

**:: MISTAKE IN THE ADVERTISED PRICE. MAY THE SUPPLIER REFUSE TO COMPLY WITH THE OFFER? ::**

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*Errare humanum est* is a well-known Latin expression meaning: "To err is human".

To err is intrinsic to human nature and – of course – occasionally mistakes are made in advertising offers of products or services aimed at potential undetermined consumers.

We will refer in this case to the advertising of products or services in which the mistake is found in the advertised price.

Such situation, especially when the announced price is much lower than the market price of the product or service subject matter of the advertisement, it usually unleashes conflicts between the offeror, which tends to refuse to comply with the offer containing a mistake and consumers, who intend to obtain the good or service in exchange of the price mistakenly announced.

Sections 7<sup>th</sup> and 8<sup>th</sup> of Act 24,240, on Consumer's Defense, respectively provide – in so far as it is relevant here - that "The offer aimed at potential undetermined consumers, obligates the issuer, during the term in which it lasts ..." (Section 7<sup>th</sup>) and that "The details contained in the advertisement, announcements, leaflets, circular letters or other advertising media are binding for the offeror and are considered included in the contract with the consumer." (Section 8<sup>o</sup>).

Said section 7<sup>th</sup> also sets forth that "...non-compliance with the offer shall be considered negative or an unjustified sale restriction, subject to the penalties provided for in section 47 of this Act."

In other words, to make an offer to potential undetermined consumers binds the offeror to comply with it, otherwise it may be considered that said offeror violates the Consumer's Defense Act.

However, is it reasonable to apply said regulations to offers spread with evident mistakes in the price of the good or service subject matter thereof?

In our opinion the answer to said question is in the negative.

Because the mistake in the price implies a defect in consent, that invalidates the offer or the contract, as applicable.

Hence, in cases in which the difference between the usual and the offered price is so large that even the consumer knows that it is not a "bargain" but that there is a mistake in the advertised price, we consider that the offeror may refuse to comply with the offer without taking the important risk or suffering negative legal consequences.

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Supporting this line of thought we may quote a judgment related to the offer made by a well-known supermarket, that advertised in its product catalog a TV set at a price which, by mistake, was clearly below its market value<sup>[1]</sup>. In accordance with what the supplier proved in the lawsuit, the market price of the TV set in question – on the date of the mistaken advertising – amounted to AR\$ 16,999,-. Within said framework, the judges, members of Panel D of the National Commercial Appellate Court understood that it was ridiculous to think that the supermarket offered a product without being mistaken at AR\$ 1,415,84 which, in fact, was worth twelve (12) times more.

Such a distortion was explained only –as stated then by the judges – in the normal and rational order of things, by accepting the presence of an offer which was diverging from the intended will, either due to its own mistake or by an error in the transmission.

In view of these circumstances the presiding judge wondered: Could the plaintiff rationally believe that the offer amounting to AR\$ 1,415.84 was not due to a mistake? Could he believe, in good faith, that said price was the correct one? And he answered: “My answer to such questions is, in both cases, in the negative.

Comments on foreign judgments coincide with the position adopted by Panel D of the National Commercial Appellate Court in the case mentioned above.

In Chile, in november 2013, the Court of Appeals of Santiago dismissed a complaint against Falabella filed by a customer that claimed that the company did not want to sell him six flat screen TV sets at the mistakenly announced price, which was clearly below its market value. Falabella argued that there was an error. And the Court sustained said position<sup>[2]</sup>.

Similar criteria as the one applied in judgment “De Rueda” may be found also in Europe.

Hence, the Lower Court 6 of Badalona agreed with the supplier against a consumer that had bought two MacBook notebooks for €67.93 each, when their market price was around €1,000<sup>[3]</sup>. To pretend to take advantage of the manifest error in the advertisement of the price may constitute an abuse of right and may be contrary to sections 7<sup>th</sup> of the Civil Code and 11.2 of the Organic Law of the Judiciary (LOPJ)<sup>[4]</sup>.

Said case bears a resemblance with other two in Germany on price mistakes in on line shopping.

One of them is a beet harvester valued in €60,000 which was acquired for 51€, and the starting price in eBay tender was only €1. The case was resolved by the Regional Superior Court of Colonia (judgment dated December 8, 2006, AZ U-18 109/06). The other one was the sale of a high-end car for €5.50 while the vehicle was valued in €75,000 (Case eBay-Porsche, 5 U 429/09, 10 O 250/08 LG Koblenz).

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In both proceedings the sales were challenged as null and void in the light of the provisions of section 242 of the BGB (German Civil Code) that includes the "*exceptio doli generalis*" (an exception whereby a defendant can raise the defense that the plaintiff has not acted in good faith) in events of abuse of right <sup>[5]</sup>.

Purchase is a synallagmatic, onerous, consensual and good faith contract. Cicero had already pointed out "*ut inter bonos bene agier oportet et sine fraudatione*" (Good men must act righteously without deceit).

Finally, rights must be exercised pursuant to good faith requirements. The law does not protect abuse of right. And in view of an error in the price informed in the advertisement, the offer must be declared as diverging from the intended will and therefore defective.

In less clear cases, in which the price of the offered product or service is incorrect but that, since they are not extremely high discounts, consumer may believe that it is really an offer, the offeror's position to refuse to comply with it will be weaker.

In short, the probabilities of success in view of eventual claims, administrative reports or lawsuits filed by the involved consumers shall depend, basically, on the fact that supplier may prove that the offer contained a mistake and that the difference between the usual price of the relevant product or service was such that consumer could not – reasonably, in good faith – ignore that it was not a special offer but that there was an error in the advertised price.

In any case, in view of the issuance of advertisements of offers with mistaken prices it is advisable to analyze each particular situation, evaluating – among other things - the cost of the defense, both in the administrative and judicial stages and the possible reputational risk of the trademark in view of eventual publications – usually in social networks – by frustrated consumers versus the losses that the supplier would have if it sells the products or services at the mistakenly published prices.

Likewise, it is an option to explore the possibility of reaching an agreement with the claimants, what could be the most advisable solution for both parties.

[1] "De Rueda, Sebastián Matías v. Jumbo Retail Argentina S.A., ordinary proceedings", Panel D of the National Commercial Appellate Court, July 30, 2009, in which the acting court stated "The offer made by the defendant in its catalog for the sum of AR\$ 1,415.84 was significantly low compared to the offer of two other TV sets, having similar characteristics as the 42-inches TV set "Philips", that the plaintiff was interested in, since one amounted to AR\$ 11,990 and the other one to AR\$ 10,990. But there is still more: on the following page of the same catalog there appears the offer of another smaller TV set "Philips" (26 inches) and different quality (because it did not have a plasma screen, but was an LCD type) at the price of AR\$ 6,990. That is to say, for a product of the same trademark but smaller and of lower quality, the

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defendant's offer was quantitatively higher than that of the 42-inches TV set mentioned above".

[2] See: <http://www.pulso.cl/empresas-mercados/falabella-insiste-en-el-aprovechamiento-de-un-error-en-precio/>

[3] See: <http://www.jprenafeta.com/2016/02/26/debe-el-vendedor-cumplir-con-el-contrato-en-caso-de-error-en-el-precio/>

[4] See: <http://www.ibidem.com/errores-en-los-precios-de-una-web/>

[5] See: <https://elderecho.com/error-de-precio-en-la-venta-online>

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