions in its' detailed and compulsory self-regulatory code. Alcohol has a Code on Advertising for Alcoholic Beverages and the beer industry has the so-called Arnoldus Code. Further relevant are the Code on Advertising for Motor vehicles, Spare Parts and Accessories (and a Royal Decree of 2001). Several Royal Decrees contain detailed information on Prospectus advertising in the banking, finance and insurance industry. The Association for Ethics in Fund-Raising has enacted an ethical Code with recommendations. The Belgian Association of Banks has enacted many recommendations and guide lines on, i.a., transparency of premium compensations on deposits.

Does industry self-regulation replace or supplement government and legislative regulation of advertising and promotion incentives? Is self-regulation an effective tool?

Self-regulation only supplements the law. It is quite effective and elaborated in the health industry. Self regulation and containment of members in the same industry play a very important role in many sectors.

To what extent do promotional incentives extended to staff in public institutions pose legal issues in your jurisdiction (i.e., paying for travel and accommodation costs on the occasion of conferences, personal entertainment, hidden education sponsoring, sponsoring of school snacks for promotional purposes)?

Excessive persuasion of potential customers in both private and public companies and institutions can be an issue of criminal offence (any form of bribery, corruption as governed by Sections Criminal code). Promotions involving certain kinds of customer benefits in a procurement or purchasing environment are tested against principles of criminal law and specific statutory instruments in procurement, company law and the laws of associations. Public staff legislation and employment law supplement the general criminal law provisions. Courts have a practice of being called to judge in matters of corruption and excessive purchasing inducement

Section IV of the Criminal code deals with active and passive bribery and corruption of staff in public institutions. A distinction is made between bribery to obtain a licit and free of charge act or decision and bribery to obtain an illegal act or omission (including gifts, regardless of whether or not the bribe was successful). The excuse that the value of the gift or promise is quite small is not sufficient to take away the criminal offence. Bribery of private persons, staff, employees, directors, agents or proxy-holders is sanctioned in Section 3bis on private bribery (Articles 504 bis and 504 ter of the Criminal code)

Are there any formal disclosure requirements for promotional incentives (i.e., rule of separation of procurement from personal dealings, rules of employer consent requirements, written form requirements, adequacy of consideration granted for a service)?

There are formal disclosure requirements in place under private and collective employment law, company law and under the general principles of civil law, including the duty to act in good faith, trust and fidelity.

Under Article 10 of the Act of 1964 on Medicines, the payment of legitimate scientific services and the invitation and payment of participation to scientific events, organised or supported by suppliers of medicines or medical devices, the supplier has to apply for a visum at Mdeon, the ethical platform of all Belgian health partners, with support of FAGG, the Medicine Agency. The Ethical code of Mdeon describes in detail the compliance regime and procedure on premiums and advantages, scientific events and services of scientific nature with detailed rules on hospitality, duration, accompanying persons and prolongation of stay. Since 1 January 2007, each producer or supplier of medicinal products and medical devices wishing to invite a healthcare professional to take part in a scientific event which includes at least one overnight is required to have a visa. The visa procedure assesses whether the hospitality offered complies with the cumulative conditions set out in the Act on medicinal products. Sponsorships of the organiser of a scientific event (such as an exhibition stand) are subject to the visa procedure. Circular letters by the Federal Agency for Medicines and Health Products, Department on Proper Use of Medicines are issued to manufacturers, importers, wholesalers and holders of a marketing authorisation or registration or distribution of medicines or medical devices.