



## **Unfair Commercial Practices**

An analysis of the existing national laws on unfair commercial practices between business and consumers  
in the new Member States with regard to the Directive on Unfair Commercial Practices

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## National Reports



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## **Cyprus**

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**I. Existing National Law****a) General Provisions on Unfair Commercial Practices****i. Could you describe the general framework of the law on unfair commercial practices in your country (e.g. structures, main acts/statutes, leading cases, codes of conduct, self regulation)?**

In general there is neither a comprehensive codification of market practices nor a codification of private law containing a general provision on unfair commercial practices in Cyprus.

Even though there is no general clause and or rule on fair or unfair commercial practices in Cyprus, there are various legislative provisions, dealing directly or indirectly with practices, which might be considered as unfair. In addition, self-regulation is a method of control of unfair commercial practices in Cyprus. Also, the fairness of commercial practices may be challenged under common law. An unfair commercial practice may constitute a breach of contract in appropriate cases or duress or undue influence as well as other tortious claims, such as passing off or injurious falsehood depending on the nature of the case.

*Legislative Provisions*

The most important instances are found in the Acts, implementing Directives 84/450/EEC, 97/7/EC and 2002/65/EC, which are amended under the Directive on Unfair Commercial Practices, such as the Control of Misleading and Comparative Advertising Act of 2000, implementing Directive 84/450/EEC, the Act for the Conclusion of Consumer, Distance Contracts of 2000, implementing Directive 97/7/EC and the Distance Marketing of Consumer Financial Services Act of 2004, implementing Directive 2002/65/EEC.

Nevertheless, it could be stated that all legislative provisions aimed at securing the economic interests of consumers in Cyprus come close to engage with the idea of a general prohibition against unfair commercial practices, imposing a duty to trade fairly, although such explicit language is not normally advanced. Among the most important instances are particular provisions found under the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Act of 2000, implementing Directive 1999/44/EC, the Consumer Contracts Concluded away from Business Premises of 2000, implementing Directive 85/588/EEC, the Trade Description Act of 1987-2000, the Unfair Terms in Consumer Contracts Act of 1996-2002, implementing Directive 93/13/EEC, the Sale of Goods Act of 1994-1999, the Inscription of the Sale of Price and the Unitary Price of Products Act of 2000, implementing Directive 98/6/EC and the Protection of Competition Act of 1989-2001.

The Control of Misleading and Comparative Advertising Act of 2000 aimed at prohibiting misleading advertising and non-permissible advertising, to be discussed more fully below, provides for the issue of prohibitory or restraining orders against misleading and non-permissible advertising. These orders may have the effect of combating unfair commercial practices.

It has to be noted that all legislative provisions aimed at prohibiting misleading and non-permissible advertising, to be discussed more fully below, may have the effect of combating unfair commercial practices.



Under s. 13(1) of the Act for the Conclusion of Consumer, Distance Contracts of 2000 it is prohibited for the trader to supply goods or services to a consumer, demanding payment, without being ordered beforehand by the consumer. This provision may have the effect of combating unfair commercial practices because it secures the right of the consumer not to be bound by a sale of products or provision of services, which have not been requested by him.

Under s.17 of the said Act the Court on application of the Competition and Consumers Protection Service of the Ministry of Commerce, Industry and Tourism is empowered to issue a prohibitory or mandatory order against any person who is liable for a violation of the provisions of the above mentioned Act, including an interim order providing for a) the immediate cessation of such violation or b) the taking of rectifying measures within a specified time-limit which will prevent the unlawful situation created by such a violation being investigated, or c) the publication of the relevant court's decision in order to remove any prejudicial consequences of the violation investigated or d) any other act or measure necessary or reasonable under the circumstances. The Court may also issue such orders on application under s. 18 of any lawfully established organizations having an adequate legitimate interest in the protection of the consumer's collective interests. They may relate to similar future acts, which may harm the interests of consumers. The issuing of such orders indisputably have the effect of combating unfair commercial practices protecting the interests of consumers in general and indirectly the interests of competitors.

Under s.17 (1) of the Distance Marketing of Consumer Financial Services Act of 2004 consumers are prevented from being exposed to unwanted offers of financial services, which by their nature oblige consumers to make payment. This provision may have the effect of combating unfair commercial practices because it secures the right of the consumer not to be bound by an offer of financial services, which has not been requested by him.

In addition, under s.7 of the said Act, information on contractual obligations to be communicated to the consumer during the pre-contractual phase, shall be in conformity with the contractual obligations which would result from the law presumed to be applicable to the distance contract if the latter was concluded. Moreover, under s.20(1) of the abovementioned Act, a term in a consumer distance contract which contradicts the provisions of the abovementioned Act protecting the interests of consumers shall be void. These provisions may have the effect of combating unfair commercial practices since they prevent the possibility of the consumer being misled in respect of the contractual obligations without holding him liable for any contractual obligations, which have not been communicated to him during the pre-contractual phase.

Also, under s.19 the Competition and Consumer Protection Service is empowered to order the person who violates any provisions of the abovementioned Act to terminate the violation or to impose administrative fine, which shall not exceed CYP 100.000. In this way the Service can play a major role in combating unfair commercial practices protecting the interests of consumers in general and indirectly the interests of competitors.

Under s. 5 of the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Act of 2000, the seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered, meaning that they do not comply with the description given by the consumer to the seller, or are not fit for any particular purpose made known by the seller or are not fit for the purpose for which goods of the same type are normally used and show the

same quality and performance which are normal in goods of the same type and which the consumer can reasonably expect. This provision may have the effect of combating unfair commercial practices since it secures the rights of consumers in the event of any lack of conformity existing at the time the goods were delivered.

In addition, under s.10 of the abovementioned Act prohibitory or mandatory order can be issued in respect of violations of the said Act by the sellers harming consumers' interests, including an interim order following the submission of an application of such order by the Competition and Consumer Protection Service of the Ministry of Commerce or of a lawfully established organizations or associations having an adequate legitimate interest in the protection of the consumers' collective interests. Such orders are of similar nature with those orders issued under s. 17 of the Act for the Conclusion of Consumer Distance Contracts of 2000, having the effect to target actions or omissions made in the course of a business that harm the economic interests of consumers, combating unfair commercial practices.

Under s.14 of the Consumer Contracts Concluded away from Business Premises of 2000, prohibitory or mandatory orders can be issued in respect of violations by the sellers of the abovementioned Act, harming consumers' interests, being of the same nature as those issued under s.10 of the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Act of 2000 and s.17 of the Act for the Conclusion of Consumer Distance Contracts of 2000. The said orders can be issued by the Court following the submission of an application by the Competition and Consumer Protection Service of the Ministry of Commerce, Industry and Tourism or of a lawfully established organizations or associations having an adequate legitimate interest in the protection of the consumers' collective interests. These orders are possible to target actions or omissions made in the course of a business that harm the economic interests of consumers and indirectly the interests of competitors, combating unfair commercial practices.

Under s. 3(1) of the Trade Description Act of 1987- 2000 a false or inaccurate trade description of goods and supplying or offering to supply of goods to which an inaccurate trade description has been applied are prohibited. The offender may be subject to a fine not exceeding CYP 750 or imprisonment not exceeding twelve months or to both (under s.16 of the Trade Description Act of 1987-2000) depending on the facts of the case. For example, in *Police Director v & M Gerimos (Florendino) Ltd and Maria Gerimou*<sup>1</sup> an action was commenced against the Defendants for violations of sections 2, 3(1) (a) (b), 4(1), 5(1), 8, 16 (1) (a), 17, 30 31 (2), 35 of the Trade Description Act of 1987-2000. A fine of CYP 80 was imposed on Defendant 1 and a fine of CYP 50 on Defendant 2.

Under s.5 of the above mentioned Act, importation or supply within Cyprus of any goods which are not labelled or accompanied in an obvious and clear manner with an indication of the country of production or manufacture is prohibited. Further, the Minister of Commerce, Industry and Tourism is empowered under s. 14 of the said Act to make an order for the labelling of any goods or any order that certain goods must be accompanied by a clear indication of certain information. In particular the authorities, which are empowered under s.18, may confiscate products with an inaccurate trade description, which are imported in Cyprus under s.18 of the said Act. These provisions have the effect of protecting the interests of competitors.

Also, under s. 9 A, a person commits an offence where during the execution of a trade, business or profession he provides consumers with any misleading indication as to the price of any

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<sup>1</sup> Case 2528/04.

product or services and is subject to a fine or imprisonment or to both, as aforesaid. Nevertheless, the Inscription of the Sale of Price and the Unitary Price of Products Act of 2000 is the Act which implements Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers.

Moreover, false representations and false or misleading statements as to services are prohibited under sections 10 and 11 of the Trade Description Act of 1987-2000. In particular, under s.10 of the Trade Description Act of 1987-2000 it is provided that no person shall in the course of any trade or business give by whatever means any false indication direct or indirect, that any goods or services supplied by him are of a kind supplied by any person. Under s. 11 (1) of the Trade Description Act of 1987-2000 it is provided that subject to the provisions of any other law no person shall in the course of any trade or business (a) make a statement which he knows to be false; or (b) recklessly make a statement, which is false as to any of the following matters, that is to say (i) the provision in the course of any trade or business of any services, accommodation or facilities, (ii) the nature of any services, accommodation or facilities provided in the course of any trade or business, (iii) the time at which, manner in which or any persons by whom any services, accommodation or facilities, are so provided, as well as the qualifications and capacity of such persons; (iv) the examination, approval or evaluation by any person or any services, accommodation or facilities so provided; (v) the location or amenities of any accommodation so provided; or (vi) the terms of payment and generally the cost of such services, accommodation, or facilities so provided. Any person who contravenes with sections 10 and 11(1) of the Trade Description Act of 1987-2000 commits an offence under s.16 of the latter and shall on conviction be liable to a fine not exceeding CYP 750 or to a term of imprisonment not exceeding twelve months or to both such fine and imprisonment.

Also, misleading or inaccurate advertisements are prohibited, which is discussed more fully below. In such a way an unfair commercial practice may be regulated.

Under s. 6(1) of the Unfair Terms in Consumer Contracts Act of 1996, implementing Directive 93/13/EEC, an unfair term in a contract between a seller or supplier and a consumer shall not be binding on the consumer. Although such a provision may theoretically have the effect to combat unfair commercial practices, it can not be considered a satisfactory one in practice because it attempts to regulate exclusion clauses without identifying the essential nature of an exclusion clause.

Under the Sale of Goods Act of 1994-1999 certain implied terms governing quality shall carry contractual force notwithstanding any agreement by the contractual parties. Such implied terms may be seen as a means to combat unfair commercial practices. That is why where there is a sale of goods in the course of the sellers' business there is an implied term that the goods will be of merchantable quality meaning goods which are fit for the purposes they are to be used for and that a reasonable person would consider them to be, taking into consideration their description, price and other relevant circumstances.

Furthermore, where a seller during his course of business is made aware by the buyer expressly or impliedly, of the particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract will be reasonably fit for that purpose except where the circumstances show that the buyer has not relied or it is unreasonable for him to rely, on the seller's and judgment.

Under s. 5 of the Sale of Price and the Unitary Price of Products Act of 2000 a trader who sells or displays products for sale to consumers is obliged to ensure that the products are marked with the selling price as well as the price per unit. Otherwise is subject to s.9 on conviction to imprisonment not exceeding six months or to a fine not exceeding CY 1,000 or both. This provision has the effect of combating unfair commercial practice because it prevents misleading assumption as to the price of the product enabling consumers to compare prices of products offered to them.

Under s.4 of the Protection of Competition Act of 1989-2001, based on Article 81 ECT, which constitutes the foundations of competition policy in Cyprus together with the Control of Concentrations between undertakings Act of 1999, all agreements between undertakings, which have as their object or effect the prevention, restriction or distortion of competition within the Common market, are prohibited. While the said provision regulates market behaviour, it aims to consumer protection despite the fact that such an explicit language is not used.

The prohibition of abusive exploitation of a dominant position by one or more undertakings, which is prohibited under section 6 of the Protection of Competition Act of 1989, based on Article 82 ECT, serves to maintain openness in the market, which ultimately benefits the interests of the consumers and competitors imposing a duty of fair-trading although not expressly stated. In this way practices affecting trade-restricting competition in Cyprus are prohibited and or controlled without distorting the interests of consumers and competitors in the market.

#### *Self-Regulation*

Self-regulation is a method of control of unfair commercial practices in Cyprus, especially in the field of misleading and non-permissible comparative advertising, to be fully analyzed below.

#### **ii. Does a general clause on unfair commercial practices exist?**

There is no general clause on unfair commercial practices. However, a various number of legislative provisions deal directly or indirectly with practices which might be considered as unfair, as it has already been analyzed above.

#### **iii. Who or what is protected by these provisions (e.g. consumers, customers in general, competitors, functioning of markets)?**

The legislative provisions, which deal with practices which might be considered as unfair, as it has already been analyzed above, have the effect of protecting all these categories directly or indirectly depending on the nature of each applicable Act. For example, the Control of Misleading and Comparative Advertising Act of 2000 offer protection to consumers, customers in general, competitors and functioning of the market. The Trade Description Act of 1987-2000 protects consumers, customers in general, competitors and functioning of the market. The Sale of Goods Act of 1994-1999 offers protection to consumers and customers in general. The Act Regulating Consumer Protection in relation to Certain Aspects of the Sale of Consumer Products and Relevant Guarantees Act of 2000 was enacted to offer an effective protection to consumers when they enter into a contract for the purchase of consumer products. The Distance Marketing of Consumer Financial Services Act of 2004 offers protection to consumers and

functioning of markets. The Unfair Terms in Consumer Contracts Act of 1996-2002 protects consumers only. The Inscription of the Sale of Price and the Unitary Price of Products Act of 2000 protects consumers.

**iv. Are there definitions of consumers, specific groups of customers, such as “vulnerable consumers” or “children”, are there definitions of “business”, “trader” or similar terms?**

There are no definitions of specific groups of customers, such as “vulnerable consumers” or “children”. Nevertheless, the Radio and Television Stations Act of 1998 and the Code of Advertising grant special protection to children. This can be seen in various sections of the said Act and Code of Advertising. For example, under s. 33 (6) (a) advertisement of alcohol containing drinks shall not be addressed in particular to minors nor to present minors consuming alcohol containing drinks. However, there are various definitions of “consumers” as well as definitions of “business”, “trader” which vary in accordance with the context of each Act.

A “consumer” is generally defined as a natural person engaged in a non-commercial, non-business, non-professional activity. Some of the most important instances are found in s.2 of the Distance Marketing of Consumer Financial Services Act of 2004, s.2 of the Act for the Conclusion of Consumer, Distance Contracts of 2000, s.2 of Unfair Contract Terms Act of 1996, s. 2 of the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Act of 2000 and s.2 of the Act for the Consumer Contracts Concluded away from Business Premises of 2000.

“Business” is generally defined as a trade or profession and the activities of any government department or local or public authority. An example of such a definition is found in s. 2 of Unfair Contract Terms Act of 1996-2002.

A “trader” is generally defined as any natural or legal person, who acts in the course of a trade, business or profession either on his own behalf or through another person. An example is found s.2 of the Act for the Consumer Contracts Concluded away from Business Premises of 2000 and s.2 of the Inscription of the Sale Price and the Unitary Price of Products Act of 2000.

**v. How are rules on fair commercial practices interpreted (e.g. by public authority, case law, codes of conduct)?**

There are no general rules on fair commercial practices. However, the legislative provisions, which deal directly or indirectly with practices which, might be considered as unfair, as explained above, are generally interpreted by the courts. Nevertheless, the interpretation of the terms referred to in the Act, dealing directly or indirectly with unfair commercial practices, as explained aforesaid, is given by the Attorney-General.

Nevertheless, the Competition and Consumer Protection Service under the auspices of the Ministry of Commerce, Industry and Tourism plays a major role in interpreting legislative provisions dealing directly or indirectly with unfair commercial practices.

Self-regulation and Codes of Conduct are of importance in relation to advertising. The Code of Journalistic Ethics controlling inaccurate, misleading, imaginary and distorting information or

comments as well as the Code of Advertising, controlling misleading and false advertisements are interpreted by the Cyprus Radio Television Authority. An appeal may be filed at the Supreme Court against decisions of the Cyprus Radio Television Authority.

**b. Provisions on specific Issues**

**i. Are there other provisions and case law prohibiting misleading advertising?**

Misleading advertising can be prohibited by legislation as well as by self-regulation.

*Legislation*

The most important provisions aimed at prohibiting misleading advertising are found in the Trade Description Act of 1987-2000, the Inscription of the Sale Price and the Unitary Price of Products Act of 2000, the Package Travel, Holidays and Tours Act of 1998 and the Control of Misleading and Comparative Advertising Act of 2000. Misleading advertising may also constitute a civil wrong on the basis of injurious falsehood and/or defamation claiming damages suffered as a result (*Attorney-General and others v Thamira Food Manufacturers Ltd*)<sup>2</sup>.

Under s. 16 of the Trade Description Act of 1987- 2000 a person involved in any advertising containing inaccurate or misleading trade description commits a criminal offence and the offender on conviction shall be liable to a fine not exceeding seven hundred and fifty pounds or to a term of imprisonment not exceeding twelve months or to both.

Also under s. 7(2) of the abovementioned Act a trade description used in an advertisement in relation to any class of goods shall be taken as referring to all goods of the class, whether or not in existence at the time the advertisement is published.

Moreover under s. 12(1)(c) of the abovementioned Act, where an advertisement through which the persons can be supplied directly with goods without previously being tested, the advertisement shall contain a clear indication of the country of manufacture or production of the goods. For example where a commodity is offered through a catalogue and the consumer does not have an opportunity for a previous examination of the goods in addition to the proper description, it is required that the advertisement shall contain clearly the country of origin.

Under s. 6 of the Inscription of the Sale Price and the Unitary Price of Products Act of 2000, implementing Directive 98/6/EC, it is provided that the selling price and the price per unit of a product shall be mentioned during the advertisements of such products. Otherwise the offender, in case of charge, is subject to imprisonment not exceeding six months or to a fine not exceeding one thousand pounds or to both. Such provision aims to combat misleading advertising as to prices of products.

Under section 4 (1) of the Package Travel, Holidays and Tours Act of 1998 no organizer or retailer shall supply to a consumer any descriptive matter concerning a package, the price of a package or any other conditions applying to the contract, which contains misleading information. This provision aims to protect the issue of advertisement leaflets, which contains misleading information.

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<sup>2</sup> Civil Appeals No. 11146 and 11163, 6 February 2004.

The Control of Misleading and Comparative Advertisements Act of 2000 is considered as the main Law aimed at prohibiting misleading advertising since EC intervention. Where the Director of the Competition and Consumer Protection Service, following an examination of a complaint or on his own motion under section 6 of the abovementioned Act, considers that the advertisement is misleading, he may apply to the Court for the issue of prohibitory or mandatory Order, including an interim order against any person that is likely to or is involved with the issuing or publication of the advertisement. The Director must bear in mind the interests at stake, particularly the public interest and consider that the encouragement of advertisement censor by autonomous organizations or associations is desirable.

The Control of Misleading and Comparative Advertising Act of 2000 is not considered an effective piece of legislation to prohibit misleading advertising for the benefit of the consumers, the competitors and the public in general, because of the following reasons:

1. It is difficult to judge under the Misleading and Comparative Advertisements Act of 2000 when advertising is misleading/open-ended notion of “misleading advertising”. Under s. 2 of the said Act, misleading advertising means any advertising, which in any way 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, is likely to injure a competitor.
2. The Director of the Competition and Consumer Protection Service is granted with a power under the said Act to apply to the Court for the issue of prohibitory or mandatory Order, including an interim order against any person that is likely to or is involved with the issuing or publication of misleading advertising. However, he shall first report the issue to the Attorney General who shall first examine whether the advertisement is a misleading one and then proceed by an application for the issuing of an order. This procedure will take approximately two months to bring the requested result and in the meantime the misleading advertisement shall be advertised without being prohibited, damaging the interests of the consumer. As a result no injunctions have been issued on the basis of the said Act preventing misleading advertising.
3. The said Act does not provide for commencing a legal action against the person who advertised misleadingly nor imposes criminal sanctions such as fines on traders who advertise misleadingly, unless the case falls within the scope of Criminal Act such as a false trade description. This is the reason for the absence of any relevant case law in relation to the said Act.

It has now been proposed by the Competition and Consumer Protection Service of the Ministry of Commerce, Industry and Tourism to amend the said Act so as to provide an effective protection for the consumers and competitors, providing for the punishment of the offender. However, it is anticipated that these problems will be overcome with the transposition and implementation of the Directive on Unfair Commercial Practices.

#### *Self-Regulation*

Self-regulation has always been considered as a method of control over misleading advertising in Cyprus.

Since Article 5 of the EC Directive 84/450 on misleading and comparative advertising does not exclude self-regulatory bodies from exercising control over misleading advertising, the Control of Misleading and Comparative Advertisements Act of 2000, implementing said Directive,

contains provisions, which support indirectly self-regulation. For example it is expressly stated in s. 8 that “legally established organizations having an adequate legitimate interest” have the power to apply before the Court for the issuing of a prohibitory or mandatory order, including an interim order against any person who may have been or is possibly involved in the issuing or publication of the advertisement. s. 8 of the Control of Misleading and Comparative Advertisements Act of 2000 supports self-regulation indirectly because it allows self-regulatory bodies having an adequate legitimate interest to apply before the Court for the issuing of a prohibitory or mandatory order against any person who may have been or is possibly involved in the issuing or publication of a misleading advertisement. It is therefore clear that the law, as it stands, does not exclude voluntary control of misleading advertising by self regulatory bodies but on the contrary it supports it.

Also, the Union of Journalists, the Association of Publishers, the Public Service Broadcasting and the owners of the private Radio and TV Stations have jointly adopted in April 1997 a Code of Journalistic Ethics, as a self-regulation system. Its implementation is monitored by a Committee consisting of individuals appointed by the media organizations themselves. Among the aims of the Code of Ethics, the Media must ensure that no inaccurate, misleading, imaginary or distorting information or comments are published.

Transmission of advertisement by private media is subject to the general principles governed by the Code of Advertising.<sup>3</sup> Subject to this Code of Advertising any advertisement, which is misleading or false, is prohibited. Under the said Code the advertisements shall be in accordance with the Trade Description Act. That is why it is not allowed for any advertisement to contain any kind of description, which directly or by conclusion misleads for the product or for the service advertised as well as for the fitness, for the purpose advertised or for the price of the product. In particular an advertisement leading a person to believe that the advertised product or an ingredient of the advertised product is of special quality or has a special capacity, which is unknown or can not be identified, is prohibited. Also advertisements of toys or other products concerning children shall not mislead a child, taken into consideration the immature judgment of the child.

The Cyprus Radio Television Authority, which among its competencies under s. 3 of the Radio and Television Stations Act of 1998, is to examine that the provisions of the said Act, the Regulations issued under the said Act and the Code of Journalistic Ethics are preserved, is empowered under the s.3 of the Radio and Television Stations Act of 1998, among others, to sue and be sued and review on its own motion or by complaint whether an advertisement is misleading and impose an administrative fine or give a warning as it thinks proper under the circumstances.

For example in the case of *Cyprus Radio Station Authority v Antenna Station*<sup>4</sup>, the Cyprus Radio Station Authority examined on its own motion the transmission from Antenna Station of an advertisement of the beer “Leon” on 18/12/2003. It could lead to the assumption that the consumption of alcohol was interlinked with driving, in violation of s. 33 (6) of the Radio and Television Stations Act of 1998, which provides that the advertisement of drinking alcohol shall not create the assumption that it is interlinked with driving. As a result, the advertisement was withdrawn and the examination came to an end.

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<sup>3</sup> Regulation 50 of the Radio and Television Stations Regulations of 2000, Appendix IX of the Radio and Televisions Stations Law of 1998.

<sup>4</sup> Case No. 7/2004(1).



This is also evident in s. 6 (3)(b) where the Director of the Competition and Consumer Protection Service in exercising the powers vested in him by virtue of this Act, shall take into account the public interest in conjunction with the fact that the encouragement of the voluntary control of the advertisements by autonomous organizations, associations or unions is desirable.

Also it is open for a private individual, such as consumer, to apply for such an order. However, there have not been any cases where a consumer applied for such an order either because of the costs involved or because the impact on consumer is negligible.

Where the relevant court is satisfied that the advertisement for which the application has been submitted is misleading, the Court may issue under s. 9 of the said Act a prohibitory or mandatory order under such conditions that it deems necessary, provided it is satisfied that the advertisement for which the application has been submitted is misleading, taking into account the public interest. The Court may order the immediate cessation of the misleading advertisement, the taking within a specified time-limit of such correction, according to the Court's opinion measures, aiming at the removal of the unlawful situation created by the infringement to which the application relates or any other measure deemed necessary or reasonable under the circumstances of the specific case.

## ii. Are there other provisions and case law regulating comparative advertising?

Comparative advertising may be mainly regulated by sections 25 and 35 of the Civil Wrongs Act (Cap. 148), s.10 of the Trade Description Act 1987-2000, s.14 of the Trade Marks Act, Cap. 268, sections 4, 6 and 9 of the Control of Misleading and Comparative Advertising Act of 2000, as well as by self-regulation.

Section 35 of the Civil Wrongs Act (Cap. 148) makes it an actionable wrong for a person to represent that his goods are those of another in such a manner as to deceive an ordinary purchaser. In the case of *Universal Advertising and Publishing Agency and Others v Vouros*<sup>5</sup> it was established that a trader must not only refrain from passing off his goods as those of another but also from making any such representation in respect of his business despite the narrow definition contained in s. 35. In this case the plaintiff respondent was the publisher of a commercial directory. The defendants/appellants wished to publish a similar directory and in doing so passed off their business as that of the respondent. Section 35 of the Civil Wrongs Act as explained above makes it actionable wrong for a person to represent that his goods are those of another in such a manner as to deceive an ordinary purchaser. At common law it is actionable to make such a representation in respect of a business as well as of goods. Section 28 (1) of the Courts of Justice Act, Cap II applies the common law to Cyprus, 'save in so far as other provision has been or shall be made by the law of the Colony'. It was decided that it could not be implied that neither the legislative authority in enacting s. 35 of the Civil Wrongs Act intended to exclude the common law tort of passing off a business, nor had the legislative authority by enacting s. 35 to make provision for all actions of passing off.

In *Adidas Sportschuhfabriken Adi Dassler KG v The Jonitexo Ltd*<sup>6</sup> the essential ingredients of the tort of passing off were set up, following the English case of *Erven Warnink v J Townend & Sons*<sup>7</sup>. That is why for the plaintiff to succeed in a passing off action he must prove: a right to

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<sup>5</sup> 19 CLR 87.

<sup>6</sup> (1987) 1 CLR 383.

<sup>7</sup> (1979) 2 ALL ER 927.

the use of the mark to the exclusion of the defendant established by reference to the association of the mark with the products of the plaintiff, imitation or copying of the mark of the plaintiff by the defendant in the proceed of manufacture or sale of the products, likelihood of confusion on the part of the ordinary purchaser arising from the imitation of the mark and damage resulting there from.

Furthermore, in *General Biscuit Co GB Co v Geo M Hadjikyriakos Ltd*<sup>8</sup> it was stated that the Court must be satisfied that the defendant's conduct is calculated to pass off other goods as those of the plaintiff or, at least, to produce such confusion in the minds of probable customers or purchasers or to other persons with whom the plaintiff has business relation as would be likely to lead to other goods being bought and sold for his.

Furthermore, comparative advertising may be regulated under s. 25 of the Civil Wrongs Act (Cap. 148) which provides that a person shall recover compensation in respect of an injurious falsehood in the event where he has suffered special damage thereby. Injurious falsehood consist of the malicious publication by any person of a false statement, whether oral or otherwise concerning the profession, trade, business or the goods or the title to property of any other person.

Under s. 10 of the Trade Description Act 1987-2000 no person shall in the course of any trade or business give by whatever means any false indication, direct or indirect that any goods or services supplied by him are of a kind supplied to any person.

Under s.14 of the The Trade Marks Act (Cap. 268) no trade mark shall be registered in respect of any goods or description of any goods or services that is identical with a trade mark belonging to a different owner and already on the register in respect of the same goods or deception of goods or services or that so nearly resembles such a trade mark as to be likely to deceive or cause confusion. The possibility for the trade marks to be confused is not satisfactory. It must be shown by evidence that the trade marks can confuse or mislead a person. This was the ruling in the case of *Philip Morris Products Inc v Republic of Cyprus*<sup>9</sup> where Philip Morris Products Inc. of the United States after filing an opposition for the registration of the trademark 'FREMA' by the Company Frema Tobacco International Ltd, which was subsequently dismissed by the Registrar of Trade Marks, appealed on the basis of sections 13 and 4 of the aforesaid Act.

The Control of Misleading and Comparative Advertisements Act of 2000 is the main legislative method of control of comparative advertising since EC intervention protecting both the interests of the consumer as well as competitors. Under s. 4 of the abovementioned Act, a comparative advertising shall be permitted where any of the following conditions are met. Firstly, it is not misleading under the latter Act. Secondly, it compares goods or services meeting the same needs or intended for the same purposes. Thirdly, it objectively compares one or more material, relevant, verifiable and representative features of those goods or services, which may include price. Fourthly, 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, services and those of a competitor. Fifthly, it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor. Sixthly, for products with designation of origin it relates in each case to products with the same designation. Seventhly, it does not take unfair advantage of a trade mark, trade

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<sup>8</sup> (1980) 1 CLR 80, at p.85.

<sup>9</sup> Case No. 255/2002, 15 May 2003.

name or other distinguishing marks of a competitor or of the designation of origin of competing products. Eighthly, it does not present goods or service as imitation or replica of goods or service bearing a protected trade mark or trade name.

The examination for non-permissible comparative advertisement is performed by the Director of the Competition and Consumer Protection Service of the Minister of Trade, Industry and Tourism under s. 6 upon the submission of a complaint or on his own motion. Prior to the examination of any complaint, the Director may require from the complainant to satisfy him that he has applied to the relevant established mechanisms for dealing with complaints, that a reasonable opportunity was given to deal with the complaints through those mechanisms and that the complaints had not been adequately dealt under such mechanisms. The Director must bear in mind the public interest and that the encouragement of the voluntary control of the advertisements by autonomous organizations, associations or unions is desirable. The Court may order under s.9, for the protection of all interests involved, the immediate non-repetition of the non-permissible comparative advertisements, its prohibition if the non-permissible comparative advertisement has not yet been published, or any other act or measure deemed necessary or reasonable under the circumstances of the specific case.

Under the said Act the Director is empowered, after examining and determining that the advertisement in question is a non-permissible comparative advertisement, to apply to the Court for the issuing of a prohibitory or mandatory order, including an interim order against any person that is likely to or is involved with the issue or publication of the non-permissible advertisement. Nevertheless, in practice such a power granted to the Director is not effective because the Director is obliged to refer the issue of a non-permissible comparative firstly to the Attorney-General, who shall first examine whether the advertisement is a non-permissible comparative advertisement and then proceed by an application for the issue of an order. In practice this procedure will take approximately two months and in the meantime the non-permissible comparative advertisement shall be advertised without being prohibited, as explained in the case of misleading advertising. That is why no injunctions have been issued on the basis of the said Act preventing non-permissible comparative advertising. The said Act provides neither for the start of a legal action against the person carrying out a non-permissible comparative advertising nor for his punishment. There is thus no relevant case law in relation to the said Act. In view of the aforesaid concerns, the Control of Misleading and Comparative Advertising Act of 2000 is considered a weak Act for the protection of the interests and rights of the consumers and competitors in relation to non-permissible comparative advertising as it is the case for misleading advertising. Even though it has been proposed by the Competition and Consumer Protection Services to amend the said Act so as to effectively protect consumers and competitors, it is anticipated that these concerns will be reflected by the Council of Ministers in an effective piece of legislation, implementing the Directive on Unfair Commercial Practices.

#### *Self-Regulation*

Self-regulation has always been considered as a mean of regulating comparative advertising as it is the case in relation to misleading advertising. Since Article 5 of the EC Directive 84/450 does not exclude self-regulatory bodies to exercise control over non-permissible comparative advertising, the Control of Misleading and Comparative Advertisements Act of 2000, implementing the said Directive, as it has already been explained, can be seen as a mean of supporting self-regulation indirectly for the same reasons explained in the case of misleading advertising, analyzed aforesaid.

Under the Code of Advertising<sup>10</sup>, any kind of imitation, which is able to mislead listeners or spectators, is prohibited. Further, the advertisements shall not denigrate or make an unfair reference to goods and or services belonging to others. Also, competitive allegations in advertisements which are based on evidence are permissible so far as they do not mislead. Finally, the advertisements shall not contain denigrated references to any other products or services.

### iii. Are there other provisions and case law regulating aggressive practices?

There are no express provisions regulating aggressive practices because there is no such legislation at community level to be transposed and implemented by Cyprus by virtue of the *acquis communautaire*. However certain legislative provisions under Contract Law, Cap. 149, and the Code of Advertising<sup>11</sup>, can be seen as means to regulate aggressive practices in Cyprus within the framework of the interpretation of “aggressive practices” given under Articles 8 and 9 of the Directive on Unfair Commercial Practices.

Where an agreement was concluded without the free consent, such as by coercion, fraud or misrepresentation under s. 19(1) of the Contract Law, Cap. 149 or where consent to an agreement is caused by undue influence under s. 20(1) of the abovementioned Law, the agreement can be considered void.

Commercial advertisements, which exploit superstition or a sense of fear, are prohibited by the Cyprus Code of Advertising.

Also, this Code prohibits advertisements addressed to children implying that in the event where they did not purchase a product they will omit to carry out a law-abiding duty towards a particular person.

Furthermore, those advertisements, which lead children to believe that they will be in a sense inferior from other children or will be subject to contempt or sarcasm for not acquiring an advertised product, are prohibited.

Moreover, advertisements of toy products shall only be transmitted in compliance of s. 34(4) of the Radio and Television Stations Act of 1998, which prohibits the advertisement of toy products unless during the permitted hours. An example is the case of *Cyprus Radio Station Authority v Logos Station*<sup>12</sup>. In this case the Cyprus Radio Station Authority after examining on its own motion the transmission of advertisements of toy products by the TV Station ‘Logos’, during prohibited time hours between 1/12/2002 and 15/12/2002 under the Radio and Television Stations Act of 1998, judged that there had been seventy four infringements of the Radio and Television Stations Act and imposed an administrative fine of CYP 12.000.

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<sup>10</sup> See Footnote 3.

<sup>11</sup> Ibid.

<sup>12</sup> Case No. 5/2003(2), 10 September 2003.

**iv. Are there provisions and case law regulating special marketing techniques?****1. Distance Marketing***Cold Calling/E-mail Spamming*

It can be inferred from s. 14(2) of the Act for the Conclusion of Consumer Distance Contracts of 2000 and s. 18(2) of the Distance Marketing of Consumer Financial Services Act of 2004 that all types of distance communications other than automatic calling machine and faxes, which allow individual communication, such as cold calling and e-mail spamming, shall not be allowed to be used in the event where the consumer does not object to it.

*Automated Calling Devices/Fax/Telephone*

Under s. 14 (1) (a) and (b) of the Act for the Conclusion of Consumer Distance Contracts of 2000, the use by a supplier of an automated calling machine and fax in the cases of distance contracts relating to the provision of goods and or services requires the prior consent of the consumer.

Under s.18(1) of the Distance Marketing of Consumer Financial Services Act of 2004 the use of automated calling machines and fax machines in relation to distance market financial services is prohibited unless there is the prior consent of consumer.

Under s.6 of the Distance Marketing of Consumer Financial Services Act of 2004, telephone communications require a supplier to *inter alia* state at the beginning of any conversation with a consumer the identity of the person in contact with the consumer and his or her link to the supplier, the purpose of the call, and a description of the main characteristics of the financial service.

In the case of telephone communications in respect of a distance contract for the supply of goods or the provision of services, the identity of the supplier and the commercial purpose of the call shall be made explicitly clear at the beginning of any conversation with the consumer under s. 5 (3) of the Act for the Conclusion of Consumer Distance Contracts for 2000.

*E-Commerce*

In compliance with the *acquis communautaire* the Certain Legal Aspects of Information Society Services Act of 2004, implementing the E-Commerce Directive 2000/31 EC, has recently been enacted establishing the general framework for the development and promotion of e-commerce in Cyprus, identifying the duty and obligations of the providers of services aimed at securing the interest of consumers in the field of information. The aim of the new act is to ensure the free movement of information society services between Cyprus and the other member states. E-Commerce Agreements are allowed to be used under s. 12(1) of the said Act unless exempted under s.1 (2).

*Unsolicited Goods*

Under s 13 (2) of the Act for the Conclusion of Consumer, Distance Contracts of 2000 where a consumer receives goods which he/she did not order before and during a period of thirty days, starting from the date of receipt, neither the supplier nor any other authorized person acting on his behalf required the return of these goods, the consumer may use, deal with or dispose these goods in such a manner as if they were made to him as an unconditional gift, and the rights of the supplier or other person acting on his behalf during the dispatch of the goods shall be forfeited.

Also under s. 13(1) inertia selling in relation to distance contract relating to the provision of goods and/or services is prohibited.

## 2. Face to Face Marketing

### *Door-to-Door Selling*

Door-to Door Selling is regulated under the provisions of the Act for the Consumer Contracts Concluded Away from Business Premises of 2000. Under s.5 no contract concluded away from business premises shall be enforced against the consumer unless it is in writing and states the date of contract, name, telephone number and address of trader in a clear and legible form, describes in detail the supplied goods and/or services, includes in a clear and legible form the fundamental term of the contract that the consumer may renounce, it is accompanied by the renunciation form, states the name and address of the person to whom the renunciation notice may be sent and is signed by a trader and consumer.

### *Touting for consumers in public places/snowball systems/Multi-Level-Marketing*

No specific provisions or cases.

## 3. Price Reduction Techniques

### *Sale at Loss*

There is no express provision or restriction on the Sale at Loss.

### *Liquidation Sales*

Liquidation sales or sales during the period of demolition or movement of the business construction are permissible under s. 4 of the Conditions for Advertising or Announcement of Sale of Products on Sale Prices Act of 1990. In general sales take place within restricted and indicated time period during February and August each year under section 3 (1) of the abovementioned act. Section 3 (2) of the said Act requires a business offering goods on sale to insert a label on the goods offered on sale of the pre-sale and sale price. However, the said Act has been proposed to be amended on the basis of being an unconstitutional piece of legislation.

### *Free Gifts*

Under the Code of Advertising it is prohibited to advertise a product addressed to children in conjunction with a free gift when the advertisement places disproportional emphasis on the free gift (*Cyprus Radio Station Authority v Capital TV*).<sup>13</sup>

## v. Are there specific provisions and case law regarding information requirements (e.g. rules that impose on traders a duty to disclose to the consumer all “material information”)?

Even though the issue of disclosure of relevant information is rather dealt with by contract law, there are certain information requirements established by community law and implemented under Cyprus law in relation to commercial communication, which are considered to be “material” under Article 5 of the Directive for Unfair Commercial Practices. Among the most

<sup>13</sup> Case No.45/2003(57), 12 November 2003.

important instances are found in the Package Travel, Holidays and Tours Act of 1998, the Conclusion of Consumer Distance Contracts of 2000 and the Distance Marketing of Consumer Financial Services Act of 2004.

Under s.4(1) of the Package Travel, Holidays and Tours Act of 1998, based on Article 3 (1) of Directive 90/314/EEC on package travel, package holidays and package tours, the organizer shall not supply to a consumer any descriptive matter concerning a package, the price of a package or any other conditions applying to the contract, which contains any inaccurate to an essential degree information or misleading information or any information that might lead to deception.

Also under s. 5(1) of the abovementioned Act, based on Article 3(2) of Directive 90/314/EEC, the organizer shall not distribute a brochure, or allow or tolerate the distribution of a brochure to a possible consumer for his account, unless it indicates in a legible, comprehensible and accurate manner the total price including any additional charges and adequate information about the matters specified in Schedule I of this Act.

Under section 5(1) of the Conclusion of Consumer Distance Contracts of 2000, based on Article 4 of Directive 97/7/EC, the consumer must be provided with the necessary information prior to the conclusion of a distance contract falling under the said Act such as the identity of the supplier, the main characteristics of the good or service, the price including all taxes, the delivery costs where appropriate, the method of payment, delivery or execution of the contract, the existence of the right for cancellation, the duration of validity of the offer or the price etc.

Also under s.6(1) of the abovementioned Act, based on Article 5 of Directive 97/7/EC, the consumer must receive written confirmation or confirmation in another durable means of communication available and accessible to him and in the language used during the offer or the conclusion of the contract in due time during the performance of the contract.

Under s. 4 of the Distance Marketing of Consumer Financial Services Act of 2004, based on Article 3 of Directive 2002/65/EC, concerning the distance marketing of consumer financial services, the supplier is required to supply to the consumer in good time before the consumer is bound by a distance contract a whole host of information on the supplier, the financial services, the distance contract and redress. This aims to prevent inappropriate influence on consumer's decision making and to guarantee essential information prior to the conclusion of the above-mentioned contract.

Furthermore, under s. 8 of the abovementioned Act, based on Article 4 of Directive 2002/65/EC, where there are provisions in the community legislation governing financial services, which contain prior information requirements additional to those, listed in s.4, these requirements shall continue to apply.

**vi. Are there specific provisions and case law concerning specific sectors (e.g. final consumers)?**

There is neither a general rule of special protection for such final consumers nor any developed category of final consumer known under Cyprus law. However, some legislative provisions may be regarded as making an assumption about the existence of final consumers. For example under s. 4 of the Act for the Consumer Contracts Concluded away from Business Premises of

2000, contracts for the supply of foodstuffs, beverages, or other goods intended for current consumption in the household and supplied to a consumer by a trader during his regular visits that take place away from his business premises are excluded from the provisions of the said Act.

Nevertheless, there are specific provisions in respect of specific sectors such as the case of advertising by lawyers. Advertising by lawyers is subject to the Professional Code of Conduct, which is issued in accordance with Articles 24(1)(b) and (i)(b) of the Advocates Act, Chapter 2. In general there is a general liberalization of rules of professional conduct in Cyprus because according to Regulation 19 (1) of the Professional Code of Conduct advertising of the professional activities of a lawyer or a law firm in Cyprus and abroad is permitted to the extent determined by the Regulations of the Professional Code of Conduct and in a manner which comply with the weight and dignity of the profession. However incorrect, untrue, misleading and comparative advertising is prohibited under Regulation 19 (2).

**vii. What are the national laws of post-contractual and after-sale commercial practices?**

After-sale commercial practices can be found in general provisions promising after-sale assistance, which is mostly dealt by contract law. An example is s. 6 (3) (c) of the Act for the Conclusion of Consumer, Distance Contracts of 2000 where it is provided that in the case of distance contracts the supplier must provide information on existing after-sales services and commercial guarantees.

Also under s. 9(2) of the Distance Marketing of Consumer Financial Services Act of 2004 the obligation to supply information can be delayed until after the conclusion of the contract but only when the contract has been concluded at the consumer's express request using a means of distance communication which does not enable the supplier to communicate to the consumer the whole host of information required to be provided under the said Act prior to the conclusion of the distance contract.

Moreover, under the Act Regulating Consumer Protection in relation to Certain Aspects of the Sale of Consumer Products and Relevant Guarantees Law of 2000, if the goods supplied to the consumer, are not in accordance with the description applied by the seller, or they are not suitable for any specific use which the consumer demands and which use was notified by the consumer to the seller at the time of the contract, or they are not suitable for the use for which such goods are usually intended, or they do not have the quality which may be reasonably expected by the consumer, the consumer is entitled either to a free of charge repair or a replacement of the product, or to an appropriate reduction in the product's price or to a repudiation of the contract as far as the said product is concerned.

**viii. Are there provisions and case law on handling complaints?**

Consumers have the option either to report a complaint to the Competition and Consumer Protection Service under the auspices of the Ministry of Commerce, Industry and Tourism or to the Cyprus Consumer Association. This option of complaints encourages active consumer participation and strengthens self-regulation.



The Acts containing provisions, which can be seen as general provisions on unfair commercial practices, as explained above, impose a duty either to the Competition and Consumer Protection Service of the Ministry of Trade, Industry and Tourism or its Director to examine upon submission of a complaint any violations of the provisions of any applicable Acts. Some of the most important instances can be found under s. 19(1) of the Distance Marketing of Consumer Financial Services Act of 2004, (24(I)/2004), s.16(1) of the Act for the Conclusion of Consumer, Distance Contracts of 2000, s.9(1) of the Certain of the Sale of Consumer Goods and Associated Guarantees Act of 2000.

Moreover under s. 6(1) of the Control of the Misleading and Comparative Advertisements Act of 2000 the Director of Competition and Consumer Protection Service has a duty for the benefit of the consumers, the competitors and the public in general to examine upon submission of a complaint or on his own motion whether an advertisement, which has been published is imminent, misleading or a non-permissible comparative advertisement.

Also under s.9 (1) of the Unfair Terms in Consumer Contracts Act of 1996-2002 the Director of the Service has a duty to consider any complaint made to him in respect of unfair terms. The Service passes the complaint through a screening process and if it is satisfied under the provisions of the applicable act, the Director of the Division has standing to apply to the Court. A number of Acts also recognize standing to individuals or incorporated consumer associations.

The Cyprus Consumers Association runs a complaints and advice service. By virtue of the latter service consumers can file a complaint for faulty, damaged or unsatisfactory products or services such as misleading advertising. The personnel of the Consumers Association are responsible for dealing with such complaints or in conjunction with the relevant governmental departments. In general the Cyprus Consumers Association refers the matters to the Competition and Consumer Protection Service, which examines the case in co-operation with the Cyprus Consumer Association.

In addition complaints can be dealt at a self-regulatory level. A consumer can seek remedy by independent mechanisms, such as the Cyprus Radio Televisions Authority, which is an independent body established by the Radio and Television Station Act of 1998, empowered to deal with complaints in respect of the violations of provisions of the Radio and Television Stations Act of 1998 among others.

Complaints can be also submitted at the Commission for the Protection of Competition. Section 22 of the Protection of Competition Act of 1989-2001 empowers the Commission for the Protection of Competition, (C.P.C), which is an independent service, to investigate complaints by natural or legal entities that have a legitimate interest on agreements, practices or decisions between undertakings or are affected by an exclusive conduct of a dominant undertaking and, in turn, these practices affect trade and restrict competition within the Republic. The C.P.C is under a duty to consider the issue and if it merits that there is a prima facie case, the Service is instructed to conduct an investigation.

Also complaints can be submitted in Cyprus through the Solvit and Eagenet complaint forms. There are specialist officers at the Competition Committee and Consumer Protection Service of the Ministry of Commerce, Industry and Tourism, who are dealing with such complaints.

## **II. Possible obstacles to the Directive on Unfair Commercial Practices from the national law perspective**

### **a. What are the main obstacles from the point of view of your country, which might result, complicate transposition and implementation of the Directive?**

In general there are no main obstacles, which might as a result complicate the transposition and implementation of the Directive. Cyprus has already harmonized its law and regulations in relation to consumers' protection to a great extent, complying with the *acquis communautaire*. It is not by chance that the Directives and regulations of the EU have been immediately adjusted in the domestic system. There is no reason why the Directive on Unfair Commercial Practices will not follow the path of the previous ones.

The transposition and implementation of the Directive will be the means for the correct intervention in the market since there are no uniform rules on the protection of consumers in Europe from unfair commercial practices. It will set the foundations for a stricter, clearer and unequivocal protection of consumers from unfair commercial practices and indirectly legitimate businesses from their competitors. One can not underestimate the fact that since Cyprus's accession in the European Union the priority is the European consumer and not the consumer in Cyprus.

Since a number of key aspects of the applicable Acts in relation to unfair commercial practices are considered to be vague, having no effect to combat unfair commercial practices in practice, such as the open-ended notion of "misleading advertising", it is of crucial importance to transpose and implement the Directive in order to overcome such problems arising under national legislation. For example the open-ended notion of misleading under the Control of Misleading and Comparative Advertisements Act of 2000 will be overcome with the implementation of the Directive which expressly states the circumstances under which a commercial practice shall be regarded as misleading.

The absence of a general legal framework of the law on unfair commercial practices in Cyprus, as explained aforesaid, may be considered as an obstacle resulting to[in] a complicate transposition and implementation of the Directive, especially due to lack of directions. However, the approach taken under Cyprus law is not very far away from the notion of a rule against unfair commercial practices. Certain number of topics covered by the Directive is dealt with provisions under national law, as it has already been explained.

The implementation of the Directive will establish a general rule of prohibition of unfair commercial practices. Commercial practices, which were neither considered as unfair nor being prohibited will now be easily prohibited under the transposition of such a general rule of prohibition of unfair commercial practices in the national law. Even though one may argue that this may lead to a case of the "floodgates argument" this will be overcome by the fact that it is desirable under the Directive that those commercial practices, which are in all circumstances unfair, be identified to provide greater legal certainty.

The issue of maximum harmonization, provided under the Directive, may lead to substantive problems at the transposition level. Yet it is anticipated that all applicable acts in relation to

commercial practices will be amended to reflect the issue of maximum harmonization unless a new Act, implementing the Directive, is enacted.

**b. Do you see any incompatibilities within your national legal system?**

In general there are no incompatibilities since Cyprus effectively implements and enforces the *acquis communautaire* of the European Union.

**c. How could the Directive be transposed into your national law?**

It could be transposed:

- a. in a new Act, implementing the Directive; or
- b. through various amended acts, amending each Act containing provisions dealing directly or indirectly with practices, which might be considered as unfair

However, the enactment of a new Act is the most preferable choice. The integration of the Directive into an existing Act is not possible because many topics are covered by different Acts, as it has already been explained. Also, the enactment of a new Act could solve the problem of amending all Acts containing provisions, which deal directly or indirectly with practices which might be considered as unfair.

**d. What would be-from the perspective of your national law-the appropriate sanctions in case of infringement of the general clause of the Directive? Is there a system to enforce the provisions on fair commercial practice? How is this organized?**

The enforcement provisions on unfair commercial practices and the imposition of sanctions under the Directive are in line with the existing legislation dealing directly or indirectly with practices, which might be considered as unfair.

Consequences of breaches of the various legislative provisions mentioned above vary between criminal sanctions, civil law remedies, injunctions or similar orders depending on each applicable Act.

*Sanctions*

It is anticipated that the appropriate sanctions would be more likely copied from the Acts dealing directly or indirectly with unfair commercial practices, as explained above.

The restraining injunction as provided under the Control of Misleading and Comparative Advertisements Act of 2000 would be one of the most important sanctions against unfair commercial practices.

Under the Control of Misleading and Comparative Act of 2000 there is no imposition of criminal sanctions neither on the person who advertised misleadingly nor on the person engaged in a non-permissible comparative advertising. However, it is anticipated that criminal sanctions would be imposed on traders engaged in an unfair commercial practice. In particular, fines or imprisonment would be imposed on offenders as it is the case under the Trade Description Act of 1987-2000. The Competition and Consumer Protection Service would be empowered to order the person who violates any provisions of the Directive to terminate the violation or to impose administrative fine as it is the case under the Distance Marketing of Consumer Financial Services Act of 2004.

*Enforcement*

There is no system to enforce the provisions on fair commercial practice since the Directive has not yet been implemented. Nevertheless, the Competition and Consumer Protection Service of the Ministry of Commerce, Industry and Tourism and the Director of such Service as well as other authorized officers are the principal enforcers of the provisions of all Acts, dealing directly or indirectly with practices which might be considered as unfair ("the applicable Acts"). Such bodies have their enforcement powers granted under the applicable Acts being empowered to submit an application for a restraining and prohibitory injunction in respect of a violation of a provision of an applicable Act, or impose an administrative fine or order the non-repetition of the violation of a provision of an applicable Act, depending on the provisions of each applicable Act. For example, the Court on application of the Competition and Consumers Protection Service of the Ministry of Commerce, Industry and Tourism is empowered to issue a prohibitory or mandatory order against any person who is liable for a violation of the provisions of certain applicable Acts, including an interim order providing for a) the immediate cessation of such violation, or b) the taking of rectifying measures within a specified time-limit which will prevent the unlawful situation created by such violation being investigated, or c) the publication of the relevant court's decision in order to remove any prejudicial consequences of the violation investigated, or d) any other act or measure necessary or reasonable under the circumstances. Some of the most important instances are found in s.17 of the Act for the Conclusion of Consumer, Distance Contracts of 2000, s.10 of the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Act of 2000 and s.14 of the Consumer Contracts Concluded away from Business Premises of 2000.

Also, lawfully established organizations or associations which either by virtue of a law or by their articles of association establish satisfactorily a legitimate interest in the protection of the collective interests of consumers, have the right under certain applicable Acts to apply to the Court for an injunction against any person who is involved in the violation of the particular Act having the effect of combating unfair commercial practices. Some of the most important instances are found in s.11 of the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Act of 2000, s.8 of the Control of the Misleading and Comparative Advertisements Act of 2000 and s.18 of the Act for the Conclusion of Consumer, Distance Contracts of 2000.

Upon transposition and implementation of the Directive it is anticipated that the Competition and Consumer Protection Service will be the enforcement authority.

**e. How would the Directive be delimited to the followings fields of law?**

Various provisions of the Directive are in compliance with provisions of the following fields of Law, with the exception of the Protection of Enterprises.

**i. Contract and Tort Law**

The Directive will be supplemented by contract or tort law in the event where an unfair commercial practice may be considered to fall under contract or tort law. It is evident that a breach of many commercial fairness rules can also constitute a breach of contract and or tort law. An unfair commercial practice may affect the validity of a contract or affect the obligations of the contracting parties giving rise to an action of duress or misrepresentation under contract law or constitute a tortious claim such as passing off or injurious falsehood. Also, where a consumer entered into a consumer contract with a trader influenced by an unfair commercial practice, such as misleading advertising, the consumer may have the right to rescind a contract on the bases of fraudulent misrepresentation under Contract Law.

**ii. Competition law (aiming at the protection of the consumer)**

An unfair commercial practice may be prohibited under Competition law if it constitutes a restrictive enterprise agreement or abuse of dominant position. That is why an agreement, which fixes directly or indirectly the purchase or reselling prices, is prohibited under Competition law.

Nevertheless, an unfair commercial practice, which may be prohibited under Competition law, may also lead to different sanctions, such as criminal ones. That is why a person applying an agreement, which fixes directly or indirectly the purchase or reselling prices, being prohibited under competition law, commits a criminal offence.

**iii. Intellectual property law (e.g. imitation)**

Violations of intellectual property rights may constitute an unfair commercial practice leading to different sanctions such as in the case of a non-permissible comparative advertising imitating the goods and services of another person, which may constitute passing off under tort law. In particular the provisions of the Directive in relation to similar trademarks in the market that may deceive or confuse the consumer are consistent with the provisions of the Trademarks Act, Cap. 268.

**iv. Protection of Enterprises (esp. SME)**

There is no specific legislation in Cyprus in the field of Protection of Enterprises so as to play a role in combating unfair practices. The issue of the Protection of Enterprises is dealt with the

rules prohibiting the abuse of dominant position under the Protection of Competition Act of 1989-2001.

**v. Product Safety and Product Liability**

A violation of the specific legislation dealing with Product Safety and Product Liability, such as the Safety of Consumer Products Act of 1994-1998 and the Defective Products (Civil Liability) Act of 1995 may constitute an unfair commercial practice notwithstanding that it is not expressly stated in the Act itself. The provisions of the Directive in respect of information requirements have already been co-existing with the provisions in respect of information requirements under the Safety of Consumer Products Act of 1994-1998.

**vi. Criminal Law**

An unfair commercial practice is interlinked with criminal law because it may constitute a crime, such as fraud or a criminal offence, such as false description. Nevertheless, there are many cases under which an unfair commercial practice may constitute a crime or a criminal offence. For example a person shall commit a criminal offence for the application of an agreement, which fixes directly or indirectly the purchase or reselling prices or other terms of transaction.

However, from the viewpoint of criminal law there is no collision with the Directive on Unfair Commercial Practices.

**vii. Public policy (questions of decency)**

An unfair commercial practice may be prohibited on the basis of public policy. For example the conclusion of an unfair distance contracts may be prohibited or restricted on public interest grounds.

In addition, the public policy is an issue to be taken into consideration when judging whether an order shall be issued by the Court combating a practice, which may be considered unfair, such as misleading advertising, non-permissible comparative advertising etc.

**f. Is there any national unfair commercial practices' law, including case law, which may constitute a barrier to the Internal market, for example case law which raises questions similar to cases like *Estee Lauder*, *Clinique* and *De Agostini***

The ban on advertising toys on TV and Radio may constitute a barrier to the Internal Market. Under section 34 (4) (a) of the Radio and Television Stations Act of 1998 such advertising is banned from morning till 10.00pm everyday. Under section 34 (4) (b) of the same Act such advertising is banned from morning till 11.00 pm:

- during school holidays, as determined in the respective Regulation of the Operation of Public Schools;
- during Saturday and Sunday;
- the days that come before the days stated in (i) and (ii).

The mentioned bans affect only the advertisements of toy products by stations which are subject to the jurisdiction of the Republic of Cyprus.

*Case Example*

The Radio and Television Stations Act of 1998 prohibits the advertisement of toy products. Section 34 (4) provides that advertisements of toy products shall only be transmitted during the permitted hours. This can be illustrated by *Cyprus Radio Station Authority v Logos Station* (case No.5/2003(2), 10 September 2003) in which the Cyprus Radio Station Authority examined the transmission of advertisements of toy products by TV Station 'Logos' during prohibited hours between 1/12/2002 and 15/12/2002. The Authority judged that there had been 74 infringements of the Radio and Television Stations Act for which an administrative fine of CYP 12.000 was imposed.





## **Czech Republic**

JUDr. Mag.iur. Michal Malacka, Ph.D.  
Palacky University

- I. Existing National Law**<sup>14</sup>
- a) General Provisions on Unfair Commercial Practices**
- i. Could you describe the general legal framework of the law on unfair commercial practices in your country (e.g. structures, main acts/statutes, leading cases, codes of conduct, self-regulation)?**

*Legislation*

The most important instrument of legal regulation of unfair commercial practices is the fifth chapter of the Commercial Code<sup>15</sup> (hereinafter referred to as ComC), which deals with the economic competition in general.

The first part of this chapter (§§ 41 to 43) deals with the participation in economic competition. It contains general provisions, such as the definition of participants in economic competition (competitors, § 41), ban on abuse of participation in the competition (§ 42), which it divides between unfair competition (which is regulated by the second part of the fifth chapter of ComC in §§ 44 to 52) and unlawful limitation of economic competition, which is governed by a special Act on protection of the economic competition (hereinafter referred to as PEC)<sup>16</sup>. Personal and territorial scope of the mentioned measures is determined in the first part as well (§ 43).

The second part of the fifth chapter (§§ 44 to 52) of the ComC deals with unfair competition. The introductory “Basic provision” contains the general clause (§ 44), i.e. the general criteria of unfair competition and the demonstrative listing of different categories of unfair competition (§ 44(2)). The following provisions of this part specify the possible unfair competitive practices. In this respect it is important to mention that the listing stipulated in the § 44(2) ComC is solely demonstrative so that other unforeseen conduct may also be considered unfair competition, in the case when it fulfils the conditions set forth in the general clause (rules for application of the general clause to other conducts are mostly set by the courts’ practice).

§ 44(2) ComC bans:

- (a) misleading advertising;
- (b) misleading labelling of goods and services;
- (c) causing possibility of confusion;
- (d) sponging on reputation of another competitor's enterprise, products or services;
- (e) bribery;
- (f) discrediting;
- (g) comparative advertising;
- (i) breach of business secrets;
- (j) endangering the health of consumers and the environment,

The Act on consumer protection<sup>17</sup> (hereinafter referred to as CP) bans:

- (a) discriminating of consumer
- (b) misleading the consumer

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14 Deepest thanks for invaluable cooperation in completing the study belong especially to JUDr. Blanka Tomančáková LL.M and Mgr. Michal Černý, Ph.D.

15 No. 513/1991 of the Collection of Acts.

16 No. 143/2001 of the Collection of Acts.

17 No. 634/1992 of the Collection of Acts.

- (c) producing, exporting, importing, selling, giving or offering of goods dangerous due to possibility of their confusion with food products
  - (d) exporting, offering or selling humanitarian material
- and sets numerous obligations regarding provision of information about goods.

The third part of this chapter (§§ 53 to 55) stipulates the legal means of protection against unfair competition, particularly the active and passive eligibility, the scope of claims deriving from the unfair competition (§ 53) and procedural specialities of such claims (§§ 54 and 55).

Specific unfair conducts stated in §§ 45 to 52 ComC can be classified into four categories with one exception.<sup>18</sup> These categories are causing possibility of confusion of goods or services with goods or services of other competitor (misleading advertising (§ 45) and causing possibility of confusion (§ 47)), stating misleading information about the qualities of goods or services (misleading labelling of goods or services (§ 46) and sponging on the reputation (§ 48)), stating incorrect information about business which could cause a harm to it (discrediting (§ 50) and comparative advertising (§ 50a)), conducts close to criminal activities (bribery (§ 49) and breach of business secrets (§ 51), with the exception of an unfair competitive conduct causing health or environmental hazard (§ 52), which is rather new and still needs to be developed by the practice. A special category is constituted by the so-called innominate unfair competitive conducts, which will be mentioned in connection with the general clause.

Even though the phenomenon of unfair competition is closely related to economic competition which is regulated by PEC, legal means protecting economic competition and unfair competition are strictly separated. § 42(2) ComC expressly leaves the protection of economic competition to a special act (PEC) and this Act expressly excludes the unfair competition from its scope.

Another relevant legal instrument of protection against unfair commercial practices is the Civil Code (hereinafter referred to as CC).<sup>19</sup> On one hand it is applied as a *lex generalis* as regards the ComC (§ 1(2)), on the other hand it contains the regulation of the consumers' contracts (§§ 52 to 57 CC) and general provisions on the liability for damage (§ 415 ff CC).

The Act on Consumer Protection<sup>20</sup> (hereinafter referred to as CP) represents no less important part of the act against unfair competition because it deals with some unfair competitive conducts in detail and allows their administrative sanctioning. However, it is primarily designed to protect consumers, while the abovementioned acts are mostly dedicated to protect the competitive environment and the competition as such, although it means under certain circumstances means to protect customers as well. Concerning the relation to other mentioned laws, the CP is absolutely independent and it constitutes its own mechanism of sanctioning the conducts harming consumers. It also contains standalone definition of consumer (§ 2(1a) CP).

A specific kind of protection against unfair competition is the regulation of advertising. In this respect it is necessary to mention the Act on regulation of advertising (RA)<sup>21</sup> and the Act on radio and television broadcasting (RTB).<sup>22</sup>

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18 Munková, J.: *Právo proti nekalé soutěži. Komentář*. 2nd edition. Praha : C.H.Beck, 2001, p. 45.

19 No. 40/1964 of the Collection of Acts.

20 No. 634/1992 of the Collection of Acts.

21 No. 40/1995 of the Collection of Acts.

22 No. 231/2001 of the Collection of Acts.

Although the case law – with regard to the Czech legal system belonging to the continental family of legal systems – cannot be considered to be a generally binding source of law, courts interpret, concretise and develop the existing law by creating a special kind of case law, the so-called stable practice of the courts. Its significance consists especially in defining the innominate unfair competitive conducts based on the general clause, interpreting the general clause itself and the concept of *bonos mores* as well. However, the case law in the Czech Republic is far less relevant than in Anglo-American legal system which is based on precedent, and definitely no leading cases exist, because the legal regulation must always be based on law.

#### *Self regulation*

Self regulation and codes of conduct have some importance in Czech Republic in the area of regulation of advertising. There is an autonomous organisation overseeing the quality of advertisements based on the Codes of advertising practice, the Advertising Standards Council. However, it is only a voluntary association and therefore it does not possess any coercive authority enabling it to enforce its decisions, so that it only depends on the will of the subject whether it respects the decision or not, which greatly diminishes Council's significance.

#### **ii. Does a general clause on unfair commercial practices exist?**

The general clause on unfair competitive conduct is set forth in the § 44(1) ComC, stating: 'Unfair competition is a conduct in an economic competition which is contrary to *bonos mores* of competition and is capable of harming other competitors or consumers.'

The essential features of the general clause are that such conduct has to be committed in an economic competition (which expresses the competitive nature of the conduct and relations), that it has to violate the *bonos mores* of the competition (which expresses its lack of morality) and that it is capable of harming other competitors or consumers (which defines the subjects protected against the unfair competition). In order to fall within the scope of the general clause the conduct has to fulfil all the abovementioned conditions.

The general clause is subsidiary to foreseen unfair competitive conducts listed demonstratively in § 44(2) ComC, i.e. it can be employed only in case that the conduct in question cannot be subsumed under any of these instances. On the other hand, every unfair competitive conduct including the ones explicitly described in §§ 45 to 52 ComC must fulfil all conditions of the general clause, because it defines the general characteristics of the unfair competition.

Unlike the laws of neighbouring countries, the Czech ComC does not require the violation of *bonos mores* in general but of the *bonos mores* of the competition. This is a way to express that there are different ethics in economic competition compared to ordinary situations (e.g. the concept of *bonos mores* according to CC), which requires especially the courts to adjust the understanding of this concept within the scope of economic competition.

This is one of the reasons of the importance of the case law connected to general clause, while another reason is that it defines the innominate unfair competitive conducts, such as snow-ball effect, boycott and economic discrimination, price advantages and other consumer-catching methods or enticing of employees etc.<sup>23</sup> This listing is naturally not exhaustive and will be continuously adjusted to the changing scope of practices employed by the competitors.

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23 Eliáš, K., Bejček, J., Hajn, P., Ježek, J. a kol.: *Kurs obchodního práva. Obecná část. Soutěžní právo*. 3rd edition. Praha : C.H.Beck, 2002, p. 335 ff.

*Decision: R3Cmo253/97*

When determining whether business activities in “horizontal” relationships have violated the general clause of the regulation against unfair competition, potential violations of other branches of law are not taken into account, whether of private law or public law, even if the other law regulates supervisory mechanisms or remedial instruments including sanctions against those violating particular regulations. On the other hand, it is relevant if an illegal action also has also an adverse impact on competition. So, if the alleged action is a breach of the good morals of competition, and it happened within economic competition, and this action is able to bring about a detriment to the other competitors or customers, then such alleged action qualifies under § 44/1 of the Business Code.

*Decision: R3Cmo260/97*

If an employee, even before the start of his own business activity, by his action (either commission or omission) prepares for himself preferable conditions to the detriment of his employer, which the employee otherwise would not have when starting his business activity, such action qualifies as competitive action, and if it also fulfils other legal conditions, his action can be judged to be an action of unfair competition.

*Decision: R3Cmo53/97*

If an advertising text implies that a product was approved by a particular institution, when in fact only one or some of the components of the product were so approved, this qualifies as unfair competition action according to § 45 of the Business Code.

*Decision: R3Cmo30/98*

It is in conflict with good morals of economic competition if a competitor, when starting his business activity, when there is not any relationship of succession (and such relationship cannot be claimed due to a mere transfer of several staff members), implies, indicates or pretends in any way a link of his business activity to any activity of another competitor, or alternatively even implies a continuity of another competitor’s activity, that is a continuity of services and performances provided by him (either their extent or quality), to the present audience of another competitor’s announcement.

*Decision: R3Cmo66/96*

If all the producers labelled their products, produced from the same raw materials, as “vanillin sugar”, it is not important that the customers connected the mentioned product in their minds with a product labelled “vanilla sugar”. In the situation when all the producers supply the market with a product labelled as “vanillin” and customers (by virtue of pre-war tradition) ask for sugar labelled as “vanilla”, but are satisfied with “vanillin” sugar, then there is equality of competitive conditions of all products being competitive to each other. However, when one of the producers starts to use for his products a label, which is subconsciously stated and used by the consumers, it is obvious that these equal conditions are being breached. If the product of this producer (differently labelled as “vanilla sugar”) does not differ by its contents from the products of other producers using the title “vanillin”, the conditions of competition are being breached in an unjustified manner and the action of such a producer is to be judged as an action of unfair competition.

**iii. Who or what is protected by these provisions (e.g. consumers, customers in general, competitors, functioning of markets)?**

In general it is possible to say that all of the mentioned subjects and interests are protected (i.e. consumers, customers in general, competitors, functioning of markets) and all of them primarily by special legal framework (e.g. the competition is protected by PEC, consumers are protected by CP etc.).

The main groups of subjects protected among others against unfair competition by the provisions of the fifth chapter of ComC are competitors and consumers (§ 44(1)). However, their interests are frequently opposite (e.g. the cases when the competitor gives an advantage of discounts or bonuses to consumers in order to gain advantage over other competitors) and therefore their protection is provided differently.

Generally speaking, the protection of consumers is governed by CP, with the exception of consumers' contracts, which are regulated by CC, whilst the ComC regulates the relations between competitors, who are its main recipients. It is also necessary to distinguish between PEC, which protects the economic competition as such, and the protection against unfair competition under ComC, which protects the mentioned subjects against harm.

Concerning the very protection against unfair competition, its focus depends on the type of unfair competitive conduct. Some conducts foreseen in the ComC are meant to protect other competitors (e.g. sponging on the reputation, discrediting or comparative advertising) and others protect consumers (misleading labelling of goods and services or causing danger of confusion), and the same applies for innominate unfair competitive conducts.

**iv. Are there definitions of consumers, specific groups of customers, such as “vulnerable consumers”; are there definitions of “business”, “trader” or similar terms?**

Although the ComC regulates unfair competition, it only contains a definition of competitor (§ 41) and not a definition of consumer. This concept is defined in two different sources – in § 2(1a) CP and in § 52(3) CC (in the chapter dealing with consumers' contracts).

Concerning the competitor, its essential features are participation in economic competition (which depends on the existence of a plurality of subjects on relevant market) while it is irrelevant if the competitor is an individual or a corporation or if he is an entrepreneur. There are no definitions of special groups of competitors although the legal persons entitled to protect the interests of competitors (namely associations or unions) foreseen by the § 54(1) ComC may be deemed an exception.

In addition to the term competitor, the ComC defines both concepts of trader and business (§ 2(1) and § 2(2)), but these are of no practical importance in the area of unfair competition, because e.g. the concept of competitor does not differ from traders and businessmen.

As already said, in Czech law there are two definitions of consumer. One of them is contained in § 2(1a) CP and the other in § 52(3) CC. These definitions differ a little in details, though their substantive parts are identical – the consumers may be both individuals and corporations who

buy goods or exploit services (CP) or who conclude or fulfil a contract (CC), and do not perform these activities within or towards business.

Although there is no general legal definition of any specific group of consumers, for certain reasons specific groups of consumers are distinguished (such as children, young people, seniors etc.), especially by courts when measuring the *bonos mores* of competition.

*Decision: R3Cmo513/95*

When analysing potential product or brand confusion, consideration is taken not only to the complete wording of each of the competitors' business names, but it is also necessary to take into consideration the impression made on the average customer. Even if there is a difference in the overall wording of the business names, it is natural for customers to usually remember just a particular expressive, dominant part of such a business name.

The regulation of advertising is a specific area, because its impact significantly differs depending on its subject. This usually influences the advertising strategies, which are often targeted at a specific group of prospective consumers. Therefore, the regulation of advertising grants a special protection to such more vulnerable groups of consumers, especially children (i.e. people under the age of fifteen). The law on regulation of advertising contains some special provisions regarding children (i.e. people younger than 18 years, in some cases even 15 years). General provision on advertising that targets children is the § 2c of that law (it must not be aggressive, immoral and must not advise children to persuade parents etc.), then there are special provisions concerning advertising of different kinds of goods – e.g. tobacco (§ 3(6a)), alcohol (§ 4(b)), medicals (§ 5a(6e)), etc. For example, § 2(3) RA prohibits advertising designed for persons under the age of fifteen or advertisements performed by such people, which could promote behaviour endangering their health or their psychic or moral development. Furthermore, §§ 3 and 4 RA which regulate advertising of tobacco products and alcohol, prohibit such advertising focused on persons under the age of fifteen or performed by them.

**v. How are rules on fair commercial practices interpreted (e.g. by public authority, case law, codes of conduct)?**

The law protecting against unfair competition is interpreted by courts, with the leading authority being the Supreme Court. It mainly unifies the practice of the courts to form a consistent interpretation of controversial or unclear issues (see above). The protection of economic competition is performed by the Office for the Protection of Competition, whose decisions develop and concretise the legal framework. However, its relevance in the area of unfair competition is rather low.

The Advertising Standards Council should also be mentioned in this connection, although its voluntary character and its inability to enforce its decisions are a limiting factor. For illustration, during ten years of its existence it has dealt with approximately 400 cases of unethical advertisement. Out of this amount approximately 90 advertisements were drawn back and only in three cases the decision of the Council was not respected.

**b) Provisions on Specific Issues****i. Are there any other provisions and case law prohibiting misleading advertising?**

Misleading advertising is generally regulated by two acts – ComC and RA. The ComC gives the definition of misleading advertising (§ 45), providing that it is a spreading of information about one's own or other's enterprises, products or services, which is capable of invoking a misleading image and thus giving advantage to one enterprise at the expense of other competitors or consumers. This provision can be applied only to a conduct which at the same time fulfils the conditions of the general clause (§ 44(1)), i.e. it has to be contrary to *bonos mores* of competition and capable of harming other competitors or consumers. One of the features contained in the general clause is that the conduct must be committed in economic competition. Therefore it is impossible to apply the ComC e.g. to misleading advertising during electoral campaign. Another condition set by the general clause is the contradiction with the *bonos mores* of the competition, which can be fulfilled e.g. by unfair persuading techniques, commercial techniques based on compassion or immoral techniques. The third condition is that the conduct must be capable of causing harm to other competitors or consumers. Conducts, which do not fulfil these conditions, cannot be considered misleading advertising.

It is important to mention that the actual harm does not necessarily have to occur; it is enough for the general clause to be applied if a threat of causing such harm exists. The RA also prohibits misleading advertising (§ 2 (1c) RA) using the definition set by the ComC. The RA is applied by appropriate public authority, which above all considers the characteristics of goods or services, their price, or the way, in which the price is set, conditions, under which the goods or services are supplied, and the advertisement's submitter. The public authority can then impose a fine up to 10 million Czech Crowns (approximately € 300 000) on submitter, creator or distributor of such advertisement. In this respect it should be also mentioned that the CP generally prohibits misleading of the consumer (§ 8 CP), namely stating false, unattested, incomplete, inaccurate, unclear, ambiguous or exaggerated information or keeping the true information secret.

There is only one definition of misleading advertising in Czech law, which is contained in the ComC. Therefore only conducts fulfilling conditions of general clause can be considered misleading advertising. The term misleading advertising is the same for ComC and the Law on advertising. Misleading advertising is a different concept from misleading of consumer, which is regulated by CP and is broader, because it includes not only misleading advertising, but other practices capable of misleading of consumer. Another difference is that it can be committed not only by entrepreneur, also by other persons such as employees as well.

The reason why the misleading advertising is regulated by different laws is the different character of these laws, which is demonstrated at the moment of the breach of the ban of misleading advertising. In such case the consumer is entitled to bring a civil action to the court to demand that the violator stops the conduct and renews the rightful state. He can ask for adequate compensation or compensation for damages as well. (procedure based on ComC) hand in a suggestion to a competent public authority, which then starts the procedure and if it finds out the law has been breached, it can impose a fine on the violator and order him to stop the misconduct. This procedure does not give the consumer the possibility to claim damage compensation, because this is possible only by bringing a civil action before the court according to a) (procedure based on CP and Law on advertising).



It is important to mention that the procedure described under b) is not dependent on the suggestion of the consumer, because the public authorities are obliged to take action ex officio. The responsibility for misleading the consumer cannot be denied even if the relevant information has not been provided by the producer, importer or supplier. For breach of this prohibition the public authority can impose a fine up to 1 million Czech Crowns (approximately 30 000 €). Similar prohibition is also contained in ComC, which prohibits misleading labelling of goods and services (§ 46).

Concerning the non-precedential nature of decisions of Czech courts, the case law in general is not significantly relevant and therefore will not be mentioned.

**ii. Are there any other provisions and case law regulating comparative advertising?**

In the first place it is necessary to mention that Czech law (§ 2(2) RA) makes comparative advertising possible, but only under certain conditions. Comparative advertising is defined in § 50a(1) ComC as any advertising which expressly or even indirectly defines other competitor or goods or services offered by other competitor. To be acceptable, the comparative advertising must not be misleading, discrediting, must not be intended to allow sponging on reputation, it has to compare only similar and comparable goods or services, and only their representative and relevant features etc (§ 50a(2) ComC).

Sanctions for unlawful comparative advertising are set in § 8(1) RA which employs the framework set by the ComC as it does not contain detailed regulation of comparative advertising in general. However, it regulates in detail the comparative advertising of pharmaceuticals, which it allows only if it is aimed at persons who can prescribe or distribute them or who provide medical care (§ 2a RA).

**iii. Are there other provisions and case law regulating aggressive practices?**

Special provisions regulating aggressive practices do not exist in Czech law. Protection against such practices is possible only by applying the general clause (§ 44(1) ComC) or general provisions of the CC setting the essential requirements for contracts (§ 37(1) CC) or conflict with *bonos mores* (§ 39 CC).

**iv. Are there provisions and case law regulating special marketing techniques?**

**1. Distance marketing**

Distance marketing is regulated by § 53 CC. The consumers' contracts can be concluded using means of communication at a distance, which enable the contract to be concluded without the coincidental physical presence of contracting parties. Means of distant communication enabling individual negotiation can be used only if the consumer did not preclude it. Automatic calling devices (without human operator) and faxes can be used only after previous approval of the consumer.

CC also sets other rules for distance marketing, such as the content of the information, which must be provided etc. (§§ 53 and 53a CC). Such information must be provided in a positive and

intelligible manner with regards to good faith and protection of consumers. Further, the CC provides a special regulation of avoidance of contract which can be performed within 14 days from the acceptance of goods by the consumer. If goods were supplied to consumer without his previous order, he is not obliged to give such goods back or inform the supplier about the supply (§ 53(8) CC).

## 2. E-commerce

E-commerce is regulated by a recently adopted law Nr. 480/2004 Coll. This law regulates among others sending e-mail containing commercial message (i.e. information dedicated to direct or indirect support of products or services or image of an enterprise, including advertising).

It sets a prohibition of sending unasked e-mail (spamming) unless the addressee has explicitly agreed with it and a prohibition of sending e-mail with a commercial content unless its commercial nature is intelligibly and clearly indicated or if such e-mail hides or conceals the identity of the sender or does not contain a valid address, to which the recipient can directly and effectively send an information that he does not wish to receive commercial e-mail from the sender.

Of special importance in the area of e-commerce is the Act on Electronic Signature, which provides basic security framework for electronic activities<sup>24</sup>.

## 3. Face to face marketing (e.g. door-to-door selling, touting for consumers in public places, snowball system, Multi-Level-Marketing etc.)

The Czech law deals with this issue within the regulation of consumers' contracts concluded outside of ordinary place of business (§ 57 CC). The CC concentrates on the possibility of avoidance of contract and provides that the supplier is obliged to inform the consumer no later than at the conclusion of the contract about his right to avoid the contract including specifications of the subject, towards which this right can be executed<sup>25</sup>. This regulation however does not apply to contracts on building, selling or renting real property, supplying food products, products ordered on the basis of catalogue or insurance contracts.

Some of the mentioned practices of face-to-face marketing (e.g. snowball system or Multi-Level-Marketing) are not expressly regulated by the Czech law, although both legal theory and practice are familiar with them. However, express regulation of snowball system (together with plentiful case law) existed in the Czech law before World War II and it was qualified as unfair competition. At present its unfair character has to be deduced from the general clause.

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<sup>24</sup> Act on Electronic Signature, No. 227/2000 of Collection of Acts.

<sup>25</sup> Czech Constitutional Court IV. ÚS 276/99.

**4. Price reduction techniques (e.g. rebates, fee gifts, end of season sales, liquidation sales, sale at a loss, loyalty cards etc.)**

No regulation of such practices exists in Czech law (nor can they be qualified as unfair competition), although with regard to frequency of their use by numerous subjects it would be quite reasonable to set detailed rules for them.

**v. Are there specific provisions and case law regarding information requirements (e.g. rules that impose on traders a duty to disclose to consumer all “material information”)?**

All products introduced to the market must be equipped with documents necessary for handling and using of these products. Further, if such products comply with all safety requirements, but using them in a specific way can be dangerous for the consumer, he must be warned about such danger.<sup>26</sup>

Most important regulation (and most detailed as well) is contained in CP. This act defines a general obligation of seller to inform the consumer about features of the sold goods, about means of their utilisation and maintaining, about dangers that can result from improper use or maintaining, or about the character of provided services as well as about possible risks connected with them. The seller is responsible for the breach of such regulation regardless of the fact that the producer, importer or supporter did not provide such information to him (§ 9 CP).

Concerning food products, the seller also has to provide information to the consumer about composition and means of utilisation of product as well as the date of minimum expiry date (§ 10 CP). The information about composition of footwear must also be provided (§ 10(1d)) and § 10a CP).

The seller is further obliged to inform the consumer about the price of offered goods or services by transparent labelling of goods by the price or by making the price information conveniently accessible (§ 12 CP). Detailed rules for informing consumers about prices are set in the Act on Prices<sup>27</sup> and appropriate rules of practice<sup>28</sup>.

The seller must also provide the consumer with the information concerning the scope and conditions of product liability including determination of the manner of its exercise (§ 13 CP). All the mentioned information must be provided in the Czech language and the measures used must be the measures commonly used in the Czech Republic (§ 11 CP). In case of a breach of these obligations the public authority can impose a fine up to 1 million Czech Crowns (approximately € 30 000).

General provisions concerning information about special means of utilisation of the products (especially when they are governed by technical standards or instructions) are contained in § 617 CC, establishing liability for possible damage. The seller is also obliged to inform the purchaser about defects of the subject of contract (§ 596 and § 618 CC).

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<sup>26</sup> Act on General Safety of Products, nr. 102/2001 of Collection of Acts.

<sup>27</sup> No. 526/1990 of Collection of Acts.

<sup>28</sup> No. 580/1990 of Collection of Acts.

Providing misleading information about goods or services is prohibited by § 46 ComC and is qualified as unfair competitive conduct. This provision can also be applied in the case of breach of obligation to provide information, provided that this failure to perform could invoke misleading assumption that some goods or services possess certain qualities, which would not be true.

**vi. Are there specific provisions and case law concerning specific sectors (e.g. final consumers)?**

The only special regulation concerning specific group of consumers in the Czech law is the abovementioned regulation of advertising designed for children. Concerning specific product sectors, the CP and other consumer protecting laws modify general obligations of seller according to the special nature of some kinds of goods (e.g. tobacco products, footwear, food products etc.).

**vii. What are the national laws of post-contractual and after-sale commercial practices?**

Czech law does not specifically regulate commercial practices performed after conclusion of the contract. Such conduct, provided it would be qualified as unfair competitive conduct, could be sanctioned employing the general clause of unfair competition.

Post-contractual relations between trader and consumer, are generally governed by the regulation of product liability and avoidance of contract (see Part Three of ComC and §§ 52 to 57 and Part Eight of the CC).

**viii. Are there provisions and case law on handling complaints?**

There are different ways of demanding remedy or satisfaction for infringement of consumers' rights.

Firstly, if the consumers' rights have been violated by a conduct breaching protection of economic competition, the harmed consumer may bring legal action before the court demanding the subject to stop unlawful conduct and relieve the unlawful state. Further, the consumer may demand reasonable compensation (which can be of financial nature as well), compensation for damages and repaying of unjust enrichment. The claim for stopping the unfair competitive conduct and relieving the unlawful state can be filed also by a juristic person entitled to protection of competitors' interests, although in fact it is not the subject harmed by unfair competitive conduct. ComC also provides for the reversion of burden of evidence in favour of consumer by laying an obligation on the defendant to prove that the conduct in question was not unfair (§ 53 ComC). If the claimant is successful, the decisions deals with consumer protection and if the claimant demanded so, the court can order the defendant to publish the court's decision on his or her expense and determine the form, manner and extent of such publication (§ 155(4) Code of Civil Procedure).

The observation of regulation of consumer protection is inspected by various public authorities, in general namely by the Czech Commercial Inspection and concerning special kinds of

products by specialized public authorities. These institutions are entitled and obliged as well to perform supervision of compliance with appropriate laws and under certain circumstances they can issue binding instructions regarding elimination of ascertained deficiencies, in case of health hazard they can stop selling of the dangerous product or they can disrupt operation of a place of business. Furthermore, they have to inform the public by all possible means (including mass media) about dangerous products, which can be confused with food products (§ 21 ff CP). If these institutions find out breach of obligations set by the CP, they can impose fines up to the extent determined by law (§ 24 CP). Paying the fine does not influence liability for damages (§ 24(10)) CP. The mentioned public authorities can act on their own initiative or on the basis of suggestion handed in by consumer or organization protecting consumers' rights.

A very specific part of the liability for unfair commercial practices is the criminal law, which for example defines a crime of causing harm to consumer (§ 121 Criminal Code). Any consumer who is harmed by the specified criminal conduct can hand in a complaint and subsequently join the criminal proceeding with the claim for damages as the sufferer (§ 43 Code of Criminal Procedure).

## **II. Possible obstacles to the Directive on Unfair Commercial Practices from the national law perspective**

### **a. What are the main obstacles from the point of view of your country, which might result, complicate transposition and implementation of the Directive?**

Upon implementation of the prepared directive, the main problem is the number of norms in the conception of legal regulation acts on unfair competition or possible absence of certain institutions or standards to regulate them.

As stated hereinabove, the core of the legal regulation of unfair competition are §§ 41-55 ComC, which deals with economic competition in general. Illegal limitation of competition is regulated by a special law – Act on the Protection of Economic Competition.

Since unfair competition is closely connected to the protection of competition which is regulated by the PEC, the legal means for the protection of economic competition and the protection against unfair competition are strictly separated: § 42(2) ComC expressly delegates the regulation of the protection of economic competition to a special act PEC, which then excludes the protection against unfair competition entirely from its force.

Another important legal element of the protection from unfair competition is the Civil Code (CC). An equally important part of the law against unfair competition is the Act on Consumer Protection (CP), whose substantial contribution is a detailed regulation of some unfair competition conducts and their administrative recourse. A special kind of protection from unfair competition is the regulation of advertising. Here it is necessary to mention the Act on Regulation of Advertising (RA) and the Act on Radio and Television Broadcasting operation (RTB).

The body of these laws contains legal regulation oriented to the protection of economic competition as well as to the consumer protection, protection of companies and entrepreneurs, protection of competitors and the market they operate on.

Therefore, upon implementation of the new directive it will be necessary to consider mutual relationships between the abovementioned standards, the scope of matters they regulate and to maintain their mutual interactions. Additionally, it will also be desirable to legislatively fill the gaps presented by the absence of certain institutions as e.g. aggressive business practices, to consider their systematizations in the body of the abovementioned regulations.

Despite these observations, in all branches of the Czech legal order there does not seem to be any aspect to disable the implementation of the new directive.

### **b. Do you see any incompatibilities within your national legal system?**

In general, the Directive does not seem to contain any elements incompatible with the Czech legal system. As stated before, the new directive will rather bring a necessary adaptation or implementation of terms and institution that have not been included in the body of laws in this

field yet. It is unlikely that a new norm will be produced, the issue is tied to many laws and branches of the legal order. The question will be a solution to the problem of introduction of new provisions within existing standards to regulate the new system in the legal order rather than the issue of compatibility, since the issue of the new directive is not unfamiliar to the Czech legislation.

**c. How could the Directive be transposed into your national law?**

While the 'old' member states when forming competition and consumer laws proceeded rather in the way of creation of autonomous national laws, into which the particular EC directives were later transposed, the Czech competition and consumer law is rather a result of implementation of the European law or inspiration by foreign legal regulations when we eventually reached the same source. In recent years the Czech Republic has been coping with harmonization of Czech norms, though frequently elaborated during the so-called 'legislation rushes' related to meeting deadlines bound to the accession to the EU. In compliance with current legislation practice, the directive would be transposed into particular norms presented hereinabove. Probably no new act to cover the entire issue of the prepared directive will be enacted, for such an act would find itself beyond the existing system of norms that pursue unfair competition practices which would result in further shattering the system. The transposition would have its basis in harmonization of existing norms, together with complementation of missing institution, namely in ComC, PEC, CP and others.

**d. What would be – from the perspective of your national law – the appropriate sanctions in case of infringement of the general clause of the Directive? Is there a system to enforce the provisions on fair commercial practice? How is this organized?**

The system of norms covering the discussed issue in the current Czech legislation contains also a system of sanctions for infringement of the rules on fair commercial practices. It is possible for the system to be preserved (see part I.) The discussion should be lead within the context of financial recourses, ability to pay in home, foreign subjects in order to prevent disproportions and/or any form of discrimination within the market and competition. Also could be considered yet less used sorts of sanctions connected with infringement of the general clauses, registration of those infringements in the Commercial Register or other public means. A common element should also be a discussion over adequate sanctions not only from a national point of view as it is emphasized in art.13 of the prepared directive but also their harmonization in the Union environment. (For example, there are some differences between Czech and Slovak law too – compare chapter b. Provisions on specific issues. i. Are there any other provisions and case law prohibiting misleading advertising? in the Czech and Slovak Report).

In the case where the provisions regulating economic competition have been infringed, the claimant (consumer, competitor, a consumer organization) may file an action against the given subject with a state court to request the given subject to cease such a conduct and remove the faulty state. Furthermore, he may claim appropriate compensation which can be a financial one, compensation for damages or giving back the unjustified enrichment. An application to court to restrain from unfair conduct and remove defective state can be filed even by a legal person authorized to protect the interests of consumers, even though it is not actually the person whose rights were prejudiced or infringed by that unfair competition. § 53 ComC further provides that

in certain cases the burden of proof is transferred in favor of the consumer, when it is the seller to prove that he has not conducted unfairly.

A proceeding by which the consumer or another person would claim refraining from unfair conduct cannot be opened at court if a proceeding in the case has already been opened (§ 83(2)) Code of Civil Procedure. Upon request, the court may adjudicate the claimant, whose action for consumer rights protection has been admitted, the right to make the judgment public at the cost of the unsuccessful party; the court shall define the volume, form and the way of announcing according the circumstances of the case.

The supervision is performed by state administrative bodies, at the general level namely by the Czech Trade Inspection, and by other special bodies of the state administration for various kinds of products. These institutions are authorized and due to perform inspection of meeting relevant legal regulations of the competition or to make use of other powers entrusted to them by the Consumer protection act. First of all it is the power to issue binding orders to remove found deficiencies, or in the cases of emergency or health risk to even discontinue sales of the respective product or closed down the place of business. In the case of failure to meet duties stated by special administrative state bodies, they are entitled to impose fines further specified by law. The duty to compensate damages is not infringed by imposing of such a fine. According to the Nr. 64/1986 act of the Czech Trade Inspection the Czech Trade Inspection can fine an unfairly acting trader with a penalty to up to 2,000.000 Czech crowns.

In proceedings under the provisions of PEC, the complaint of the consumer addressed to the respective body of the state administration has a character of an incentive for the above mentioned measures. These incentives can be filed also by organizations dealing with the protection of consumers' rights.

Currently, the protection of competition in the Czech Republic is ensured institutionally by the Office for the protection of competition. The Office is regulated by the PEC, Chapter 5, and mainly in Act No. 273/1996 Coll., o operation of the Office for the protection of competition, as amended by Act No. 187/1999 Coll.

The Office has a number of powers and responsibilities. First of all, it has decision making powers and duties – it grants and cancels individual exceptions from the prohibition of agreements infringing the competition, extends exceptions from the prohibition of agreements, determines if a certain agreement of competitors is subject to the prohibition § 3-6, decides upon applications whether a certain conduct of a competitor is or is not a misuse of dominant position, imposes so-called deconcentration measures, fines, orders to remedy etc.

Next power is the surveillance power and duty of the Office, defined by § 20 (see above). In order to enable the Office to duly perform this power, competitors are obliged to comply with inspections of the Office and the Office is entitled with a number of authorizations (to enter lands, all buildings, rooms and means of transportation that are subject to inspection, to require from competitors documents and information needed for its activities, to review business and accounting files, etc.).

In addition to the abovementioned powers, the Office is also empowered with information power and duty. The Office had the duty to announce in the Commercial Bulletin any opening of proceeding for permission of competitors' fusion, to publish its own valid decisions, to keep a public trust register on agreements, permitted exceptions, their extensions, etc. The Office is



obliged to keep trade secrets and protect confidential information, since such duty is imposed by § 24 PEC to all subject in a labour-law or other relationship towards the Office.

The objective of the Office's activities is a consistent protection and support to competition in all branches of economy. The main difference between the Office and the Czech Trade Inspection is concentrated in their character and roles. Office is the main state administration body for support and protection of Competition, and the Czech Trade Inspection is a control institution most oriented on consumer protection.

**e. How would the Directive be delimited to the following fields of law?**

**i. Contract and Tort Law**

The regulation of consumer contracts applies to contractual relationships to which parties are a consumer and a supplier. The consumer law within the Czech Civil Code reaches a better protection of the consumer mainly by:

- prohibition of certain contractual covenants regarded as most frequent unfair terms in consumer contracts
- enables the consumer to withdraw from a concluded contract under a priori settled conditions, and sets forth other provision which the supplier shall obey.

§ 52 of the Civil Code defines consumer contracts as sales contracts, contracts for work done, or other sorts of contracts, defined in part eight of the Act, provided that the parties to the contract are:

- a) consumer (a person not conducting upon concluding and performing the contract within the framework of its business or another entrepreneurial activity)
- b) supplier (a person conducting upon concluding and performing the contract within the framework of its business or another entrepreneurial activity).

Consumer contracts must not include clauses which are in contradiction with the requirement of good faith, which mean a considerable unbalance between rights and duties of the parties to the detriment of the consumer. The provision further provides a demonstrative list of inadmissible contractual covenants.

Upon comparison of the context of the directive and the existing Czech legal regulation, we can state a harmony with fundamental principles and basic wording of the directive, with minor legislative alterations.

**ii. Competition law (aiming at the protection of the consumer)**

Legal protection of consumers as an element of consumer-oriented state policy is in oriented primarily to the establishment of effective legal guarantees for actual protection of the consumer and in wider circumstances to ensuring the development of equal conditions in economic competition. Of most importance is Act No. 634/1992 Coll. on the protection of consumers. This act regulates sales of goods and providing of services when the performance takes place in the territory of the Czech Republic; other cases can be considered under this act only if the performance is related to business activities operated in the Czech territory.

The main groups of subjects protected among others from unfair competition in chapter 5 of the ComC are competitors and consumers. Their interests are though often controversial (see e.g. the cases when a competitor grants the consumer bonuses or reductions in order to reach an advantage before other competitors), therefore their protection is solved in different ways and the prepared directive may affect both the fields.

In general, it has to be mentioned that the consumer protection is primarily regulated by the CP, while the issue of consumer contracts are governed by CC. The ComC rather regulates relations between competitors its primary addressees. However, it is necessary to make a distinction between the operation of PEC, which, as reads from its title, protects mainly the competition as such, and the protection from unfair competition under the ComC, which protects the respective subjects from prejudice.

As to the protection from unfair competition as such orientation differs by the kinds of unfair competition conducts. In some merits of case, it is obvious from their nature which subjects are primarily protected (e.g. depreciation, sponging on other's reputation or comparative advertising oriented to other competitors, while deceptive designation of goods and services or endangering health and environment protect mainly the consumers), while the same applies to unlisted unfair competition delicts (see part I.).

### **iii. Intellectual property law (e.g. Imitation)**

The Czech copyright law will not be in its substance affected by the directive, as a legal discipline or a body of laws it is only marginally connected with the questioned set of norms - in contractual relationships of sellers and buyers, provided that the subject of purchase is a product protected by copyright. Copyright and consumer law relationships must nonetheless be in this case classified as existing independently to each other; possible defects from the viewpoint of consumer protection would thus belong to the sphere of defects on product and liability for damage, or to the protection of competition.

### **iv. Protection of Enterprises (esp. SME)**

The legal order of the Czech Republic does not directly regulate the protection of small and medium-size businesses – SME. The issue of misuse of dominant position is concretely regulated in the PEC in both systems, where the general clause determines the misuse of dominant position and the position of SME.

Like in the covenants that harm competition, in this issue has been chosen the form which first defines by the general clause the misuse of dominant position and then provides a demonstrative list of merits of case of the misuse of dominant position.

The general clause holds in § 11(1): “A misuse of dominant position to the detriment of other competitors or consumers is prohibited”. This provision is considered a general clause for the reason that it prohibits any form of misuse of dominant position to the detriment of any other competitors or consumers.

The mentioned cases have then only a demonstrative character, which means that even when the entrepreneur's conduct is not listed, he may be sanctioned under the general clause.

**v. Product Safety and Product Liability**

Until enactment of the Act on Liability for Damage Caused by Defective Products, the only way to claim liability for damages caused by defective product was the proceeding under the Civil Code (provisions on liability for defects and liability for damages). The act on liability for damages caused by defective product recognizes the term defective product and introduces the institute of the concept of objective liability. The injured person then has only to prove the defect on product, the occurred damages and the causal relation between the defect on product and the damages.

The Act on liability for damages caused by defective product also regulates the relation of this act to the Civil Code. If not stated otherwise by the act, provisions of the Civil Code shall be applied. In a general context, there is no threat of opposition between this issue and the prepared directive.

**vi. Criminal law**

Causing damage to the consumer is in the Czech criminal law defined as a conduct when a certain subject causes not an insignificant damage to another's property by cheating on quality, quantity or weight of the goods, or introduces on the market a large volume of products, labor or services and conceals their material defects. More severe sanctions for such a conduct can be imposed on members of organized groups, or in the case where they gain a significant profit through such conduct (§ 121 Criminal Code). From the viewpoint of criminal law there is no opposition with the text or objective of the Directive.

**vii. Public policy (questions of decency)**

It is important to note that unlike neighbouring countries Czech unfair competition law does not require for unfair conduct to be contrary to good practices in general, but rather contrary to good practices in competition. This way is the term understood also by judicature.

Self-regulation and moral codes have their importance in the Czech Republic mainly in the field of regulation of advertising. The Council for Advertising is a self-governing organization monitoring the quality of advertising, based on the Advertising code. The Council is though a voluntary organization, therefore their activities must not be overestimated mainly for the reason that it lacks power to enforce its resolutions and it is solely up to the subjects whether they conform or not.

**f. Is there any national unfair commercial practices' law, including case law, which may constitute a barrier to the Internal market, for example case law which raises questions similar to *Estee Lauder*, *Clinique* and *De Agostini*.**

Unfair competition law is in principle interpreted by courts, where the highest authority is the Supreme Court. It mainly unifies the jurisprudence in order to establish a unified interpretation of questionable or unclear issues and its activities will not influence the internal market. Office for the protection of competition is also a decision making body in the field of the protection of

competition, its decision are important for the development of legal regulations in this field. However, its influence on unfair competition is only marginal.

Since the Czech legal culture belongs to the continental legal systems, court decisions cannot be considered as generally binding sources of law. However, there is the so-called established jurisprudence, through which the courts develop, precise and concretize the current legal regulations. As stated above, its importance can be seen mainly in undefined torts of unfair competition under the general clause, the definition of which is the task of courts, as well as a general interpretation of the general clause or the interpretation of the term “good practices”. However, the importance of the decision-making activity of courts is impossible to compare to the role of precedents in the Anglo-American legal system, nor we can talk about leading cases, because the bases of every legal regulation must always stem from law.

**Annex: translation of Czech statutory provisions***Commercial Code***§ 44 Basic Provision**

(1) Unfair competition means conduct in economic competition which conflicts with the *bonos mores* of competition and which may be detrimental to other competitors or customers. Unfair competition is prohibited.

(2) Unfair competition under subsection (1) means in particular the following:

- (a) misleading advertising;
- (b) misleading labelling of goods and services;
- (c) causing possibility of confusion;
- (d) sponging on reputation of another competitor's enterprise, products or services;
- (e) bribery;
- (f) discrediting;
- (g) comparative advertising;
- (i) breach of business secrets;
- (j) endangering the health of consumers and the environment.

**§ 45 Misleading Advertising**

(1) Misleading advertising is the dissemination of information by a competitor about its own or someone else's enterprise, products or services, with the aim of creating misleading perceptions as to the advantage of its own or someone else's enterprise at the expense of other competitors or consumers.

(2) Dissemination of information is deemed to be communication through the spoken or written word, the press, pictures, photographs, radio or television broadcasts or other communications media.

(3) The use of a fact which in itself is true but which, owing to the circumstances or context in which it is presented, may be misleading, is also considered to be misleading.

**§ 46 Misleading Labelling of Goods and Services**

(1) Misleading labelling of goods and services means the marking of goods and services in such a way as to create an erroneous impression in the market place about the country, region or location where the goods or services so marked originated or are made by a certain manufacturer (producer), or the special characteristics or quality of such goods or services. It is irrelevant whether such markings appear on the goods, the packaging, or in commercial documentation, etc. It is also irrelevant whether the misleading marking was provided directly or indirectly, or by what means. § 45(3) applies as appropriate (*mutatis mutandis*).

(2) Misleading labelling also means incorrect marking of goods or services with expressions such as "(of) the kind", "(of) the type", or "(using) the method" in order to distinguish such goods or services from authentic original, if such marking is capable of creating an erroneous impression with regard to the origin or nature of the goods or services involved.

(3) The marking of goods and services which is commonly used in business to describe a particular kind or a particular quality is not considered misleading, unless accompanied by additional words which might be misleading, e.g. "genuine", "original", etc.

(4) The above provisions do not affect rights and duties ensuing from the registered designation (marking) of products, trademarks, protected plant varieties and livestock (animal) breeds, as stipulated by particular Acts.

#### **§ 47 Causing Possibility of Confusion**

Causing possibility of confusion means:

- (a) using a commercial name or designation or the special designation of an enterprise which is already legitimately being used by another competitor;
- (b) using the special designation of an enterprise, a special marking or a specific design related to products, services, or commercial materials which customers associate with a particular enterprise, or a particular branch of an enterprise (e.g. packaging, printed matter, catalogues, advertising materials, etc.);
- (c) imitating a competitor's products, packaging or performance, unless this imitation involves elements which are predetermined functionally, technically or aesthetically, and the imitator has taken every possible measure which could be required of him to avoid the danger of mistaken identity, or at least has substantially restricted such danger; if such conduct is capable of creating the danger of mistaken identity or a misleading notion about a particular enterprise, its commercial name or special designation, by using such designation or by imitating the products or services of another competitor.

#### **§ 48 Sponging on Reputation**

Sponging on reputation means the use by a competitor of the reputation of another competitor's enterprise, products or services to gain extra benefits for its own or a third party's business activity which would not otherwise have been achieved by such person.

#### **§ 49 Bribery**

Under this Code, bribery means conduct whereby:

- (a) a competitor offers, promises or renders benefits, directly or indirectly, to an individual who is a member of another competitor's statutory or similar organ or employee (or an individual of similar status) to gain an advantage by means of unfair conduct for himself or a third party (another competitor) to the detriment of other competitors, or an illegal competitive advantage; or
- (b) an individual under letter (a) directly or indirectly demands or solicits or accepts any kind of benefit for the same purpose.

#### **§ 50 Discrediting**

- (1) Discrediting means conduct whereby one competitor states or disseminates false information about the circumstances, products or services of another competitor, such false information being likely to be detrimental.
- (2) Disparagement also involves stating and disseminating truthful information about the circumstances, products or services of another competitor, if such information is capable of causing detriment to that competitor. However, it is not considered unfair competition if a competitor is forced by circumstances to such conduct (e.g. in justified defence).

#### **§ 50a Comparative Advertising**

- (1) Comparative advertising means any advertising which explicitly or by implication identifies a competitor or goods or services offered by other competitor.
- (2) Comparative advertising shall be permitted when:
  - (a) it is not misleading;

- (b) it compares only goods or services meeting the same needs or intended for the same purpose;
  - (c) it objectively compares only such features of the goods or services which are fundamental (material), relevant, verifiable and representative; as a rule, several features must be compared and these may include the price; only exceptionally may comparison of one feature be permitted, provided that such comparison fully meets all the stipulated conditions;
  - (d) it does not create confusion in the market place between the advertiser and a competitor or between their enterprises, goods or services, or trademarks, commercial names or other distinguishing marks typical of one or the other;
  - (e) it does not discredit a competitor's enterprise, goods or services, or trademarks, commercial name or other distinguishing marks which are typical of the competitor or of its activity, relations or other related circumstances;
  - (f) in the case of products for which a competitor is entitled to use a protected designation of origin, it relates in each case to products with the same designation;
  - (g) it does not take unfair advantage of the reputation of a competitor's trademark, commercial name or other distinguishing marks which have become typical of such competitor, or of the designation of origin of competing products;
  - (h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name or commercial name.
- (3) Any comparison referring to a special offer shall indicate in a clear and unequivocal way the date on which the offer ends or, where appropriate, that the special offer is subject to availability of the goods or services which are offered. When the special offer has not yet begun, the competitor must also state the date of the beginning of the period during which the special price or other specific conditions shall apply.

### **§ 51 Breach of Business Secret**

Breach of business secret means conduct whereby an individual illegally informs another person about a business secret (§ 17 ComC), or provides him with access to it, or exploits it for his own or another person's benefit, using it in competition, and of which the individual learned of:

- (a) as a result of having been entrusted with that secret, or by having gained access to it through technical documentation, instructions, drawings, models or patterns on the basis of an employment or other relationship with the competitor, or while performing a function to which the individual was appointed by a court or other authority; or
- (b) through his own or another person's illicit conduct.

### **§ 52 Endangering the Health of Others and the Environment**

Endangering the health of others and the environment is conduct whereby a competitor distorts the conditions of economic competition by manufacturing and marketing products, or by carrying on activities, which endanger health or the environment as protected by law, in order to acquire benefits for himself or for another person at the expense of other competitors or consumers.

## *Law on Consumer Protection*

### **§ 3 Honesty in Sale of Products and Provision of Services**

Sellers are obliged:

to sell products with the proper weight, measure, or quantity and to enable the consumer to check the correctness of the same;

to sell products and to provide services of the prescribed or approved quality, if such quality is determined in a binding manner or ensues from special regulations, or of the quality described by the seller; if the quality is not prescribed, approved or stated, products and services are to be of the usual quality,

to sell products and to provide services for prices agreed in compliance with pricing regulations and to charge correct prices when selling products or providing services.

#### **§ 6 Prohibition of Discrimination against Consumers**

No seller may behave contrary to good practices when selling products or providing services, in particular no seller may discriminate against any consumer in any way.

#### **§ 7a Prohibition to Produce, Import, Export, Offer, Sell, and Give Away Products Dangerous Due to Being Possibly Mistaken for Foods**

No one may produce, import, export, offer, sell or give away products that are dangerous due to being possibly mistaken for foods.

#### **§ 8 Prohibition to Deceive Consumers**

(1) No one may deceive consumers, particularly by providing untruthful, unsubstantiated, incomplete, inaccurate, unclear, ambiguous or exaggerated information, or by concealing information about the real properties of products or services or the quality of purchasing conditions.

(2) Considering as deceiving a consumer is also offer or sale of goods or products violating certain intellectual property rights as well as storage of such goods or products with the purpose of offering or selling the same.

(3) One cannot be released from the liability for deceiving consumers by claiming that the necessary or correct information was not provided by the manufacturer, importer or supplier.

(4) The terms "guarantee" or "guaranteed" as well as other terms with a similar meaning may be used only when the content and conditions of the guarantee are specified at the same time.

(5) The provisions of the preceding paragraphs shall have no effect on the general provisions on unfair competition.

(6) For the purposes of this Act, storage of goods or products violating intellectual property rights means the placement of such goods or products in storage facilities, means of transportation, offices or other non-residential areas as well as points of sale, including outdoor stands.

#### **§ 9 Information Duty**

(1) Sellers shall duly inform consumers about the properties of products to be sold, the nature of services to be provided, the manner of use and maintenance of particular products, any risks related to the improper use or maintenance thereof, and about any risks concerning services that are to be provided. If necessary due to the nature of a product, the manner of its use, and the period of its use, the seller shall ensure that the relevant information is contained in enclosed operating instructions and that such information is comprehensible.

(2) A seller may not be released from the duties set forth in paragraph (1) on the grounds that the required or correct information was not provided to him by the manufacturer, importer or supplier. However, such duty does not apply in cases of obvious or generally known facts.

#### **§ 10**

(1) Sellers shall ensure that products to be sold by them are visibly and intelligibly marked:



- a) with the name of the product, the designation of the manufacturer, importer or supplier, the weight, quantity, size or dimensions, and any further information that based on the nature of the product is necessary for its identification or use,
  - b) with information about the composition of the material in the case of textile products, with the exception of products that under a special regulation are not subject to the duty of being identified this way,
  - c) with information about the minimum durability of foods or the expiration date in the case of perishable products, as specified in a special law,
  - d) with information about the materials used in the main parts of footwear, with the exception of products that according to the relevant implementing regulation are not subject to the duty of being identified this way.
- (2) If special rules are to be observed when using a certain object, especially if instructions for use are to be followed, sellers shall inform consumers accordingly, unless such rules are generally known.
- (3) When products to be sold cannot be marked directly, sellers must mark them clearly and intelligibly with the information described in paragraph 1 in another suitable manner. When it is not possible or expedient to mark products to be sold due their nature, sellers shall provide such information truthfully, on request, to any consumer or authorities monitoring compliance with the provisions of this Act, and if necessary sellers must substantiate such information.
- (4) Special regulations may define a different manner of marking products.
- (5) No seller may remove or change product markings and other information provided by the producer, importer or supplier.
- (6) In the case of sale of used or modified products, products with a defect, or products whose usefulness is otherwise limited, sellers must advise consumers clearly of these facts in advance. Such products must be sold separately from other products.
- (7) The provisions of paragraphs 1 to 3 shall apply to the sale of used goods only where applicable.
- (8) In the case of sale of a product marked with symbols, sellers must inform consumers about the significance of such symbols in an appropriate manner.
- (9) The duty set under paragraph 1, letter d) shall also apply commensurately to producers, importers and suppliers.

### **§ 10a**

Producers and importers of footwear shall provide suppliers and sellers with a detailed description of the materials used in the main parts of the footwear in accordance with the implementing regulation.

### **§ 11**

If the information referred to in Sections 9 and 10 is provided in writing, it must be in the Czech language. Information in the Czech language concerning foods must conform to a special Act (Act on Foods and Tobacco Products). Physical quantities must be expressed in measuring units stipulated by a special act (S. 2 Metrology Act).

### **§ 12**

- (1) In accordance with price regulations, sellers shall clearly inform consumers about the price of products to be sold or services to be provided by clearly marking the price on every product or providing information about the price of products or services in another suitable manner.
- (2) Information about the price, or the fact that information about the price is incomplete or missing, may not make it appear that:  
the price is lower than the actual price,

the setting of the price depends on circumstances on which it in fact does not depend, the price includes delivery, performance, work, or services, that in fact is to be paid for separately, the price has been or will be increased or reduced or will remain unchanged, if this is not the case, the price and usefulness of an offered product or service is comparable to the price and usefulness of a similar product or service if this is not the case.

(3) The provisions of paragraph 2 shall apply commensurately to information about methods of setting prices.

### **§ 13**

Sellers shall duly inform consumers about the extent, conditions, and manner of making claims concerning defects in products and services (hereafter "claims") and advise them as to where they can claim a defect and obtain warranty service.

### **§ 14**

When a retail outlet is to be closed down, the seller shall inform the applicable Trade Licensing Authority (Act on Trade Licensing Authorities) where claims can be settled.

### **§ 15**

- (1) If the nature of a product so permits, the seller shall demonstrate the product to consumers upon request.
- (2) In the cases stipulated by law (s. 620(2) and (3), s. 621 Civil Code) the seller shall duly issue a warranty certificate.

### **§ 16**

- (1) At the request of a consumer, a seller shall issue a receipt confirming purchase of a product or provision of a service, stating the date of sale of the product or provision of the service, the type of product or service, and the price for which such product was sold or service provided, unless otherwise stipulated in a special law (s. 31(12) Act on Trades).
- (2) Receipts of purchase for products that are to be delivered at a later date must state the place and date of delivery.
- (3) Receipt of purchase for used or modified products, products with a defect, or products whose usefulness is otherwise limited must clearly indicate this fact.

### **§ 17**

If the nature of products so requires, particularly in respect of the hygienic conditions in which they are sold and the manner in which they are used, the seller shall sell products in hygienic packaging or wrap them in such packaging materials at the time of sale; in the case of self-service sale, the seller shall provide the consumer with a suitable packaging material.

### **§ 18**

- (1) Sellers must inform consumers about the monetary deposit paid for returnable packaging and post this information in a visible place.
- (2) Sellers must inform consumers about a change in the sum of the deposit paid for returnable packaging or the termination of refund of the deposit for returnable packaging at least 30 days before the change or termination is to take place. During this period refund of the deposit for such returnable packaging may not be stopped.

**§ 18a**

Manufacturers, importers and sellers may not use the names of individual types of crystal glass and symbols assigned thereto which are defined in the implementing regulation, in the case of products that are not specified in detail by such implementing legal regulation; the foregoing applies also to the advertising for such products. When a glass product bears a company or production designation or a brand or business name or a name including the words "crystal" or "made of crystal" or words derived there from, the producer or importer and the seller must add to such designation a detailed specification in accordance with the implementing regulation.

**§ 19**

(1) Except when another person is designated to perform repairs (S. 625, second sentence CC), a seller must accept a claim in respect of a product that he sold in any of his outlets, if this is possible taking into account the assortment of goods sold or services provided, at his registered office, or at his place of business.

(2) An employee authorized to handle claims concerning sold products must be present at a retail outlet during the entire course of business hours.

(3) A seller, or an employee authorized by him, shall decide about a claim immediately, in complicated cases within three business days. This period shall not include an adequate time required for expert assessment of a defect in a product or service. A claim concerning a defect in a product sold or service provided must be settled and the defect rectified without delay, at the latest within 30 days of the making of the claim, unless a longer period is agreed between the seller and the consumer. After the elapsing of such a period, the consumer shall have the same rights as if the defect were non-rectifiable.

(4) In the case of sale or provision of services outside a registered retail outlet, the seller must upon request add to the information specified in Section 13 the seller's name and the address where the consumer may file a claim after such sale or provision of services is terminated.



## **Estonia**

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**I. Existing National Law****a) General Provisions on Unfair Commercial Practices****i. Could you describe the general legal framework of the law on unfair commercial practices in your country (e.g. structures, main acts/statutes, leading cases, codes of conduct, self regulation)?**

The Estonian legal system is a young one and the framework of unfair commercial practice laws has not fully developed yet. There are areas, where legislation has been more active (such as advertising) and others where legislation is not very successful.

The Estonian Law of Obligations Act, which is not as specialised as unfair commercial practice law, is the main instrument for regulating not only contractual relationships, but also non-contractual relationships. Its general part includes provisions such as the principle of good faith. More specific laws that relate to unfair business practices are the Consumer Protection Act, the Advertising Act and the Trading Act.

**ii. Does a general clause on unfair commercial practices exist?**

In Estonian law the term ‘unfair commercial practices’ has not been used so far. Moreover, there is no framework law which generally deals with unfair commercial practices or which would encompass all aspects of it. There are a number of laws, where general clauses on specific aspects of unfair commercial practices are laid down.

The Law of Obligations Act (*Võlaõigusseadus*)<sup>29</sup> is a new law, which entered into force on 1 July 2002 and replaced a number of instruments, including the Civil Code which partly dated back to the Soviet era. The LOA was the most important single law for the reform of the private law in Estonia. The LOA contains a number of consumer oriented specific provisions, but also general provisions. The LOA includes a number of clauses regarding consumer contracts and transactions that are made with consumers. The sections dealing with consumer transactions of the Law of Obligations are also mandatory, whereas other sections can be usually deviated upon mutual agreement.

The principle of good faith is stated in the general part of the LOA. It is stated in Article 6 that “obliges and obligors shall act in good faith in their relations with one another” and that “Nothing arising from law, a usage or a transaction shall be applied to an obligation if it is contrary to the principle of good faith.” The good faith principle has been used in Estonian legal practice in the absence of specific laws, therefore it could also be applied to unfair commercial practices. There is no case law where only the good faith principle was used to base a claim against a trader, it is usually used as a supporting argument. A damages claim can be based also on the general tort law provisions in the LOA.

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<sup>29</sup> Law of Obligations Act (*Võlaõigusseadus*). *Riigi Teataja* I 2001, 81, 487. Entered into force on 1.07.2002. Modified on 5.06.2002 (RT I 2002, 53, 336), 19.11.2003 (RT I 2003, 78, 523), 11.02.2004 (RT I 2004, 13, 86), 22.04.2004 (RT I 2004, 37, 255).

The LOA also includes general consumer protection articles, such as rules on standard terms (§ 35 - § 45 LOA), contracts negotiated away from business premises (§ 46 - § 51 LOA), distance contracts (§ 52 - § 62 LOA) and contracts entered into through computer network (§ 621).

The main legal instrument relating to unfair commercial practices from the consumer protection aspect of the issue is the Consumer Protection Act (*Tarbijakaitseadus*).<sup>30</sup> The purpose of the act is “to safeguard consumer rights” (§ 1(1) CPA) and its scope is to regulate “the offering and sale, or marketing in any other manner, of goods or services to consumers by traders”, to determine “the rights of consumers as the purchasers or users of goods or services”, and to provide for “the organisation and supervision of consumer protection and liability for violations of this Act.” (§ 1(2) CPA).

Article 12 CPA states that “the offering and sale of goods and services to consumers shall follow good trade practice and be honest with regard to the consumers.”

Chapter 7 of the Competition Act (CA) (*Konkurentsiseadus*) deals with unfair competition.<sup>31</sup> § 50(2) simply states that “unfair competition is prohibited.” Unfair competition is defined as “Unfair competition is taken to mean dishonest trading practices and acts which are contrary to good morals and practices” (§ 50(1)). The scope of the law is “the safeguard of competition in the interest of free enterprise upon the extraction of natural resources, manufacture of goods, provision of services and sale and purchase of products and services, and the preclusion and elimination of the prevention, limitation or restriction of competition in other economic activities.” The law is thus aimed at ensuring the proper functioning of the market.

**iii. Who or what is protected by these provisions (e.g. consumers, customers in general, competitors, functioning of markets)?**

The main legal instrument relating to unfair commercial practices is the Consumer Protection Act. The purpose of the act is “to safeguard consumer rights” (§ 1(1)) and its scope is to regulate “the offering and sale, or marketing in any other manner, of goods or services to consumers by traders”, to determine “the rights of consumers as the purchasers or users of goods or services”, and to provide for “the organisation and supervision of consumer protection and liability for violations of this Act” (§ 1(2)).

**iv. Are there definitions of consumers, specific groups of consumers, such as “vulnerable consumers” or “children”, are there definitions of “business”, “trader” or similar terms?**

§ 34 LOA provides: “for the purposes of this Act, a consumer is a natural person who performs a transaction not related to an independent economic or professional activity.”

<sup>30</sup> Consumer Protection Act (*Tarbijakaitseadus*). *Riigi Teataja* I 2004, 13, 86. Entered into force on 15.04.2004, partly on 1.05.2004. Modified on 21.04.2004 (RT I 2004, 41, 278).

<sup>31</sup> Competition Act (*Konkurentsiseadus*) *Riigi Teataja* I 2001, 56, 332, enacted on 1.10.2001. Modified on 14.11.2001 (RT I 2001, 93, 565), 19.06.2002 (RT I 2002, 61, 375), 19.06.2002 (RT I 2002, 63, 387), 18.09.2002 (RT I 2002, 82, 480), 9.10.2002 (RT I 2002, 87, 505), 20.11.2002 (RT I 2002, 102, 600), 11.02.2003 (RT I 2003, 23, 133), 24.03.2004 (RT I 2004, 25, 168), 28.06.2004 (RT I 2004, 56, 401)

The CPA defines consumer as “a natural person to whom goods or services are offered or who acquires or uses goods or services for purposes not related to his or her business or professional activities” (§ 2(1)); trader is defined as “a person who offers and sells, or markets in any other manner, goods or provides services to consumers within the scope of the person’s business or professional activities” (§ 2(2)); goods are referred to as “movables which a trader offers, sells or markets in any other manner to consumers”; service as “a service offered or provided by a trader” and universal service “means a service provided in the public interest and used by the overwhelming majority of the population of the state or a certain region, such as gas, electricity, heating, water, sewerage, waste handling, communications and other similar services” (§ 2 CPA).

Advertising directed at children is regulated by § 9 of the Advertising Act. There is a general prohibition not to “exploit the natural credulity or lack of experience of children.” There are also specific requirements for advertising, which is directed principally at children:

- “advertising shall not suggest that possession of a product, use of a service or achievement of some other objective intended by the advertisement will give the child an advantage over other children of the same age or that the lack thereof would have the opposite effect.”
- “advertising shall not incite children to behave or act in a manner which has or may have the effect of bringing children into unsafe conditions;”
- “advertising shall not include any direct appeal to children to demand the product or service being advertised from other persons;”
- “advertising shall not create feelings of inferiority in children or incite them to act in an aggressive manner.”

Also, “in the production of advertising directed at children and in the use of children in advertising, their unique physical and mental state resulting from their age shall be considered.” These rules are very general and have not been specified by case law. There is no definition of who are to be considered children, as the term has not been defined in the law. In specific regulation of advertising of strong and light alcohol advertising the terms “children” and “youth” are used as well, neither of them being defined.

**v. How are rules on fair commercial practices interpreted (e.g. by public authority, case law, codes of conduct)?**

Rules are at the first stage interpreted by the Consumer Protection Board, which is the state authority responsible for protect consumer rights. The authority has been constantly improving its practices, but there have been many problems with its interpretation and role.

The CPB is an alternative to the civil courts and the decisions of the Board serve as guidelines for trade enterprises. The Board is entitled to impose fines and prescriptive orders in case of the violation of the CPA and other regulations. The decisions of the CPB constitute a form of extrajudicial proceedings, but it is always possible to appeal from its decision to the courts according to the general Code of Misdemeanour procedure. Depending on the nature of the rules, the extrajudicial proceedings may also be conducted by local governments, police prefectures, etc.

There is no self-regulatory body in Estonia for advertising agencies or special areas. The absence of such organisation has created a situation where the traders and companies have



virtually no input in the creation of neither the advertising rules nor their interpretation. There have been a number of cases, two of which relate to the use of celebrities in TV advertisements for vodka, where the actions of the authority could have been regarded as unjust.

**b. Provisions on specific issues**

**i. Are there other provisions and case law prohibiting misleading advertising?**

Advertising is regulated by the Advertising Act (*Reklaamiseadus*).<sup>32</sup> § 4 of the Act deals specifically with misleading advertising. It is defined as “advertising which in any way, including its presentation, deceives or is likely to deceive the public, or which, for those reasons, injures or may injure a competitor.” It also includes a list of advertising features that can indicate whether advertisement in question is misleading or not. The Advertising Acts requires that in determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning the following features:

1. the composition, environmental safety and risk of damage to health related to use of the product, the method and date of manufacture, fitness for purpose, manner of use, place of production, country of origin or other characteristics;
2. the value and actual price of the product or service;
3. the terms of payment for products or services, such as hire purchase, leasing, instalment sales and credit sale;
4. delivery, exchange, return, repair and maintenance of the products;
5. terms of guarantee of products or services;
6. the manufacturer of the product or service provider, the manufacturer's or service provider's area of activity and qualifications, and the intellectual property rights related to the product or service;
7. official recognition or approval of the product or service, receipt of awards, distinctions or diplomas;
8. extent of endorsement for public or charitable causes using the name of the product or service.

There is also a broad prohibition to use the results of scientific or other research, quotations from scientific or technical publications and statistical or scientific data in advertising in a manner that misleads the public concerning the subject of the advertising

In addition, it prohibits “using the results of scientific or other research, quotations from scientific or technical publications and statistical or scientific data in advertising in a manner that misleads the public concerning the subject of the advertising.” Furthermore, “advertising shall not suggest that claims presented have a scientific basis that they do not possess.”

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<sup>32</sup> Advertising Act (*Reklaamiseadus*) *Riigi Teataja* I 1997, 52, 835, entered into force on 1.01.1998. Modified on 18.02.1999 (RT I 1999, 27, 388), 25.02.1999 (RT I 1999, 30, 415), 14.02.2001 (RT I 2001, 23, 127), 9.05.2001 (RT I 2001, 50, 284), 5.06.2002 (RT I 2002, 53, 336), 19.06.2002 (RT I 2002, 61, 375), 19.06.2002 (RT I 2002, 63, 387), 8.04.2004 (RT I 2004, 27, 177), 12.05.2004 (RT I 2004, 45, 315), 13.10.2004 (RT I 2004, 75, 520)

**ii. Are there other provisions and case law regulating comparative advertising?**

Comparative advertising is regulated in § 4<sup>1</sup> of the Advertising Act. It defines comparative advertising as “advertising which directly or indirectly identifies a competitor operating in the same market or goods or services offered by a competitor who meet the same needs or are intended for the same purpose as the advertised goods or services.” It is further stated that “comparative advertising shall compare one or several relevant, material and verifiable features of the compared goods or services, which may include price.” Prohibited is advertising which:

1. creates confusion or is likely to create confusion between the compared competitors or the competitors’ trade marks, business names, goods or services or material features or conditions of sale of the goods and services;
2. discredits or denigrates the trade marks, business names, goods or services of competitors or the material features or conditions of sale of the goods or services;
3. takes unfair advantage of the reputation of the trade marks, business names or other distinguishing marks of competitors or of the designation of origin of the compared goods;
4. compares goods or services marked with different geographical indications within the meaning of the Geographical Indications Protection Act (RT I 1999, 102, 907; 2000, 40, 252; 2001, 27, 151; 56, 332; 335; 2002, 53, 336; 63, 387);
5. presents goods or services as replicas or imitations of goods or services bearing a protected trade mark.

**iii. Are there other provisions and case law regulating aggressive practices?**

The term ‘aggressive practices’ is not used in the current Estonian advertising laws, but both offensive and denigratory advertising are prohibited (§ 5 and 6 Advertising Act). Offensive advertising includes, among other things, advertising that “plays on superstition, fear or sympathy.” This could include also harassment or threats as prescribed in the Directive, but there are no provisions that are specifically designed to prevent marketing practices that are aggressive.

Denigratory advertising is defined as “advertising which directly or by implication degrades or in some other manner denigrates a person, activity, area of activity, product, service, business activity or anything else published in advertising.” (§ 6 of the Advertising Act).

There are general clauses of the General Part of the Civil Code Act which the consumer could rely on to tackle aggressive practices. For example § 86 GPCCA declares void all transactions which are contrary to good morals or public order. According to § 90 GPCCA, “a transaction entered into under the influence of a relevant mistake, fraud, threat, violence or gross disparity may be cancelled pursuant to the procedure provided by law.” § 96 GPCCA regulates transactions entered into under the influence of an unlawful threat or violence. It allows for cancellation of such transactions only if the threat or violence “was under the circumstances so imminent and serious as to leave the person who entered into the transaction no reasonable alternative.” The same article also defines that a threat is considered unlawful if:

- the act or omission with which the person who entered into the transaction was threatened is unlawful,
- the objective of the transaction entered into under the influence of the threat is unlawful or
- the use of the act or omission for threatening in order to induce the person to enter into the transaction is unlawful.

§ 97 deals with transactions entered into under extremely unfavourable conditions. These can be cancelled if the other party took advantage of "the urgent needs, dependence or inexperience of the person, or other similar circumstances."

It must be pointed out that these provisions have been rarely tested in courts and their application to the field of unfair commercial practices is still *terra incognita*.

**iv. Are there provisions and case law regulating special marketing techniques?**

The regulation of marketing is usually restricted to advertising only and all other fields are less regulated. Since the legal system is very young, the case law regarding specific special marketing techniques has also not yet developed. The CPA includes a few provisions regarding for example contracts negotiated away from regular business premises and distance contracts, but these are general in nature and refer back to the provisions relating to regulation of such transactions and contracts in the LOA.

A contract negotiated away from business premises is defined by § 46 LOA. It is a contract for the delivery of movables or the provision of services where a supplier makes an offer to a consumer or makes a proposal to negotiate entry into a contract in or near the home or the place of work of the consumer, in public transport or street, at a recreational event. There is a *de minimis* rule which limits the application of this article only to transactions which are worth more than 15 euros. There is an obligation on the supplier to inform and provide a right of withdrawal from the contract within 14 days (§ 48-49 LOA).

**v. Are there specific provisions and case law regarding information requirements (e.g. rules that impose on traders a duty to disclose to the consumer all "material information")?**

Chapter 2 of the Consumer Protection Act deals specifically with requirements and conditions regarding informing the consumer. A general statement gives consumers the right "to obtain information on the safety of goods and services offered as well as on aspects concerning protection of health, property and economic interests." (§ 4(1) CPA). The information that the traders are required to provide includes: the characteristics and conditions of use of the goods or service, if a warranty applies and warranty conditions, the price, conditions of payment, performance of the contract, and the rights, obligations and liability arising from the contract, including the possibilities for submitting complaints regarding the goods or services.

**vi. Are there specific provisions and case law concerning specific sectors (e.g. final consumers)?**

There are a number of sectors where commercial practices have been restricted. This concerns mostly advertising of specific groups of products and services.

The advertising of tobacco products is completely prohibited according to § 10 Advertising Act. § 11 of the same act restricts the advertising of alcoholic beverages, which are divided into strong alcoholic beverages (over 22% alcohol by volume) and low-alcohol beverages (between 3 – 22% alcohol). Advertisement of such alcoholic beverages "which promotes initiation of the

use of alcoholic beverages or which contains a direct appeal to purchase or consume such beverages or is directed primarily at persons under the age of twenty-one” is prohibited. There is also a list of places where alcohol may not be advertised as well as some restrictions on the contents of the advertisements.

The advertising of medicinal products is also regulated separately with § 14 Advertising Act. The content of such advertisements is required to:

1. be set out in such a way that it is clear that the message is an advertisement and that the product is a medicinal product;
2. be up-to-date, understandable, unambiguous, ensure the distinguishing feature of the medicinal product from other medicinal products and shall contain sufficient information for the correct and safe use of the medicinal product;
3. be in accordance with the summary of product characteristics approved by the Agency of Medicines at the time of registration;
4. include the name of the medicinal product, as well as the common names of the active ingredients which the medicinal product contains;
5. include an express, legible invitation to read carefully the instructions on the outer packaging or on the package leaflet and to consult a physician.

It is prohibited to use materials in advertising of medicinal products which:

1. contains symbols of the state or local governments;
2. contains references to characters from film, television, entertainment, sports or other public figures or renowned physicians or scientists, or characters from cartoon animation or three-dimensional animation;
3. contains complicated terminology from specialised fields or unfounded opinions or assessments of the manufacturer concerning the properties or effectiveness of the medicinal products;
4. gives the impression that a medical consultation or surgical operation is unnecessary, by offering a diagnosis or by other comparable means;
5. suggests that the effects of taking the medicine are guaranteed, are unaccompanied by side effects or are better than, or equivalent to, those of another treatment or medicinal product;
6. suggests that the health of the subject can be enhanced only by taking the medicine;
7. suggests that the health of the subject could be affected by not taking the medicine;
8. is directed exclusively or principally at children or young people;
9. suggests that the medicinal product is a foodstuff, cosmetic or other consumer product;
10. suggests that the efficacy or safety of the medicinal product is due to the fact that it is natural;
11. could, by description or detailed representation of a case history, lead to an erroneous self-diagnosis;
12. refers, in improper, misleading or alarming terms, to claims of recovery;
13. uses, in improper or misleading terms, pictorial representations of changes in the human body caused by disease or injury, or of the action of a medicinal product on the human body or parts thereof;
14. mentions that the medicinal product has been granted a marketing authorisation.

There are also restrictions on the form of advertising of medicinal products. It is prohibited to advertise such products:

1. on video cassettes, video games, compact discs or by any other technical means;
2. on the front or back cover of newspapers or magazines;

3. in printed publications which are directed principally at children or young people, or on printed matter containing information published principally for children or young people;
4. as outdoor advertising and inside or on the outside of public transport vehicles and taxis.

Advertisement of services, such as health and financial services is also regulated separately (§ 14-15 Advertising Act). For poisonous, flammable and otherwise dangerous products, it is required to inform the consumer of the circumstances of using the products (§ 16). It is prohibited to advertise narcotic drugs and psychotropic substances (§ 17) and weapons and ammunition (§ 18). Weapons may be advertised in exceptional circumstances and places such as the place of sale, as well as specialty magazines. The advertising of gambling is prohibited, except for the place of gambling (§ 19). It is also prohibited to advertise prostitution (§ 20).

**vii. What are post-contractual and after-sale commercial practices?**

Post-contractual practices such as warranty are covered in § 230-231 LOA. The latter specifies warranty against defects in event of consumer sale, including the requirement for the terms of the warranty to be set out in a manner understandable to the consumer. The provision establishes that the consumer has the right “to demand the repair of the thing or delivery of a substitute thing without charge during the warranty period.”

Regarding after-sale services, § 232 LOA provides that the consumers have a reasonable expectation that services related to the usage and repair will be provided together with the item bought. If, these services are not provided, the purchaser has the right to request these services also after delivery.

**viii. Are there provisions and case law on handling complaints?**

There is no self-regulatory organisation in place in Estonia, although there is an intention on behalf of the Estonian Association of Advertising Agencies to create one. Until this has not happened, the main recourse outside of the judicial system for the consumers is to turn to the state consumer protection agency, the Consumer Protection Board. In the CPA, there are two other options for consumer protection organisations to exist also foreseen in the law: through non-governmental consumer associations (§ 15 CPA) and at local government level (§ 16 CPA). The latter two organisations have no obligations for handling consumer complaints and they also lack the power to enforce consumer protections laws.

The procedure for complaints (§ 19 CPA) also entails the possibility to submit a complaint to the trader in case it results from a breach of contract. The trader can receive both oral and written complaints, but has to reply within 15 days only if the complaint has been in writing or in a format which can be reproduced in writing. The trader must give a justified refusal if the claim is deemed unfounded.

The primary recourse for a consumer whose problem has been left unresolved by the trader or if a problem results not from a contractual relationship (as is the case with marketing) is to turn to the independent consumer complaints committee (§ 22 CPA) which operates at the Consumer Protection Board. The consumer complaints committee hears disputes from consumers in matters where death, physical injury or damage to health has not occurred. The commission hears complaints free of charge.

## **II. Possible obstacles to the Directive on Unfair Commercial Practices from the national law perspective**

### **a. What are the main obstacles from the point of view of your country, which might result, complicate transposition and implementation of the Directive?**

The system for regulating unfair trade practices has not been fully established in the Estonian laws. There are a number of areas not covered by laws, which will need to be added or changed, such as more specific regulation of aggressive practices, special marketing techniques and others.

The advertising and regulation of marketing is highly problematic and has created a number of problems. The Advertising Act constitutes highly detailed collection of rules some of which are worded either too broadly or so restrictively that their application is sometimes of questionable quality in terms of legal certainty.

In order to transpose and implement the directive a cohesive system of laws covering unfair trade practices needs to be created. At the moment, there are only some fields that are highly regulated and where the trend is toward even more complex and detailed provisions such as those covered by the Advertising Act, while other areas of marketing are virtually unregulated. There is for example no consistent regulation on price reduction techniques, face to face marketing and distance marketing.

The biggest problem in regulating unfair commercial practices is that the oversight for the issues has been solely placed to the government agencies. The Consumer Protection Board has been tasked with controlling and overseeing a large range of issues starting from the labelling of goods until the content of the advertisements on TV. As has been evidenced many times, the CPB lacks the capacity and the manpower to fulfil these tasks and therefore the practical application of the acts concerning unfair trade practices might be less than what the directive foresees.

### **b. Do you see any incompatibilities within your national legal system?**

There are no foreseeable incompatibility issues within the Estonian legal system regarding unfair trade practices. The consumer protection laws are in line with each other and the Directive would complement these existing provisions well. The laws concerning advertising are being rapidly changed and developed, and there is a draft for a new Advertising Act at the Parliament, but it is unknown whether subsequent changes in the Estonian laws would introduce any incompatibilities.

### **c. How could the Directive be transposed into your national law?**

The directive can be transposed into Estonian law by the *Riigikogu* (Estonian Parliament) enacting a specific act and/or by modifying the existing laws to take account of the Directive. Since there does not exist any general unfair commercial practices law acts, it might be most

suitable to create a specific act replacing and modifying some of the already existing laws. The current Advertising Act is undergoing a review, but since the Directive covers much larger issue than advertising, simply changing or adding to the provisions of the Advertising Act is insufficient. Consumer law in general is a rather new field of law and correct application of the Directive is crucial for the development of the Estonian consumer protection laws. It could also provide an impetus for the review of the whole system of regulation of commercial practices to bring it into a more cohesive form. Therefore it can be said that the transposition of the Directive to Estonian law might bring about problems.

**d. What would be - from the perspective of your national law- the appropriate sanctions in case of infringement of the general clause of the Directive? Is there a system to enforce the provisions on fair commercial practice? How is this organised?**

The sanctions for infringements of the general clauses in the Directive would most likely also be under the scope of activities of the Consumer Protection Board (CPB).

In the case of advertisements, it is possible for the CPB as the responsible authority to issue a mandatory precept upon ascertaining a violation of the Advertising Act (§ 23). The Advertising Act also specifies liability for misleading advertising in § 23. It is stated in § 23(1) that “misleading, offensive, denigratory or surreptitious advertising, advertising which violates the inviolability of private life or ownership, and violation of the requirements for comparative advertising or advertising directed at children is punishable by a fine of up to 300 fine units.”<sup>33</sup> Legal persons can be fined up to 50 000 kroons (€ 3200). Proceedings against an advertiser can be instituted by the Consumer Protection Board, a rural municipality or city government and the Agency of Medicines (with regard to the advertising of medicinal products). It is also possible to impose an injunction against a broadcaster. As far as I am aware, there have been no cases where consumer organization or competitors have filed a claim for damages before a civil court. There is nothing in the laws which would disallow such claims so it would depend on the circumstances.

The system is flawed, however, due to its nature. The lack of self-regulatory organisation means that it is the sole responsibility of a government authority to effectively ensure the existence of fair commercial practices. The existing system has often proved highly ineffective and its usefulness has been questioned both by the consumers and the industry. It is unlikely that the?

**e. How would the Directive be delimited to the following fields of law?**

**i. Contract and Tort law**

The measures in the Directive are in line with the existing LOA. There should be no problem incorporating the provisions of the Directive to the LOA, especially regarding the mandatory provisions concerning contracts between consumers and undertakings. It might be necessary to make a few minor changes, but on the whole there are no discrepancies between the existing contract law and the measures in the Directive.

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<sup>33</sup> A fine unit is based on is a base amount for monetary fines and is currently set at 60 Estonian kroons (approx. € 4).

**ii. Competition law**

There are no specific consumer-oriented competition law clauses: the Estonian competition law is designed to ensure a competitive business environment which in itself is in the interests of the consumers. The Directive thus has little effect on the provisions of the CLA.

**iii. Intellectual Property law**

Estonian copyright laws do not in themselves regulate unfair commercial practices (except for the liability for sale of pirated goods). Therefore the Directive is in harmony with the Estonian IP law. Regarding trade mark law, the Estonian Trade Marks Act protection is not afforded to and, more importantly, can be taken away from trade marks “which are of such a nature as to deceive the consumer as to the kind, quality, quantity, intended purpose, value or geographical origin of the goods or services, the time of production of the goods or of rendering of the services, or other characteristics of the goods or service” (Articles 9(1) p 6 and 53(1) p 2).

**iv. Protection of Enterprises (esp. SME)**

There are no laws, which cover specifically the protection of SMEs or other kind of enterprises.

**v. Product Safety and Product Liability**

The Product Safety Act<sup>34</sup> is in line with European Community rules and compatible with the Directive. It regulates issues such as recall of potentially dangerous products from consumers and defines the roles of the supervising authorities.

**vi. Criminal law**

Provisions of Estonian criminal law complement certain measures in the Directive. These include § 210-213 Penal Code<sup>35</sup> which cover fraud, including investment, insurance and computer-related fraud. Extortion is covered in § 214. Of specific interest are so-called economic offences (Chapter 21 of the Penal Code), especially those concerning competition law breaches (§ 399-402), for which it is possible for the offender to be punished with up to 3 years of imprisonment.

**vii. Public Policy**

§ 86 Civil Code declares void all transactions which are contrary to good morals or public order. There are no general public policy considerations referred to in other consumer or advertising

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<sup>34</sup> Product Safety Act (*Toote ohutuse seadus*) Riigi Teataja I 2004, 25, 167. Available in English at <http://www.legaltext.ee/text/en/X80038.htm>.

<sup>35</sup> Penal Code (*Karistusseadustik*) RT I 2001, 61, 364; amended by RT I 2004, 56, 401; RT I 2004, 54, 387; RT I 2004, 46, 329; RT I 2004, 7, 40; RT I 2003, 90, 601; RT I 2003, 83, 557; RT I 2003, 4, 22; RT I 2002, 105, 612. Available in English at <http://www.legaltext.ee/text/en/X30068K5.htm>.



laws. § 9 (1) p 7 of the Trade Marks Act precludes protection from “signs which are contrary to public policy or accepted principles of morality”.

- f. Is there any national unfair commercial practices’ law, including case law, which may constitute a barrier to the Internal Market, for example case law which raises questions similar to *Estee Lauder*, *Clinique* and *De Agostini*?**

The preliminary conclusion is that there are currently no provisions in the law which might be seen as a barrier to the Internal Market. The requirements established to commercial practices are still being developed and the laws regulating the subject matter have been rarely used in courts. This might stem from the lack of consumer awareness of their rights.



## **Hungary**

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**I. Existing National Law****a) General Provisions on Unfair Commercial Practices****i. Could you describe the general legal framework of the law on unfair commercial practices in your country (e.g. structures, main acts/statutes, leading cases, codes of conduct, self-regulation)?**

Act IV of 1959 on the Civil Code (hereinafter referred as: Civil Code) contains basic provisions on contracts, general contractual conditions, false compliance, guaranty and warranty. The Civil Code also defines consumer contract. These rules harmonise Hungarian law with Directive 1999/44/EC on certain aspect of the sale of consumer goods and associated guarantees.

Act CLV of 1997 on consumer protection (hereinafter referred as: Consumer Protection Act) includes general rules concerning consumer information, labelling, protection of the life, health and safety of consumers, protection of consumers property, indication of price, packaging, consumer education, enforcement of consumer rights.

Act LVII of 1996 on the prohibition of unfair and restrictive market practices (hereinafter referred as: Competition Act) contains a general clause on unfair commercial practices with a view on the interests of the undertakings as well as on the interest of consumers.

Act LVIII of 1997 on Commercial Advertising Activity (hereinafter referred as: Advertising Act) includes general provisions on unfair commercial practices, comparative advertising, protection of children and juveniles, and special rules on advertising tobacco and alcohol products.

The Hungarian Code on Advertising Practice was enacted in 1997, modified in 2001 by ten advertising and other undertaking associations. The Code complements legislation on advertising. Its core principles are strengthening fair competition, ethics and moral norms, ensuring commercial freedom of speech. There are sector specific codes in force as well: beer-, pharmacy- tobacco- and television industry have their own codes of conduct.

**ii. Does a general clause on unfair commercial practices exist?**

According to the Article 5 point 1 of 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 (hereinafter referred as: UCP), unfair commercial practices shall be prohibited. These practices shall be considered as business-to-consumer commercial practices (Article 3, point 1). Concerning the definitions laid down in Article 2 point d) of UCP, business-to-consumer practices mean any act, omission, course of conduct or representation including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.

Hungary already has the provisions concerning unfair commercial practices laid down in UCP in its consumer protection and competition law.

Chapter II of Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter referred as: Competition Act) includes the general prohibition of unfair competition. The Competition Act shall generally apply to the market conduct of natural persons and legal entities, as well as of unincorporated business associations (hereinafter jointly referred to as "undertakings"), carried on in the territory of the Republic of Hungary, unless otherwise provided by law. The Article 2 Competition Act says that it is prohibited to carry on economic activities unfairly, in particular, in a way violating or jeopardising the lawful interests of competitors or consumers, or in a way breaching the requirements of business integrity. On these grounds the general clause on unfair competition applies to business to business (B2B) and business to consumer (B2C) relations as well. It means the general clause on commercial practices is included in the general clause on unfair competition.

In the interest of ensuring the fairness and freedom of economic competition between economic organisations, the Competition Act covers practices that may harm competitors' interests without harming consumers' interests (B2B).

Article 3 Competition Act prohibits violating or jeopardising the good reputation or creditworthiness of a competitor by stating or spreading untrue facts, and by misrepresenting true facts, as well as by any other practices. According to Article 4, it is prohibited to gain access to or use business secrets unfairly, and to disclose such secrets without authorisation to third parties or publish them.

The Competition Act prohibits unfair appeals to somebody with the intention to disrupt existing economic relationships with third parties or to prevent the creation of such relationships (Article 5). Concerning Article 6, it shall be prohibited to manufacture, distribute or advertise goods and services without the consent of competitors if such goods have a characteristic, presentation, packaging or labelling, or use a name, mark or designation, by which a competitor or its goods are usually recognised. According to Article 7 it shall be prohibited to infringe in any way the fairness of any bidding process - in particular in respect of competitive tenders - and that of auctions or stock exchange deals as well.

The Competition Act includes a general prohibition of unfair influence over consumer decisions (Chapter III). In order to achieve a high level of consumer protection, the Competition Act covers practices, which harm consumers' economic interest directly, and may have an indirect effect to the competitors' interest (B2C). According to Article 8 Competition Act, it shall be prohibited to mislead consumers in economic competition. For the purposes of the Competition Act, consumers shall be considered as customers, buyers and users. The provisions of the Competition Act protect consumers from the competitors' point of view. This means that consumers are only protected in case of competition, in the process of competition between competitors. The goal of the regulation is not to materially distort the economic behaviour of consumers or to use undue influence towards consumers by the trader.

Materially distorting the consumers' economic behaviour means, according to the Competition Act, using a commercial practice to appreciably impair their ability to make an informed decision, thereby causing them to take a transactional decision that they would not have taken otherwise. The Competition Act defines the term of undue influence as well. It means exploiting a position of strength in relation to the consumer so as by applying pressure, even without using

or threatening to use physical force, significantly limiting the consumer's ability to make an informed decision.

Act CLV of 1997 on Consumer Protection (hereinafter referred as: Consumer Protection Act) contains general provisions on consumer information, including labelling (Articles 9- 11), user's manual and instructions (Article 12), conformity assessment (Article 13), indication of price (Article 14) and packaging (Article 15). According to Article 8 of Consumer Protection Act, the purpose of information is the following.

"Consumer information shall provide consumers

- a) with adequate knowledge for selecting such goods or service, furthermore with basic knowledge regarding the basic attributes and characteristics of the goods and services necessary for the use of goods and services and the maintenance of goods, the quality, price or fee of the goods and services, instructions relative to the use of goods and any hazards associated with such use,
- b) with basic information necessary for enforcing his rights."

**iii. Who or what is protected by these provisions (e.g. consumers, customers in general, competitors, functioning of markets)?**

The development of fair commercial practices within the area without internal frontiers is vital for the promotion of the development of cross-border activities. The purpose of the UCP is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating laws, regulations and administrative provisions of the Member States on unfair consumer practices harming consumers' economic interests.

The UCP therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors.

On these grounds, Article 3 says that this Directive applies to unfair business-to-consumer practices, before, during and after a commercial transaction in relation to a product. UCP is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract, or national rules relating to the health and safety aspects of products.

According to the preamble of the Competition Act, the public interest attached to the maintenance of the market competition serving economic efficiency and social progress, as well as the interests of the economic organisations, observing the requirements of business integrity as well as that of consumers are protected by its provisions.

Concerning the scope of the Competition Act (Article 1), the Act applies to the market conduct of natural persons and legal entities, including Hungarian branch offices of foreign-registered companies, as well as of unincorporated business associations carried on in the territory of the Republic of Hungary, unless otherwise provided by law. This means that the subject of the Competition Act is so broad that it involves everyone and every organisation able to act in the market.

The Competition Act provisions are protecting consumers in the process of competition between undertakings. Chapter III of the Competition Act addresses commercial practices

directly related to influencing consumers' transactional decisions in relation to products. The Competition Act directly protects consumer economic interests from unfair business to consumer commercial practices on the market. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in the Competition Act and thus guarantees fair competition in fields coordinated by it.

The Consumer Protection Act protects the consumer. According to the preamble of the Consumer Protection Act, the protected interest is the provision of proper protection of consumer interests, with special emphasis on the safety of goods and services, protection of property, proper information and education, efficient legal remedy, and consumer protection through non-governmental (civil) organisations, and further development of the institutions necessary for the enforcement of such measures. Article 1 Consumer Protection Act says that this Act shall apply to all activities conducted by natural and legal persons, unincorporated business associations and to the branch offices of foreign registered enterprises (hereinafter jointly referred to as "economic organisations") within the territory of the Republic of Hungary, which involve or may involve consumers.

**iv. Are there definitions of consumers, specific groups of customers, such as “vulnerable consumers” or “children”, are there definitions of “business”, “trader” or similar terms?**

According to the definitions of UCP, consumer means any natural person who, in commercial practices covered by the Directive, is acting for purposes, which are outside his trade, business, craft or profession (Article 2(a)). It is the same definition laid down by other Directives on consumer protection.

Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly vulnerable to a commercial practice or to the underlying product and the economic behaviour of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.

Concerning the Hungarian legislation, the Consumer Protection Act includes the general definition of *consumer*. According to the Consumer Protection Act, *consumer* shall be taken to mean the person who buys, orders, receives or uses goods – for purposes other than the business or professional activity he engages in – or to whose benefit a service is provided, furthermore, who is the target of any information or offer on goods or services (Article 2 point (e)). With regard to the preamble of the Competition Act, the term '*consumer*' means customer, purchaser or user (Article 8(1)). According to the business advertising activity, as written above, by Article 2 point f) Advertising Act, *consumer* means all private individuals, legal entities and economic associations without legal entity towards at or which advertising is directed.

In coherence with the *aquis communautaire*, with particular regard to the Directive 89/552/EEC concerning the pursuit of television broadcasting activities, the Advertising Act restricts advertising tobacco and alcoholic beverages. On these grounds, the Advertising Act has several provisions protecting the interests related to health and moral welfare of children and juveniles.

Concerning Article 2 sub h Advertising Act, *children* mean persons younger than 14 years of age, *juveniles* means persons between 14 and 18 (Article 2 point (e)). Advertising targeted at

children or juveniles may not be published if it may harm their *physical, intellectual or moral development*, or take advantage of their credulity or lack of experience, it *directly encourages them to motivate adults to purchase goods*. Advertising may not be published if it may harm the physical, intellectual or moral development of children or juveniles, including in particular advertising which shows children or juveniles in dangerous or violent situations or in situations with sexual emphasis (Article 5). Advertising of pharmaceuticals may not be published if it is addressed to children (Article 10).

Advertising of tobacco products or alcoholic beverages is prohibited

- a) in *printed materials* fundamentally targeted at children or juveniles,
- b) on the *front cover* of printed materials,
- c) in *theatres or cinemas before 8 PM*, as well as immediately preceding any programs for children or juveniles, during the full duration thereof, and immediately after,
- d) on *toys* and the packaging thereof,
- e) in *public education*, in *health institutions* and within a distance of 200 meters from the entrance thereof (Article 12 indent (1)).

Tobacco products or alcoholic beverages may not be advertised if the advertising is targeted at children or juveniles, or depicts children or juveniles (Article 12, indent (2)).

The UCP defines trader as any *natural or legal person* who, in commercial practices covered by this Directive, is *acting* for purposes relating to his trade, business, craft or profession and anyone is acting in the name of or on behalf of a trader (Article 2 sub b).

Hungarian legislation uses the term “*undertaking*” to define the trader. It shall be noted that although the term is uniform, in the English translations different terms are used both in the Competition Act and in the Advertising Act. According to the Competition Act, the term *company*, which means natural and legal entities, defines trader including Hungarian branch offices of foreign-registered companies, as well as of unincorporated business associations. The Advertising Act refers to the trader as “*enterprises*”, which includes private individuals, legal entities or economic associations without legal entity. The Hungarian law also uses a few other expressions for defining the trader or business.

The Consumer Protection Act makes a distinction between distributor and manufacturer. Concerning Article 2 sub j, *distributor* shall mean an *economic organisation* marketing goods and/or services to consumers. For the purposes of Chapter II of this Act (‘Protection of Life, Health and Safety of Consumers’) “*distributor*” shall mean the entity that does not alter the safety features of the goods he places on the market. According to Article 2 Consumer Protection Act *manufacturer* shall mean:

- ka) any profit-oriented entity *established* in the European Economic Area engaged in the manufacture, production, restoration or reparation of goods, or an entity labelling itself as the manufacturer by affixing its name, trademark or other distinguishing label;
- kb) the manufacturer’s authorised *representative* who is established in the European Economic Area, if the manufacturer itself is not established in the European Economic Area; or in the absence of such a representative, the importer, furthermore;
- kc) an entity whose activities may influence the *safety* of the goods in the process of marketing.”

The aim of the distinction is that different rules apply to the distributor and the manufacturer in particular with regard to the liability in connection with consumer safety aspects.



**v. How are rules on fair commercial practices interpreted (e.g. by public authority, case law, codes of conduct)?**

Chapter VII of the Consumer Protection Act circumscribes the institutional system of consumer protection institutions. According to Article 40, the Minister responsible for consumer protection shall draw up and present to the Government for approval the strategy for a consumer protection policy and shall make recommendations for the organisational and institutional implementation of such. The Minister shall also take or initiate measures concerning the enforcement and protection of consumer rights.

The main consumer protection enforcement authority is the General Inspectorate of Consumer Protection that is under the supervision and control of the Minister designated by the Government. Regional inspectorates work in every county of Hungary and in the capital Budapest. The regional inspectorates shall perform the regulatory tasks of consumer protection with the professional guidance of the General Inspectorate on Consumer Protection.

However, the competence of the General Inspectorate of Consumer Protection and the regional inspectorates may not interfere with the consumer protection duties and competence falling by law under the jurisdiction of other organs. Concerning unfair commercial practices, this other organisation is the Hungarian Office of Economic Competition (hereinafter referred to as: Competition Office).

With regard to Article 44 Consumer Protection Act, the representative bodies of local governments may promote formation of independent consumer organisations and may support the activities of non-governmental organisations aimed at the enforcement of local consumer protection interests. The representative bodies of local governments may voluntarily take part, based on agreement with the chamber, in the operation of arbitration boards, as well as operate consumer protection by consulting offices, depending on consumer demand.

Finally, Article 45 Consumer Protection Act says that the State and local governments shall promote and assist the activities of non-governmental organisations providing representation of consumer interests. The State shall support civil organisations representing consumer interests through the annual budget.

It is very important that in the last few years arbitration boards have become more popular with consumers. Article 18-37 Consumer Protection Act deals with the arbitration board that is established for the purpose of attempting to reach an agreement between an economic organisation and a consumer to settle a dispute (consumer litigation) or, should the prior process fail, to decide on the matter in order to quickly, efficiently and simply enforce consumer rights. The arbitration board is an independent body operating in connection with regional chambers of commerce (hereinafter referred to as „chambers”). The chambers of commerce and industry and the chamber of agriculture operating within the same territory operate the arbitration board jointly. Local governments may, voluntarily and on the basis of an agreement with the chamber, participate in the work of arbitration boards.

Conducting the proceedings due to the violation of the prohibition of the unfair competition (the general clause – B2B) shall fall within the competence of the court (Chapter XII of the Competition Act). In the statement of claim, the interested party may demand that a violation of the law be established or may demand the termination of the violation of the law and the prohibition of the party violating the law from any further violation of the law or may demand

that the party violating the law give satisfaction (make an apology) by making a statement or in another appropriate manner, and, if necessary, that sufficient publicity be given to the satisfaction (apology) on the part or at the expense of the party violating the law or may demand the termination of the injurious situation, the re-establishment of the state of affairs prior to the violation of the law, and the deprivation of the goods manufactured or placed on the market through the violation of the law of their offending character, or, if this is not possible, the destruction thereof, and the destruction of any special devices and facilities used for the manufacture thereof, or may demand that the defendant disclose information on the parties participating in the manufacturing and marketing of the products involved in the case as well as on the business relations it has established to distribute such products. Proceedings conducted by the court shall also extend to the imposition of the fine.

Concerning the rules of the unfair commercial practices specially for B2C, the competent authority is the Hungarian Office of Economic Competition (hereinafter referred as: Competition Office). The Part III of the Competition Act contains the rules of the proceeding of the prohibition of unfair influencing of consumer decisions by the Competition Office. The competence of the Competition Office shall extend to the whole territory of the country. (Art. 46.)

A review of the decision passed on the merit of the case of the Competition Office, may be requested of the court with a statement of claim within thirty days reckoned from service. Such request for review shall have no dilatory effect on the execution of the decision (Art. 83(1)). The court may alter the decision of the competition board (Art. 83(4)).

Concerning unfair commercial practices there are codes of self-regulation on the field of commercial advertising. The Hungarian Advertising Association has held together the representatives of the publicity business since 1975. The Publicity Ethics Commission has carried out its work since 1981, and they consider the creation of the Publicity Ethical Codex a great merit. This Codex is the basis for the settlement of complaints relating to the advertisements already published. The 16 largest professional federations, bodies, associations agree with the contents of the Codex, and the leaders of these organizations have attested by their signatures that their members recognize the requirements set forth in the Codex mandatory for themselves. This means that the Hungarian Publicity Ethical Codex is a document based on business consensus. The Publicity Ethics Commission enjoys strong legitimacy since it carries out its tasks in compliance with the Codex based on mutual understanding.

It is important to know that the Publicity Ethics Commission is no court, does not punish but advises the participants on their ethical delinquency. About half of the issues submitted to the Commission and asking for its position concern violation of ethical norms, while the rest concerns mainly publicity taste, is subjective, where the Commission does not initiate in merito investigation. The Commission meets every second week and discusses five issues in average in compliance with the Codex and with its own Procedures. These figures indicate, too, that both the consumers and the business are aware of the existence and activity of the Publicity Ethics Commission.

**b) Provisions on Specific Issues****i. Are there other provisions and case law prohibiting misleading advertising?**

The UCP sets up a general prohibition of unfair commercial practices which in particular shall be regarded as unfair if they are misleading as set out in Articles 6 and 7, or aggressive, as set out in Articles 8 and 9. UCP does distinguish between misleading actions and misleading omissions. According to Article 6, *misleading action* should be considered, if as a commercial practice containing false information therefore untruthful or in any way, including the overall presentation deceives or is likely to deceive the average consumer. Misleading exists even if the information is factually correct, in relation to one or more of the *elements* listed in point (1), and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. According to Article 7(1) UCP, *misleading omissions* mean such a commercial practice, which, in its *factual context*, 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 he would not have taken otherwise. To determine the *factual context* it shall be taken into account of all the features and circumstances and *limitations of the communication medium*. Where the medium used to communicate the commercial practice imposes *limitations* of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted (Article 7(3)). In order to ascertain, which information shall be regarded as *material*, subparagraph 4 contains a list of omissions.

Article 7(2) UCP contains an additional provision. It says that a misleading omission deemed to exist where a trader hides or provides unclear, unintelligibly, ambiguously or untimely such material information or fails to identify the commercial intent of the commercial practice if not already apparent from the context.

Like the UCP, Article 8 Competition Act details the general clause and indicates those elements that shall in particular constitute the misleading of consumers. It contains practices, such as *stating untrue facts* in respect of the price and material qualities of the goods, presenting goods with attributes capable of misleading the consumer (Article 8(2) point a). Furthermore, it shall be prohibited to conceal that the *goods do not satisfy the provisions of the legal rules or the usual requirements* set in respect of the goods, and that the consume of the goods requires to achieve conditions substantially different from the usual (Article 8(2) point b). It shall also be prohibited to provide *information* capable of misleading the consumer in respect of circumstances related to the sale and distribution of goods and of *influencing the consumer's decision*, in particular, in respect of the method of distribution, the terms of payment, the attached gifts, the discounts granted and the chances of winning (Article 8(2) point c). Finally, misrepresenting a purchase as a highly advantageous bargain constitutes the misleading of consumers as well (Article 8(2) point d).

The infringement is realised by false allegation, by presenting true misleadingly and by any information *objectively suited to mislead*. A thorough examination of the target consumer group is essential since any information can be misleading, moreover, according to the decision 1997/1995. *VJ of the Hungarian Office of Economic Competition*, professionals and laymen consider the same act in a different way.

The petitioner “K” Beer Ltd. produces beer-industry products. Its competitor’s, “B” Ltd, activity is the same. “K” Ltd. issued brochures advertising “K” brewery methods and appliances. The petitioner applied to the Competition Office for a decision concerning the publication by the adverse party of brochures like his in order to popularise “A” Beer. According to his standpoint, a consumer who had seen the brochure used to popularise “K” brewery technique before, could have been misled by assuming that the similar brochure is promoting “K” product as well. Hence this could be regarded as a misleading action as regards the origin of the product.

The Competition Council examined whether the similar form of the brochures had been able to mislead the consumers. It should have taken into account the fact that the appliance used for brewery sold by “B” Ltd. was relatively of great value and buyers were customers who dealt with beer production and marketing. Moreover the customers’ practice was after preliminary information and before purchasing these products, to survey reference plant during work. On these grounds, Competition Council held that similarity of the brochures’ pictures is neither sufficient to be considered as unduly influencing the decision of customers with competence nor restricts substantially the freedom of choice.

Frequent infringements occur when the trader or supplier exaggerates the effect of the substantial features of the product, or the impact on health and environment or states a basically untrue result on the possible effect.

The Competition Office held that the statements of Scorpio Ltd. that appeared in several magazines was able to mislead the consumers (Vj-144/1995/21.). It was stated that “ALEX” car air conditioner is able to regulate humidity, designed for every car type and that] its system was equivalent to the manufactured ones. In its decision the Competition Office ordered to stop the behaviour and imposed penalty. The Courts rejected the appeal of the petitioners. The appellate Courts decided that an advertisement is unlawful, where it states an untrue result on the possible effect of the product restricting the consumers’ freedom of choice.

Consumers’ misleading can be committed not only in an active manner, by false allegation, but also when the vendor *omits* the substantial deficiencies of the product (misleading omission). It is important for the consumer to know the substantial features of the product or supply, and whether the purchased product is in accordance with the standards and specific provisions applying to the product.

In compliance with Article 7 paragraph 2 UCP, Article 9 Competition Act says that in assessing whether the information provided is capable of misleading the consumers, the *general meaning of the terms* used as accepted in everyday life and/or in the trade shall apply.

In that special case when a practice is both directed to business and consumers Article 7 of Act LVIII of 1997 on Commercial Advertising (hereinafter referred as: Advertising Act) says, that it is forbidden to publish misleading advertisements.

According to the preamble of the Advertising Act, the intention of the Parliament is to regulate business-advertising activity for the purposes of achieving fair communication with consumers, protecting the interests of enterprises, observing the requirements of fair business practices, and facilitating the sale of goods and services.

As for this issue Article 1 Advertising Act adds the following. This Act shall apply to *any business advertising activity* performed by private individuals, legal entities or economic associations without legal entity (hereinafter jointly referred to as: enterprises) in their capacity as advertisers, advertising service providers or publishers of advertising in the territory of the Republic of Hungary. With regard to this, the Advertising Act does only applies to business advertising, but does not to political or social advertising or other means of policy communication (for example: subvention). Similarly to Competition Act, “the subject of the Advertising Act is so broad that the *business advertising activity* is the key issue in defining the scope of the Act.

Specific parts of commercial practices can constitute misleading advertisements. Article 2 point n Advertising Act contains the definition of misleading advertising. It shall mean 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, for reason of its deceptive nature, is *likely to affect their economic behaviour* or which, for those reasons, *harms or is likely to harm a competitor* engaged in the same or similar activities. Article 7(2)-(3) Advertising Act says that for the purpose of defining a misleading advertisement, the following information transmitted in the advertisement shall be taken into consideration. It is important to inform the consumer about the *general characteristics* of the merchandise (Article 7(2) point a). It shall be understood as any facts transmitted concerning the place of origin of the merchandise, its ingredients, safety factors, its impact on health, technical features, its environmental features and energy consumption (Article 7(3)). Furthermore, its availability, date of manufacture, quantity, its suitability for a given function, the expected results from its use, the way it is controlled or tested, and any other fact regarding the application, shipping, use and maintenance of the merchandise (Article 7(3)). It is obliged to transmit information on the *price* of the merchandise or the pricing method, and other *contractual conditions* of purchase as well as on the *disposition of the advertiser*, such as its characteristics, the rights, wealth and/or endowments of or the awards received by the advertiser (Article 7(2) point b-c).

**ii. Are there other provisions and case law regulating comparative advertising?**

Comparative advertising may be published if it fulfils the conditions set out in Article 7/A(2)-(3) Advertising Act, as follows. Comparative advertising cannot be misleading, shall not harm the reputation of another company or the name, merchandise, brand name and other marking of such company. Comparative advertising shall not produce confusion between the advertiser and another company or the name, merchandise, brand name and other marking of such company, shall not produce any unfair advantage derived from the reputation of another company or the name, merchandise, brand name and other marking of such company. Furthermore, it shall not violate the provision of Article 6 Competition Act on the prohibition of imitating the merchandise of another company or the characteristics of such merchandise. The Competition Act requires some positive conditions as well. Comparative advertising shall be allowed to compare only goods, which are similar in terms of purpose and function. The advertisement shall objectively compare one or more features of the goods in question which are definitive and typical, and which can be confirmed. It shall objectively exhibit the prices, where applicable, and relate to goods of the same origin, where applicable.

**iii. Are there other provisions and case law regulating aggressive practices?**

Concerning Article 10 Competition Act, it shall be prohibited to apply business methods, which restrict, without justification, the freedom of choice of consumers.

Clearance sales for example, which distract consumers' attention from the substantial features – low quality – of the product and prevent consumers from making an informed decision can be regarded as aggressive practices.

**iv. Are the provisions and case law regulating special marketing techniques?****1. Distance marketing**

Regulations set out in Government Decree No. 17/1999 (II. 5.) on Distant Contracting harmonise Hungarian law with Directive No. 97/7/EC of the European Parliament and the European Council on the distance contracts with regard to the protection of consumers. According to Article 1 the Decree applies to contracts concluded between business organisations on the one part and consumers on the other part concerning provision of services or sales of goods by business organisations, using exclusively one or more means of telecommunication (distant contracting). 'Means of telecommunication' shall refer to devices that make it possible for remote contractual declarations to be made between absent contracting parties. Such devices include pre-printed forms not indicating the address or the addressee, standard letters, press advertisements with order forms, catalogues, telephones, automatic calling devices, radios, video-phones, videotexts (microcomputers with screen) with keyboard or touch-screen, electronic mail (e-mail), facsimile and television.

With regard to automatic calling devices Article 9 (1) of the Decree says that the explicit consent of the consumer shall be required for the business organisation to conclude a contract via either fax or an automatic calling device. Article 9 (2) adds that unless special legislation provides otherwise, the business organisation may, in the absence of the consumer's explicit objection, use direct contact telecommunication devices, except for those falling within the scope of Paragraph (1). Although cold calling is an increasingly used method of marketing in Hungary, there are not any specific provisions of this issue; general rules of this Decree apply.

This regulation contains provisions on contracts concluded through electronic mail. However, it is material to indicate that Act 108 of 2001 on electronic commercial activities deals with e-commerce and other issues concerning information society. This Act contains provisions regarding information and technical provisions connected to contracts concluded electronically and service providers' including intermediary's liability as well.

Concerning Article 8 of the Decree the business organisation may not demand any consideration from the consumer in case it sells a product or provides a service that the consumer has not ordered at an earlier date (unsolicited goods). The absence of an explicit statement by the consumer shall not justify the assumption that the consumer has - automatically - accepted the offer of the business organisation.

As far as information duties of this Decree are concerned, see for reference point I.b.V.

## 2. Face to face marketing

Article 1 (1) of Government Decree No. 370/2004. (XII. 26) shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded away from his business premises: - during an excursion organised by the trader or a third party, or-during a visit by a trader to the consumer's home or to that of another consumer; to the consumer's place of work; where the visit does not take place at the express request of the consumer. Furthermore, the protection of the consumer has more directions. First of all, the circle of marketed goods is restricted. It is prohibited to sell for example foods or medicaments. The trader has to meet information duties towards consumers, it is prohibited to visit the consumer from 19 p.m. to 9 a.m. and the consumer can terminate a contract within 8 working days.

Multi-Level-Marketing is legal as long as it can not be regarded as pyramid-selling, as it is written below. The provision of pyramid-selling laid down in the Act IV. of 1978 on Criminal Code. It is prohibited to organise of a pyramid game (Art. 299/C). According to this paragraph, the person who organises a game based on the collection and distribution of the money of the others in a predetermined form and way, which also contains an element of risk, in which the participants joining in a chain-like manner pay cash to, or perform other service for the participants preceding them in a chain, directly or through the organiser, commits a felony and shall be punishable with imprisonment of up to three years. Common attributes of pyramid games are that real economic activity can slightly be detected.

## 3. Price reduction techniques

The Hungarian Competition Act includes the prohibition of the unfair influencing of consumer decision in particular of misrepresenting a purchase as a highly advantageous bargain. In Hungary the Act on Commercial Advertising and the Act on Agrarian Market Regulation regulates specially price reduction techniques.

The Competition Act is prohibited to mislead the consumers in the economic competition (Art. 8(1)). Misleading information shall all information, which are capable of misleading the consumer is provided in respect of the price of the goods or which are capable of misleading the consumer is provided in respect of circumstances related to the sale and distribution of the goods, in particular the terms of payment, the attached gifts, the discounts granted and the chances of winning (Art. 8(2)).

The Act LVIII of 1997 on Commercial Advertising (hereafter: Advertising Act) has provisions on the special offer. Art. 2 point m defines the special offer. It says that special offer shall mean all offers, which differ from common commercial practice due to their unique features in terms of time, quantity, quality or for other reasons, such as, in particular, seasonal sales promotions, clearance sales, discount sale offers whether temporary or tied to a special event, and any promotions for gifts or prizes. The Advertising Act permits advertise special offer, including special price offers, if it clearly and plainly states the product to which it pertains, as well as the period or duration for which it is offered, or that it is offered for a product from a specific date as long as such product is available.

Sales below cost are prohibited in relation to foodstuffs. According to the Act XVI. of 2003 on the Agrarian Market Regulation retail trade price of agricultural and foodstuff industry products cannot be lower than their invoiced deliverance price stipulated in the contract. In case of

violating this provision it is possible to recourse to the competent County Agricultural Office for legal redress within 60 days from committing. In case of other goods only general competition rules apply.

**v. Are there specific provisions and case law regarding information requirements (e.g. rules that impose on traders a duty to disclose to the consumer all ‘material information’)?**

The Government Decree No. 17/1999 (II. 5.) on Distant Contracting contains provisions concerning information duty towards consumers. These shall be unambiguous, plain and accurate information, according to the means of telecommunication applied. According to Article 2(1) of the Decree, prior to contracting, the business organisation shall – in due time – inform the consumer of the following:

- a) the registered name (name), registered seat (place of residence) and registration number of the business organisation, determined in a separate rule of law, as well as the tax identification number and the telephone number of the business organisation. Article 2 (3) adds to this subparagraph the following. If the business organisation offers to conclude a contract with the consumer via telephone, at the beginning of the telephone conversation it shall inform the consumer of its registered name (name), registered seat (place of residence), telephone number and, especially, of its intention to conclude a contract.
- b) relevant features of the subject of the contract;
- c) the consideration, including other payment obligations in connection with the consideration;
- d) delivery costs, [where necessary];
- e) other terms of payment, conditions of delivery or terms of performance of the contract;
- f) the right of termination of the contract (Articles 4 and 5);
- g) the fee of using the means of telecommunication, if different from the basic rate;
- h) the term of the offer; and
- i) the shortest term of contract, in case the contract is performed continuously or repeatedly.

According to Article 3 (1) of the Decree, the business organisation shall provide the consumer with written information or other documents confirming the verbal information (hereinafter jointly referred to as ‘written information’) on the contents of Subparagraphs a) to f) of Paragraph (1) of Article 2 of this Decree in due time, prior to the signing of the contract or at the time of the execution of the contract at the latest. In addition to those stipulated in Paragraph (1), the written information shall include the following:

- a) the conditions, modes and consequences of termination;
- b) the address of the premises (branch office) or other unit of the business organisation where consumers may enforce their complaints;
- c) the conditions of warranty (guarantee) and the provision of any available after-sale services (spare part supply, servicing);
- d) the possibility of terminating the contract, if it was concluded for an indefinite period of time, or for a period exceeding one year.



**vi. Are there specific provisions and case law concerning specific sectors (e.g. final consumers)?**

Act LXXXII. of 2003 on foodstuffs (hereinafter referred as: Food Act) refers to the Regulation No. 178/2002 of the European Parliament and of the Council on 28<sup>th</sup> January 2002 laying down the general principles and requirements of food law establishing the European Food Safety Authority and laying down procedures matters of food safety. Article 3 point 18 of the Regulation says that final consumer means the ultimate consumer of foodstuff who will not use the food as part of any food business operation or activity. Food Act aims to protect the interest of consumers and provides adequate information for consumers to make an informed decision concerning the food they buy, According to Article 10(2) Food Act visualisation of the foodstuff and labelling shall not mislead the consumer.

**vii. What are the national laws of post-contractual and after-sale commercial practices?**

The Civil Code contains the basic provisions regarding guarantee and warranty caused by false compliance. According to Article 305(3) the obligor is liable for false compliance. If the obligee knew or ought to have known about any lack of conformity at the time of concluding the contract, the obligor is exempt from bearing guarantee responsibility (Article 305/A(1)). Unless proved otherwise, any lack of conformity, which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity (Article 305/A(2)). In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods (Article 306(1)). The Civil Code contains provisions regarding the subjective and objective deadline of enforcing the consumer's right. The consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity (Article 307(2)-(3)). The objective deadline of enforcing rights is two years from the time of delivery (Article 308(4)).

**viii. Are there provisions and case law on handling complaints?**

Article 38 Consumer Protection Act contains provisions concerning customer service. This means that economic organisations or those providing financial, private pension, insurance and telecommunication services shall operate a customer service department for handling consumer correspondence, investigating and redressing complaints and for providing extensive information to consumers at a location which is open for customers. The economic organisation shall establish the policy and business hours and shall provide the operating conditions of the customer service department without causing any detriments to the interests of consumers. The customer service must issue a written statement regarding the rejection of a complaint with an explanation attached, a copy of which shall be presented to the consumer or sent to the customer within 15 days. As part of the procedure of handling consumer correspondence and providing information to consumers, the customer service must cooperate with non-governmental organisations providing representation of consumer interests.

## **II. Possible obstacles to the Directive on Unfair Commercial Practices from the national law perspective**

### **a. What are the main obstacles from the point of view of your country, which might result, complicate transposition and implementation of the Directive?**

The term of average consumer is used by UCP but it was not defined. Every Member State has its own enforcement system and jurisdiction, which are able to elaborate the definition of the average consumer, taking into account the relevant decision of the *European Court of Justice* as well. The Hungarian Office of Economic Competition uses the term average consumer, which means as a consumer acting *circumspectly* and *reasonably* in a *generally expected manner*. A *circumspectly* acting consumer takes decision regarded as optimal, in the current situation, by subjective guess of presumption. The requirement of acting in an *expected manner* meets the consumer if he keeps informing until the expected advantages of questing information exceed the expected costs.

On these grounds the transposition of UCP would have been complicated if average consumer were defined in the text. Still, the application of average consumer is possible in Hungarian legislation in lack of this definition.

### **b. Do you see any incompatibilities within your national legal system?**

Hungarian national legal system is prepared to implement UCP. The enforcement would have been difficult if the term of average consumer had remained in the directive.

### **c. How could the Directive be transposed into your national law?**

UCP could be transposed into the Competition Act as well as the Commercial Advertising Act.

### **d. What would be – from the perspective of your national law – the appropriate sanctions in case of infringement of the general clause of the Directive? Is there a system to enforce the provisions on fair commercial practice? How is this organised?**

UCP orders the Member States to ensure that adequate and effective means exist to combat unfair commercial practices and for compliance with the provisions of this Directive in the interest of consumers (Article 11 paragraph 1). According to Article 13, Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.

In the Hungarian legislation, the enforcement of regulations is assured by sanctions. According to the provisions of the Competition Act, in case of misleading practices the Hungarian Office of Economic Competition is entitled to impose sanctions as follows:

- shall state the kind of behaviour violating the law,
- shall order to stop the behaviour violating the law,
- shall prohibit continuing the behaviour violating the law,
- In case of breach of the law the Hungarian Office of Economic Competition is entitled to proceed and prohibit, without justification, to create or maintain business relations appropriate for the type of transaction. (Article 21(c))
- shall order to publish emending statement concerning information suitable for deceit
- shall evoke or amend its decision made previously (Article 19, 32)
- The Competition Council shall impose penalties against those violating the provisions.

The maximum amount of the penalty shall be at the most 10% of net revenues of the enterprise in the previous business year. However, the maximum penalty imposed against NGO's of enterprises, public bodies, associations and other bodies shall be at the most 10% of net revenues of the targeted undertaking/body in the previous business year.

Article 47(1) Consumer Protection Act says that the acting authority (the General Inspectorate of Consumer Protection), upon establishing in proceedings a violation of consumer protection regulations prescribed in this Act and in other legal regulations, may, unless otherwise prescribed by legal regulations,

- a) order the state of infringement to be terminated,
- b) prohibit continuation of the illegal conduct,
- c) order the goods imposing hazards to the life, health or physical safety of consumers to be removed from the market,
- d) order the goods imposing hazards to the life, health or physical safety of consumers to be destroyed in observation of environmental protection regulations,
- e) order a business establishment to be closed, in the event of sales conditions endangering the life or health of consumers or of economic activities in violation of the provisions of the prohibition of unfair market practices affecting a wide range of consumers and/or causing substantial damages.

According to Article 48(1) Consumer Protection Act, the acting authority may impose a penalty. In the event of multiple infringements, fines may also be imposed cumulatively. The amount of the fines shall be established in consideration of all circumstances, with particular emphasis on the sphere and gravity of damages caused to consumers, the duration of the violation and repeated offence, and on the advantage gained by such violation. There is no upper limit of the amount of the fine prescribed by this Act. Article 18(1) Advertising Act says that if the authority responsible for the proceedings (either General Inspectorate of Consumer Protection or Hungarian Office of Economic Competition) establishes that the advertising violates the law,

- a) it may order that such violation should be terminated,
- b) it may prohibit continuation of the violation.

The authority responsible for the proceedings may impose a *penalty* on the party violating the law. In the event of repeated violations of the law, *cumulative penalties* may also be imposed. The amount of the penalty shall be established with respect to all circumstances of the case, including, in particular, the scope and severity of the offence against consumer interests, the duration of the violation of law, and any repeated violating conduct. Any penalties imposed on the basis of a final legal judgement and not paid shall be collected in the same way as taxes (Article 18(2)-(3)).

According to Article 39(1) Consumer Protection Act, non-governmental (civil) organisations providing representation of consumer interests may file charges against any party causing substantial harm to a wide range of consumers by illegal activities aimed at enforcing the interests of consumers even if the identity of the injured consumers cannot be established.

**e. How would the Directive be delimited to the following fields of law?**

**i. Contract and Tort Law**

Recital 11 of the UCP says that the Directive sets out a limited number of key information, which the consumer needs to make an informed transactional decision. Such information will not need to be disclosed in any advertisements, but only where the trader makes an invitation to purchase, which is a concept clearly defined in the Directive. Thus UCP provisions shall be applied to pre-contractual activities made by the trader (*invitation to purchase*) and also after the contract is concluded. Contract law is regulated by the Civil Code which contains provisions regarding consumer contracts including specific rules on general contractual conditions as well. On these grounds consumer protection authorities are able to handle complaints and impose sanctions against traders in connection with consumer contracts. Furthermore consumer protection authorities have right to inspect certain “pre-contractual” activities, such as advertisements, misleading actions and omissions and, after implementing UCP, aggressive practices as well.

**ii. Competition Law (aiming at the protection of the consumer)**

Competition law is regulated in Hungary by the Competition Act, which has explicit consumer protection provisions as it is written above. Competition Office deals with consumer complaints as well.

The Competition Act prohibits misleading the consumers in the economic competition (Article 8(1)). On the basis of the Competition Act the misleading of consumer in particular means the statement of the price and material qualities of the goods are untrue facts or true facts are stated in a manner capable of misleading the consumer, the goods are presented with attributes capable of misleading the consumer, or any other information capable of misleading the consumer is provided in respect of the material qualities of the goods or misrepresenting a purchase as a highly advantageous bargain (Article 8(2)). In establishing whether the information provided is capable of misleading the consumers, the general meaning of the terms used, as accepted in everyday life and/or in the trade shall apply.

The basic provisions of Hungarian competition law are laid down in the Competition Act. Based on the Competition Act, Government regulations contain provisions on the exemption of certain groups of restrictive agreements.

The Competition Act covers both competition restricting practices (antitrust law) and unfair market practices of undertakings. The Competition Act includes the most important provisions in respect of unfair market practices, unfair manipulation of consumer choice, restrictive agreements of undertakings (both horizontal and vertical), abuse of dominant position, merger control.

The legal framework is basically the same in respect of both horizontal and vertical agreements restricting competition. These agreements are prohibited, null and void, unless they fall within one of the exceptions set out in the Competition Act or are exempted on the basis of criteria laid down in the Act. Exemptions may be granted by block exemption regulations and individually.

Individual exemptions must be applied for to the GVH. Hardcore cartels however (as e. g. price fixing agreements between competitors) might never be subject of exemption. In the case of abuse of dominant position the "abuse principle" is applied, according to which the dominant position on the market is not illegal in itself, only the abuse of such position (e.g. exploiting consumers or restricting competition) is prohibited.

Competition Act also defines procedural framework for the application of Articles 81 and 82 of the EC Treaty in competition procedures before Hungarian courts and the Hungarian Competition Office. Article 21 Competition Act contains a general clause on the abuse of dominant position which is prohibited.

The Competition Act details the general rule with examples which shall in particular be considered as abusing dominant position (Article 21 points a-j). The Competition Act holds provisions on prohibition of agreements restricting economic competition as well. Namely, Article 11(1) Competition Act declares that agreements between undertakings and coordinated practices, as well as the decisions of the social organizations of undertakings, public corporations, unions and other similar organizations of undertakings, unions, which are aimed at the prevention, restriction or distortion of economic competition, or which may display or do display such an effect, are prohibited. An agreement concluded between undertakings that are not unrelated shall not be construed as such.

### **iii. Intellectual Property Law (e.g. Imitation)**

According to Article 86(1) Civil Code intellectual properties are under protection of the Act. This Article refers to the specific provisions of the particular areas, ties down the protection of the know-how and the application of the general civil rules (sanctions) as well. Thus, intellectual property law can be handled separately from the provisions of unfair commercial practices.

### **iv. Protection of Enterprises (esp. SME)**

According to Recital 5 of the UCP, this Directive neither covers nor affects the national laws on unfair commercial practices, which harm only competitors' economic interests or which relate to a transaction between traders, nor the provisions of Directive 84/450/EEC on advertising which misleads business but which is not misleading for consumers and on comparative advertising. This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. On these grounds, transposition will not have an effect on the regulations concerning the protection of enterprises. Furthermore, from the competition laws' point of view, the size of an enterprise does not matter at defining whether it has violated the rules on misleading advertising or on other unfair practices.

However, out of the scope of the consumer protection legislation, Competition Act contains several provisions as regards SME's as compared to businesses in general. The Article 21 Competition Act holds the prohibition of abuse of a dominant position. The Competition Act details this general rule with examples which shall in particular be considered as abuse a dominant position (Article 21 points a-j). A dominant position shall be deemed to be held on the relevant market by persons who are able to pursue their business activities to a large extent independently of other market participants substantially without the need to take into account

the market reactions of their suppliers, competitors, customers and other trading parties when deciding their market conduct. Dominant positions may be held by individual undertakings or jointly by more than one undertaking (Art. 22).

Retail traders use several other practices which in most cases cannot be regarded as abusing a dominant position. These practices overall are interpreted by the Competition Office as 'buyer power' that appears in activities which arise from the stronger market position of a retail trader. These practices are mostly legal, thus often used towards other businesses, in particular SME's. Retail traders frequently demand 'shelf charges', contributions to common marketing expenses, entering into exclusive contracts, etc.

#### **v. Product Safety and Product Liability**

The Consumer Protection Act regulates general product safety. According to Article 3(1) Consumer Protection Act, only goods that are safe may be placed on the market. Manufacturers shall take measures to ensure the safety of goods. Distributors must refrain from supplying products which they know or should have presumed, on the basis of the information in their possession and as professionals, do not comply with applicable safety requirements. Thus, implementing UCP will not have an effect on the provisions on product safety.

Act X of 1993 on product liability says that manufacturer of the product is responsible for the damage caused by the defect of the product. In case of an imported product manufacturer related provisions of this Act shall properly apply to the importer. These provisions do not have an effect on unfair commercial practices rules.

#### **vi. Criminal Law**

Transposition of the UCP would not touch regulations laid down in the Act IV. of 1978 on Criminal Code (hereinafter referred as: Criminal Code). However, pyramid selling is regulated in the Criminal Code, which has similarities to Multi-Level-Marketing.

#### **vii. Public Policy (questions of decency)**

Article 200(2) Civil Code declares that contracts in violation of legal regulations and contracts concluded by evading a legal regulation shall be null and void, unless the legal regulation stipulates another legal consequence. A contract shall also be null and void if it is evidently in contradiction to good morals. According to the Act XI of 1997 on the Protection of Trademarks, a sign shall not be granted trademark protection if its use would be contrary to public policy, morality or law (Article 3 par 1 point a). Under Article 96 Trademarks Act, collective marks are marks that are capable of distinguishing goods or services of the members of a social organization, public body or association from the goods or services of other undertakings according to the quality, origin or other characteristics of goods or services bearing the collective mark. A sign shall be excluded from trademark protection as collective mark if the regulations governing its use contain provisions contrary to public policy, morality or law (Article 96(3)(b)).

Concerning morality the Advertising Act includes special provisions. Advertisement may not be published if it may harm the physical, intellectual or moral development of children or juveniles, with particular regard to advertisements which show children or juveniles in dangerous or violent situations or in situations with sexual emphasis (Art. 5(1)). Any display of a pornographic advertisement is forbidden, with the exception of such a display on sexual goods and in sex shops (Art 5/A(1)). It is also forbidden to publish any advertisement that is aimed to arouse sexual stimulus, with the exception of such advertisement on sexual goods and in sex shops. (Art 5/A(4)).

There are voluntary codes of conduct, for example in advertising, that contain specific provisions concerning questions of decency. The Hungarian Code of Advertising Ethics has been drawn up with the purpose of providing norms in trading ethics for those engaged in advertising activities in Hungary. The Code is the collection of the practical, professional-ethical norms of those engaged in advertising in Hungary. The Hungarian Code of Ethics contains several prohibitions and restrictions in order to prevent unfair and unmoral advertising activity. According to the Code an advertisement may not include such elements and may not create a general impact that would injure the generally accepted moral and ethic norms of society (point 4.1). An advertisement may not distinguish people, nationalities, ethnics or sexes disadvantageously and may not support such views (point 4.5). An advertisement may not include elements, and may not create a general effect that encourages, supports or justifies aggressive, violent or unlawful behaviour (point 4.7). It is prohibited to use erotic or sexual elements for purposes not justified by the object and substance of advertising. Presentation of the human body within the limits of good taste may not be objected to (point 4.11). The advertising of pornographic objects, means and services may be carried out only by appropriately oriented methods, advertising media and locations (point 4.12).

**f. Is there any national unfair commercial practices' law, including case law, which may constitute a barrier to the Internal market, for example case law which raises questions similar to *Estee Lauder, Clinique* and *De Agostini*.**

The experiences of last years show that authority proceedings have a major role in legislative enforcement and imposing penalties. The regulations are under continuous formulation in order to solve arising problems concerning consumers' deceit.

As it is written above, Hungarian national unfair commercial practices' law does not constitute a barrier to the internal market. As far as case law is concerned its direction ought to be changed in certain fields of jurisdiction after implementing UCP with particular regard to the practices listed at the Annex and to the term of the average consumer.

According to VEF 2001/13. of the *Fővárosi Bíróság* (Appellate Court), the advertisement of TESCO *Globál Áruházak co.* (Tesco Global Stores in Hungary) (hereinafter referred as: TESCO) is not appropriate for misleading the consumers. TESCO promoted in his newsletter a TI 30XA scientific calculator for 1999 HUF for a period from 12 to 25 April 2000. However, in the picture a scientific calculator with higher capacity (TI 36 XS) was depicted. The type number of the device was not visible in the picture because the text covered it, but the image of the keyboard could well be seen. According to TESCO's reasoning the correctness of the type number or the false labelling does not have an "information value" with regard to the average consumer. On these grounds this action is not relevant from the competition's point of view so the infringement was marginal. The Competitions Office held this reasoning as acceptable,

since the substantial features of the calculator had been recognisable because of the correctly transmitted type number and price. Replacing the pictures of products is not sufficient for misleading consumers, namely selecting a calculator is determined by its usage potentials instead of its look. On the spot the consumer can get acquainted with the real features of the product. The consumer, as the claimant appealed (Appellate Court) against this decision of the Competition Office at the *Fővárosi Bíróság*. He alleged that it is not possible to decide in general whether the targeted consumer group is in accordance with the average consumers' group or it is narrower. The consumer decided to visit TESCO and purchase the product on the basis of the picture. Although the type in the image is worth 4.500-5000 HUF, he considered the offer of 1999 HUF as real because the sale seemed to be reasonable. The claimant referred to Article 8(1) and Article 8(2) sub a and d Competition Act, and that bait-and-switch practices of department stores are getting more and more widespread. The *Fővárosi Bíróság* rejected the claim stating that provisions of the Competition Act are breached only if the information communicated is able to influence both the consumers' decision and economic competition. When examining this both the relevant consumer group and the required consumers' knowledge should be clarified. In this case the type and price of the product offered were right. The image of the product appeared, however, in a false way. According to the Court, buyers of calculators can be divided into two groups. Misleading is excluded concerning consumers who do not have any information on the visual features of the product. They only know that TESCO is offering calculators for 1999 HUF. Misleading for consumers who are able to recognise the keyboard and the operational qualities shall be excluded as well since the background knowledge of this group is enough to make a decision about the calculator's type and its price. In its decision the Court also added that it could not be concluded that it had been a conscious misleading action, but just a simple mistake made by TESCO.



## **Latvia**

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**I. Existing National Law****a) General Provisions on Unfair Commercial Practices****i. Could you describe the general legal framework of the law on unfair commercial practices in your country (e.g. structures, main acts/statutes, leading cases, codes of conduct, self-regulation)?**

In Latvia commercial practices are regulated in general with following Acts:

- Consumer Rights Protection Act
- Advertising Act
- Competition Act

The purpose of the Consumer Rights Protection Act is to ensure that consumers are able to exercise and protect their rights when entering into contracts with manufacturers, sellers or service providers. It defines specific rules on unfair contract terms, consumer crediting, timeshare, distance contracts, outdoor selling, respective withdrawal rights, guaranties provisions, information to be supplied when offering goods or services, provisions concerning sales and price reductions.

The Competition Act (article 11) prescribes that actions, as the result of which regulatory enactments or the fair practices of commercial activities are violated and which have created or could create a hindrance, restriction or distortion of competition, shall be deemed to be unfair competition. It also specifies that agreements between market participants, which could distort competition in the territory of Latvia, are prohibited and null and void from the moment of being entered into, and prohibits abuse of dominant position.

**ii. Does a general clause on unfair commercial practices exist?**

There is no general clause on unfair commercial practices included in the normative acts in Latvia. There are general clauses on some specific unfair commercial practices, for example, Article 8 of Advertising Act prohibits misleading advertising and Article 18 of Competition Act prohibits unfair competition.

Actions, as the result of which regulatory enactments or the fair practices of commercial activities are violated and which have created or could create a hindrance, restriction or distortion of competition, shall be deemed to be unfair competition. Unfair competition may also occur in the form of the following activities if as a result of such activities a hindrance, restriction or distortion of competition has been created or could have been created:

- 1) the utilisation or imitation of a legally used name, distinguishing marks or other features of another market participant (whether existing, having ceased its activities or reorganised) if such use may be misleading as regards the identity of the market participant;
- 2) the imitation of the name, external appearance, labelling, or packaging of goods produced or sold by another market participant, or the utilisation of trademarks, if such imitation or utilisation may be misleading as regards the origin of the goods;
- 3) the dissemination of false, incomplete or distorted information regarding other market participants or their employees, as well as, in respect of the goods produced or sold by such a market participant, the economic significance, quality, form of production, characteristics,

- quantity, usefulness, prices, their formation and other provisions, which may cause losses to such other market participant;
- 4) the acquisition, utilisation or distribution of information, which includes the commercial secrets of another market participant, without the consent of such participant;
  - 5) the coercion of employees of another market participant with threats or bribery in order to create advantages for one's own economic activity, thereby causing losses to the market participant.

According to Article 17 Consumer Right Protection Act it is the duty of a manufacturer, seller or service provider to acquaint the consumer with true and complete information regarding the quality, safety, price, guarantee and the possibilities for guarantee service, directions regarding use, the name (firm name), given name, surname and address of the manufacturer, seller or service provider regarding the goods or services offered, indicating such information in the labelling, the attached instructions for use, the technical certificate or in other written information in respect of such goods or services.

The consumer can file a claim against an unfairly acting business mainly on the basis of Consumer Right Protection Act, but not general tort law.

Consumer Rights Protection Act in general obliges the producer, seller or service provider to provide consumer with truthful information concerning goods, services etc. It also contains specific rules on sales and price reductions.

Radio and Television Act protects the rights of public concerning commercials in TV and radio and TV shop. General provision declares that commercials and teleshops shall be truthful and fair.

There is no definition of “misleading practice” in Latvian legislation. Fragmentary it is covered by definition of misleading advertising in Article 8(2) Advertising Act, which is corresponding to the definition given in the Directive 84/450/EEC: misleading advertisement is an advertisement that in any manner, including its manner of presentation, is directly or indirectly misleading or may be misleading and, due to its misleading character, may affect the economic behaviour of a person (consumer), or is harmful or may be harmful to a competitor.

Article 3(1) Advertising Act determines that advertisement shall be lawful, truthful and objective and it shall be created in accordance with ethical advertising practices. Advertising shall not reduce public confidence in advertising and it shall comply with the principles of fair competition. Also the Consumer Rights Protection Act prescribes that goods or services do not conform to provisions of a contract if misleading information is provided regarding them (article 14(1) point 6 and 14(2) point 2).

Sponsorship is regulated in articles 25 and 26 of the Radio and Television Act. Article 25 sets general standards for sponsorship: If a program or broadcast is sponsored, the name of sponsor or his trademark must clearly be indicated at the beginning or end; the sponsor may not influence the content of sponsored programs or broadcasts, so restricting editorial independence of the broadcasting organization. The goods or services of the sponsor or other persons may not be advertised in sponsored programs or broadcasts by incorporating in them direct or promotional references. Article 26 provides that persons who manufacture goods, advertising of which is prohibited, may not be sponsors of programs and broadcasts. It also prohibits the

sponsorship of news and current affairs programs (with the exception of narrowly focused thematic news) (EU Directive 89/552/EEC on television broadcasting activities).

**iii. Who or what is protected by these provisions (e.g. consumers, customers in general, competitors, functioning of markets)?**

The purpose of Consumer Rights Protection Act is to ensure that *consumers* are able to exercise and protect their lawful rights when entering into contracts with manufacturers, sellers or service providers. The rules of this law and respective and above mentioned Regulations of the Cabinet of Ministers (issued under the Consumer Rights Protection Act) apply to consumers – natural or legal persons, which expresses wish to obtain, obtains or could obtain product or service for the purpose, which is not directly related to his/her entrepreneurship.

The purpose of Advertising Act (Article 2) is to protect the interests of *all persons as well as the general public* in the field of advertising and to promote fair competition – it protects consumers, entrepreneurs and general public.

Radio and Television Act protects the interests of the consumers, entrepreneurs and general public.

Competition Act protects *market participants – natural or legal persons* or partnerships, which performs or are preparing to perform economic activity in the territory of Latvia, irrespective of the form of such activity. If a market participant or several market participants jointly have a decisive influence over one or more of the other market participants, then all market participants within the meaning of this Act shall be considered as one market participant.

**iv. Are there definitions of consumers, specific groups of customers, such as “vulnerable consumers” or “children”, are there definitions of “business”, “trader” or similar terms?**

Article 1 of the Consumer Rights Protection Act contains following definitions:

*consumer* – a natural or legal person who expresses a wish to purchase, purchases or might purchase goods or utilises a service for a purpose which is not directly related to his or her entrepreneurial activity;

*service provider* – a natural or legal person who provides a service to a consumer;

*seller* – a natural or legal person (also – importer) who offers or sells goods to consumers by means of entrepreneurial activity, as well as a person who acts in the name of the seller or at his or her instruction.

*service* – performance of a consumer’s order or such fulfilment of a contract entered into with a consumer, for remuneration or free of charge, within the scope of entrepreneurial or professional activity of a natural or a legal person as a result of which an article is leased, a new article is produced, an existing article or its characteristics are improved or altered, or work is performed, or intangible result of work is achieved.

According to the Commercial Act a *commercial activity* is an open economic activity, which is performed by merchants in their name for the purposes of gaining a profit; it is one of the types of entrepreneurial activity. Economic activities are any systematic, independent activities for remuneration.

Article 1 of the Act of Lotteries of Goods and Services defines the **participator of lottery** as the person who buys good or concludes service contract and perform actions prescribed by rules of lottery for participation in lottery.

According to Protection of the Rights of the Child Act (article 3) a child is a person who has not attained 18 years of age, except such persons for whom according to law, majority takes effect earlier, that is, persons, who have been declared to be of the age of majority or have entered into marriage before attaining 18 years of age.

There are no specific definitions for consumer groups.

**v. How are rules on fair commercial practices interpreted (e.g. by public authority, case law, codes of conduct)?**

According to Article 13 Advertising Act advertising is supervised by the Consumer Rights Protection Centre, the Competition Council, the State Pharmaceutical Inspection and the Radio and Television Council within their respective competences.

If violations of regulatory enactments in the field of advertising have been determined, the Supervisory Institution is entitled to take a decision in which :

- 1) The advertiser is instructed to provide through advertising or goods labelling, or in another manner, additional information which is essential from the point of view of protection of persons or the lawful rights of entrepreneurs;
- 2) Particular elements (information, visual representations, audio or other special effects) are requested to be deleted from the advertising;
- 3) Distribution of the advertising is prohibited;
- 4) Recall of the advertising is requested; or
- 5) The application of an administrative sanction is determined in accordance with procedures prescribed by law.

According to Consumer Rights Protection Act (articles 24-25) consumer rights protection is supervised by the Consumer Rights Protection Centre, whose main functions concerning unfair commercial practices are following:

- 1) to examine submissions and complaints of consumers regarding violations of consumer rights, as well as to assist consumers in resolving conflicts that have arisen with respect to manufacturers, sellers or service providers, and to require compliance with the lawful claims of consumers;
- 2) to require that the manufacturer, seller or service provider make changes in draft contracts or discontinue performance of the contract terms if unfair or ambiguous contract terms are determined in the draft contract proposed by the manufacturer, seller or service provider or in the contract entered into;
- 3) to provide legal assistance to consumers regarding issues of consumer rights protection;
- 4) to supervise compliance with consumer rights regarding contracts entered into between consumers and manufacturers, sellers or service providers.

If a violation of consumer rights has been determined, which affects individual or group consumer interests (consumer association interests) and which may cause harm or losses to particular consumer rights, the Consumer Rights Protection Centre inter alia is entitled to:

- 1) take a decision which requires a manufacturer, seller or service provider to cease the violation, and to perform specific activities to rectify the impact thereof and which determine the time period for the implementation of such activities; and
- 2) publish the decision taken either fully or partially in the newspaper *Latvijas Vēstnesis* [the official Gazette of the Government of Latvia] (the costs associated with the publication shall be covered by the manufacturer, seller or service provider);
- 3) specify a time period within which the manufacturer, seller or service provider or their authorised representatives shall give a written answer about circumstances listed in consumer's claim or application or rectify violations of normative acts;
- 4) draw up documents on examination and reports of administrative violations, examine administrative violation matters, and impose administrative fines;
- 5) in cases prescribed by regulatory enactments, suspend the selling of goods or provision of services until receipt of an opinion by experts or testing laboratories if:
  - a. information regarding the goods or the labelling does not conform to the requirements prescribed by regulatory enactments;
  - b. attestation or approval of conformity is not produced;
  - c. well-founded suspicions arise regarding the dangerousness of goods or services;
- 6) on the basis of the opinion of testing laboratories or experts, or specific information, request the withdrawal of goods from the market or the discontinuation of the provision of services if the quality or safety of such goods or services does not conform to the requirements prescribed by regulatory enactments or regulatory technical documents.

According to Competition Act (article 6) supervising is carried out by the Competition Council, which shall in this area:

- 1) monitor the observance of the prohibitions against the abuse of dominant position, unfair competition and prohibited agreements by market participants, which prohibitions are prescribed in this Act, other regulatory enactments and international agreements;
- 2) supervise compliance with Advertising Act.

The Competition Council inter alia is entitled to:

- 1) Perform market assessments, with the involvement of independent experts if necessary;
- 2) Provide opinions regarding conformity of the activities of market participants with regulatory enactments that regulate competition;
- 3) Submit claim applications and complaints to a court in the cases provided for in this Act and other regulatory enactments.

The regular procedure of the appeal against a decision of the Consumer Rights Protection Centre and other administrative bodies is the following: decision of the local institution may be appealed to a higher authority in accordance with procedures regarding subordination. If there is not such an institution or it is the Cabinet of Ministers, the administrative act may be immediately appealed to a court. The decision of a higher authority may be appealed to a court (Article 76 Administrative Procedure Act).

There is an exclusion of this procedure in area of advertising. According to Article 17 Advertising Act a decision of the Supervisory Institution (including Consumer Rights Protection Centre and Competition Council) may be appealed directly to a court within one month from the day the decision is taken. The appeal of a decision shall not suspend the execution of the decision.

The only code of conduct we have in Latvia is Code of Ethics adopted by the Latvian Advertising Association. This code is interpreted by Latvian Advertising Association. The code provides liability for comparative advertising, hidden advertising and incomplete information.

**b) Provisions on Specific Issues**

**i. Are there other provisions and case law prohibiting misleading advertising?**

According to Article 8 Advertising Act misleading advertising is prohibited. Misleading advertising is “ advertising which in any manner, including its manner of presentation, is directly or indirectly misleading or may be misleading and due to its misleading character, may affect the economic behaviour of a person, or is harmful or may be harmful to a competitor”.

In determining whether advertising is misleading, all its aspects shall be considered – individual component and overall content and design and, particularly, any information that is offered in the advertising regarding:

- 1) accessibility, properties, operation, content, manufacturing or distribution method and date, purpose, usage, quantity or the effect on the environment or human health of goods or services, the geographical or commercial origins or the results which are expected from the use of goods, or the results of tests or inspections, or material features of goods or services;
- 2) the price or method for calculating price and the conditions under which goods are supplied or services are provided; and
- 3) the advertiser, including the identity and good characteristics, qualifications, property rights or awards of the advertiser.

There is no case law developed regulating misleading advertising in Latvia.

**ii. Are there other provisions and case law regulating comparative advertising?**

According to Article 9 Advertising Act comparative advertising is “any advertising in which comparison is used which directly or indirectly indicates a competitor or goods or services offered by a competitor”. A comparison shall not be misleading. The comparison shall be developed in accordance with principles of fair competition, utilising facts that may be proved.

Comparative advertising, in so far as it pertains to a comparison, shall be permitted if all of the following conditions are complied with:

- 1) it compares goods or services that are intended for the same needs or for the same purposes;
- 2) it objectively compares one or more material, related, verifiable and characteristic features of the relevant good or service, which may also include price;
- 3) it does not create confusion between the advertiser and a competitor, or between the advertiser and the company, trade mark, brand names or other distinguishing marks, goods or services of a competitor;
- 4) it does not defame a competitor, or the name (firm name), trade marks, brand names or other distinguishing marks, goods, services or operations, or personal characteristics and the like of a competitor;
- 5) it does not unfairly use the name (firm name), trade mark, brand name or other distinguishing marks of a competitor or the reputation of the designation of origin of a competing good;

- 6) it does not display goods or services as an imitation or copy of such good or service as there is a protected trade mark for; and
- 7) in advertising goods with a designation of origin, the comparative advertising pertains to goods with the same designation of origin.

There is no case law developed regulating comparative practices in Latvia.

### **iii. Are there other provisions and case law regulating aggressive practices?**

There are no specific regulations on aggressive practices in Latvia.

The Article 1440 of the Civil Act specifies that in order to consider legal transaction as valid it is not enough if parties express their will, but it is necessary that this will is not influenced by misrepresentation, falsehood or duress.

### **iv. Are there provisions and case law regulating special marketing techniques?**

#### **1. Distance marketing**

According to Consumer Rights Protection Act (article 10) a distance contract is “an agreement between a consumer and a seller or service provider on the basis of an offer by the seller or service provider through directed or non-directed printed matter, model letter, catalogue, advertisement published in periodicals to which an order form is attached, telephone, facsimile, internet, electronic mail, television, radio and other means of communication or transmission of information”.

According to the Consumer Rights Protection Act (article 4) consumer shall not be obliged to accept goods or services and pay the price for the goods or services if the goods are supplied or the services provided without an order being made by the consumer.

Distance marketing is regulated by Cabinet of Ministers Regulations regarding distance contracts.

The Regulations hold that information to be included in distance contracts and provided by offers expressed to consumers shall be the following:

- 1) the name (firm name), registration number and date, given name, surname and, if pre-payment is required, also the address of the seller or service provider;
- 2) characteristics of the goods or services;
- 3) price of the goods and services (including all taxes);
- 4) the charge for delivery (if such charge is provided for);
- 5) procedures for payment, delivery or performance;
- 6) information regarding the right of withdrawal;
- 7) costs for the utilisation of the relevant distance information means of communication or transmission (if such costs differ from the tariffs that are in effect in the State);
- 8) time period, during which the offer or the price is valid;
- 9) in contracts regarding a regular or repeat delivery of goods or provision of services – the minimum term of validity of the contract (if such term exists);



- 10) in contracts that are entered into through the Internet (except electronic mail) additional information to be specified shall be the following:
- technical stages that shall be observed in order to enter into the contract;
  - conditions for the storage of the contracts that have been entered into (whether the contract is stored) and availability of such contracts to consumers;
  - technical means for determination and correction of input errors prior to the making of an order;
  - languages offered for the entering into the contract; and
  - behaviour code that is observed and information regarding the accessibility thereof.

If the consumer has had full information on good or services, he may exercise the right of withdrawal and unilaterally withdraw from the contract within a time period of 14 calendar days, unless the parties have agreed on a longer time period. If this information is not complete, consumer may exercise the right of withdrawal and unilaterally withdraw from the contract within a time period of 90 calendar days.

According to the Act on Information Society Services, sending of commercial communication by e-mail to persons who did not given prior approval to it, as well as sending of other troublesome communications is prohibited.

## **2. Face to face marketing**

Door-to-door selling in Latvia is regulated by the Cabinet of Ministers Regulations regarding contracts entered into outside the permanent sales or provision of services premises of an Undertaking (Company). In accordance with a contract entered into outside the permanent location of sale or provision of services of the undertaking (company), the seller on his or her own initiative or at an explicit request of the consumer supplies goods, or the service provider provides services to the consumer by visiting the consumer at his or her home, place of work or another location where he or she may be found. According to these regulations, the contract shall include information about name, given name and surname of the seller or service provider, characteristics (also price) of the goods or services and description of the right of withdrawal (Point 2 of the Regulations).

A consumer is entitled to utilize the right of withdrawal from a contract within 14 calendar days of entering into such contract. Unless otherwise agreed by the parties, a consumer is not entitled to exercise the right of withdrawal in regard to the supply of such foodstuffs as are intended for immediate household use and are regularly supplied by a commercial agent (Points 3, 4 of the Regulations).

Upon entering into a contract, the seller or service provider shall issue to the consumer a written form of withdrawal according to which the specific contract may be identified. The consumer, in order to confirm the receipt of the withdrawal form, shall make a note on the copy of the withdrawal form (Point 5 of the Regulations).

If a consumer exercises the right of withdrawal, he or she shall return the goods or articles to the seller or service provider at the location where such goods or articles were received, or at another location specified by the consumer if it does not cause inconvenience to the seller or service provider. The seller or service provider shall repay to the consumer all the payments made by the consumer (Point 6 of the Regulations).

Upon entering into a contract, the seller or service provider shall issue to the consumer a written form of withdrawal according to which the specific contract may be identified.

There are not specific rules concerning such methods as touting for consumers in public places, snowball systems, Multi-Level-Marketing and others.

### 3. Price reduction techniques

Some price reduction techniques are regulated by Consumer Rights Protection Act. According to this Act (article 21/1) the word “izpārdošana” [sale] or words of a similar meaning when offering goods is permitted to be used only when all of the following conditions are observed:

- 1) it relates to a sale of all goods or a sale of an indicated part thereof;
- 2) the sale takes place in a restricted and indicated time period; and
- 3) the prices are lower than the normal prices of the relevant goods or services.

The words *atlaide* (discount), *pazeminātas cenas* (reduced prices) or words of a similar meaning when offering goods are permitted to be used only when all of the following conditions are observed:

- 1) it relates to the selling of such goods or the providing of such services with which the seller or service provider is permanently engaged;
- 2) such trade takes place within a restricted time period; and
- 3) the prices are lower than the normal prices of the relevant goods or services.

After a public announcement of reduced prices, discounts or a sale, the initial price and the price after reduction of the goods and services shall be clearly indicated. A sale shall be publicly announced at least five days before its commencement by placing notices in the place of trade. The price of the relevant goods or services regarding which discounts are specified may not change at least one month before the public announcement of the reduction in price, discount or sale.

It is prohibited to announce and conduct a sale on discount of one and the same goods or services if three months have not passed since the last sale, except in the case where the seller or the service provider is being liquidated or the type of activity is being changed.

According to Advertising Act (article 6) advertising, in which a special offer is made or a sale is announced, shall comply with general advertising requirements and the following shall be set out therein:

- 1) the subject of the special offer;
- 2) the date when the special offer or the sale starts and ends; and
- 3) the conditions on which the special offer or sale depend.

In evaluating the compliance of the advertising of the special offer or sale with the provisions of this Section, the advertising shall be considered in its totality.

**v. Are there specific provisions and case law regarding information requirements (e.g. rules that impose on traders a duty to disclose to the consumer all “material information”)?**

The Consumer Rights Protection Act (articles 17-19) establishes that it is the duty of a manufacturer, seller or service provider to acquaint the consumer with true and complete information regarding the quality, safety, price, guarantee and the possibilities for guarantee service, directions regarding use, the name (firm name), given name, surname and address of the manufacturer, seller or service provider regarding the goods or services offered, indicating such information in the labelling, the attached instructions for use, the technical certificate or in other written information in respect of such goods or services.

The procedures for indicating the selling price and the unit measurement price of the goods offered to the consumer, as well as the procedures for indicating the price of services, shall be regulated by Cabinet Procedures for Displaying Prices of Products and Services.

According to Consumer Rights Protection Act in order to identify the manufacturer, the name of the location of the manufacturer and the name (firm name) of the manufacturer shall be indicated on the labelling of the goods, on the packaging or on the attached label. If such indication is not possible, the name of the location of the manufacturer and the name (firm name) of the manufacturer shall be indicated on the external packaging, the accompanying documents or at the location of sale. The seller is prohibited to offer or sell counterfeit goods or goods, the manufacturer of which cannot be identified. This provision shall not apply to the selling of second-hand goods.

Technically complicated goods, as well as goods which contain dangerous substances or the use of which requires specific skills, shall be supplied by the manufacturer with directions for use and warning signs or symbols. If the information included in the directions for use is in a foreign language, a translation of the information into the official language shall be attached.

The information provided on the labelling shall be clearly visible and comprehensible, and it shall objectively reflect the safety or harmlessness and the quality of the goods. The information provided on the labelling shall not attribute such characteristics to the goods as they do not possess, or lead the purchaser to think that the goods possess certain specific characteristics, if all goods of the relevant type have such characteristics. The labelling shall be indelible. The information provided on the labelling shall be clear, and it shall not be covered by other written information, picture or sticker.

The manufacturer or the seller shall ensure that the information included in the labelling of goods is provided to the consumer in compliance with the regulatory enactments regulating the use of the official language.

In addition there are several specific normative acts which require for specific information to be given (as, for example, previously mentioned regulation on distance contract, doorstep selling etc).

**vi. Are there specific provisions and case law concerning specific sectors (e.g. final consumers)?**

The only specific regulation concerning specific groups of consumers is related with advertising for children and minors. The Advertising Act and Radio and Television Act specifies rules concerning advertising for children or minors, as well as use of the children and minors in advertising.

According to the Advertising Act (article 5) advertising directed to children or advertising which has been created with the participation of children shall not threaten the rights or interests of children and in its creation, regard shall be had to the perception and psyche of children. Exploiting the natural credulity or lack of experience of children in advertising is prohibited. Exploiting children in alcoholic beverage and tobacco product advertising, and aiming alcoholic beverage and tobacco product advertising at children, are prohibited.

In advertising directed to children, it is prohibited:

- 1) to include assertions, or visual or audio information, which could cause moral or physical harm to them or create feelings of inferiority;
- 2) to include encouragement for or encourage aggressiveness and violence, and discredit the authority of parents, guardians or teachers;
- 3) to draw attention to the fact that the acquisition of specific goods or services creates physical, social or psychological advantages over peers or that the lack of the relevant good creates the opposite result;
- 4) to unmistakably indicate that the acquisition of the good or service to be advertised is possible for any family, irrespective of its budget;
- 5) to directly invite children themselves or invite children to encourage their parents or other persons to purchase goods or use services; and
- 6) to portray children in dangerous situations.

According to the Radio and Television Act (articles 20, 24) commercials may not cause moral or physical harm to minors, and they shall comply with the criteria for the protection of minors. They shall not:

- 1) directly convince minors to purchase the advertised goods or to utilise the advertised services by exploiting their inexperience or credulity;
- 2) directly encourage minors to persuade their parents or other persons to purchase the advertised goods or to utilise the advertised services;
- 3) exploit the special trust minors place in parents, teachers or other persons; or
- 4) show minors in dangerous situations without a serious reason for doing so.

Teleshops also shall comply with these requirements, and in addition, may not convince minors to purchase the goods or to utilise the services.

Commercials addressed to or using children may not harm the interests of children, and their production shall have regard to the special susceptibilities and psyche of children.

Commercials and teleshops for beer and wine are permitted, but commercials and teleshops for other alcoholic beverages are prohibited. Commercials and teleshops for alcohol may not be aimed at minors, and minors shall not participate in them.

**vii. What are the national laws of post-contractual and after-sale commercial practices?**

According to Consumer Rights Protection Act (article 27) “a consumer is entitled to submit a claim to the manufacturer, seller or service provider in respect of the non-conformity of goods or services with the provisions of a contract within a period of two years of the day of purchase of the goods or receipt of the services. If a manufacturer or seller of goods or the service provider has issued a guarantee for the goods or the services, the consumer is entitled, after the end of the given time period, to submit a claim with respect to the all of the remaining period of the guarantee in accordance with the conditions indicated in the guarantee document”.

A consumer to whom goods not in conformity with the provisions of a contract are sold or given for use is entitled to require the performance of one of the following actions by the manufacturer or seller:

- 1) appropriate reduction of the price of the goods;
- 2) rectification of the non-conformity of the goods with the provisions of the contract free of charge, or compensation for the expenses of the consumer for the elimination of the non-conformity;
- 3) exchange of the goods for the same goods or equivalent goods with which conformity with the provisions of the contract is ensured; or
- 4) revocation of the contract and repayment to the consumer of the amount paid for the goods.

A consumer to whom a service not conforming with the provisions of the contract has been provided, is entitled to request that the service provider perform one of the following activities:

- 1) appropriate reduction of the price of the service;
- 2) rectification of the non-conformity of the service provided with the provisions of the contract free of charge;
- 3) manufacturing of another article from the same material or material of the same quality, or provision of service in conformity with the provisions of the contract; or
- 4) revocation of the contract and repayment to the consumer of the amount paid for the service.

Exercising these rights shall not exclude the added right of a consumer to require compensation for losses or payment of a contractual penalty.

Compensation for losses shall be determined in accordance with the Civil Code, taking into account that:

- 1) the consumer does not have specific knowledge regarding the characteristics and description of the goods purchased or the services provided; and
- 2) a statement by a seller that the information provided by the manufacturer regarding the goods is false, shall not release the seller from liability.

Consumer Rights Protection Act defined a guarantee as “a confirmation by the manufacturer, seller or service provider that the goods or services, or component part thereof will maintain use, safety and operational qualities for a specified period of time, and that the manufacturer, seller or service provider undertakes additional obligations that are not provided for in this Act and other regulatory enactments”.

A guarantee shall be given in writing, it shall be freely accessible before the purchase of goods or receipt of service, and it shall clearly set out conditions for submission of a claim with respect to the guarantee and the period of guarantee – the period of time to which the guarantee

applies, as well as the name (firm name), or given name, surname and address of the guarantor. It shall be indicated in the guarantee that the consumer has specific rights in accordance with regulatory enactments, and that the guarantee does not influence such rights. If the guarantee does not conform to these provisions, which shall not influence the validity of the guarantee and the consumer is entitled to request that the guarantee be fulfilled.

The guarantee issued by any manufacturer, seller or service provider shall be binding on its issuer in conformity with the conditions of the guarantee document and the information included in advertisements of the relevant goods or services. If the manufacturer is not an undertaking (company) registered in Latvia, the seller or the authorised representative of the manufacturer shall be responsible for ensuring the guarantees given by the manufacturer. A seller is not entitled to reduce the scope of a guarantee given by the manufacturer, and to shorten the time period of the guarantee.

#### **viii. Are there provisions and case law on handling complaints?**

Handling Complaints are regulated by the Consumer Rights Protection Act and Cabinet of Ministers Regulations concerning Procedures for Submission of Consumer Claims Regarding Non-conformity of Goods or Services with Contract Provisions and the Organisation of Expert-examination of Goods or Services.

It shall be a duty of a manufacturer, seller or a service provider to accept and examine consumer claims. A consumer may express the claim verbally or submit it in writing. (Article 27 Consumer Rights Protection Act, Articles 3 and 13 Cabinet of Ministers Regulations concerning Procedures for Submission of Consumer Claims Regarding Non-conformity of Goods or Services with Contract Provisions and the Organisation of Expert-examination of Goods or Services).

If a manufacturer, seller or a service provider refuses to satisfy a claim in respect of the non-conformity of goods or services with the contract provisions expressed by a consumer orally or postpones the satisfaction of the claim until later the manufacturer, seller or service provider has a duty to inform the consumer of the right to submit a written claim application.

A manufacturer, seller or a service provider shall provide the consumer with a written answer regarding the decision taken in respect of the claim put forward in the claim application within a period of three working days from the receipt of a claim application, if no mutual agreement in respect of satisfaction of another claim has been reached within the period specified. If the manufacturer, seller or a service provider agrees to satisfy the claim of the consumer without the expert-examination of goods or services, the manufacturer, seller or a service provider shall notify the consumer regarding the date, place and procedures of claim satisfaction. The claim shall be satisfied within a period of seven working days from the receipt of the claim application if the parties have not agreed on another time period.

If the manufacturer, seller or a service provider does not agree to satisfy the claim of the consumer, the manufacturer, seller or a service provider has a duty to:

- 1) within three working days from the receipt of the claim submit a submission to the Consumer Rights Protection Centre with a request to notify regarding recommended performers of expert-examinations in the specific case;
- 2) within two working days from the receipt of the notification regarding recommended performers of expert-examinations:

- notify expert-examination of goods or services;
- apply for an expert-examination of goods;
- inform the Consumer Rights Protection Centre regarding the chosen performer of the expert-examination.

If the opinion of expert-examination confirms that the claim put forward in the consumer claim application is justified or if the Consumer Rights Protection Centre takes decision that the consumer claim should be satisfied, the manufacturer, seller or a service provider shall within seven working days from the receipt of the expert-examination opinion to notify the consumer of the date, place and procedure of claim satisfaction and shall satisfy the claim.

If the claim is not solved in the above mentioned administrative procedure, it can be submitted to the court.

## **II. Possible obstacles to the Directive on Unfair Commercial Practices from the national law perspective**

### **a. What are the main obstacles from the point of view of your country, which might result, complicate transposition and implementation of the Directive?**

The main problems related with the implementation and further enforcement of the Directive would be related with the legal practice existing in Latvia. For example, the application of such terms as average consumer, professional diligence, material distortion of the economic behaviour of consumers etc. could cause difficulties for the enforcing agencies and the courts.

The most important obstacles for the enforcement of this directive would be financing of the Consumer Rights Protection Centre as enforcing agency and providing it with all necessary means for the effective enforcement. The comprehensive training would be needed as for the inspectors of the Consumer Rights Protection as well as for the judges, who will further enforce this Directive. Decision making would not be easy, because the practice to give reasons for such kind of decisions is very little in Latvia.

### **b. Do you see any incompatibilities within your national legal system?**

There are no serious incompatibilities with Latvian legal system. The principles of the Directive are similar to those existing in Latvian legal system.

### **c. How could the Directive be transposed into your national law?**

There are mainly 2 possible ways for the implementation of the Directive into national legislation – either by the Consumer Rights Protection Act or by special Act on unfair commercial practices. During transposition period it will be discussed by all interested ministries – Ministry of Economy, Ministry of Justice and other institutions, and the best solution will be chosen. At the moment it seems that the special Act would be the most appropriate instrument for the transposition of the Directive.

### **d. What would be – from the perspective of your national law – the appropriate sanctions in case of infringement of the general clause of the Directive? Is there a system to enforce the provisions on fair commercial practice? How is this organised?**

According to Consumer Rights Protection Act (article 25) when defending consumer rights and lawful interests, the Consumer Rights Protection Centre shall have the rights to submit a statement of claim to a court or to provide an opinion on the matter. The Act on Advertising comprises specific rules concerning enforcement of that Act according to the EU Directive on misleading advertising. The requirements set and instructions given by officials of the Consumer Rights Protection Centre, within the scope of their competence as determined by Acts and other regulatory enactments, shall be binding on the manufacturer, seller and service provider in each particular case.



In case when advertising is not compatible with the law the Supervisory Authority is entitled to take decisions, for example - the advertiser is instructed to provide through advertising or goods labelling, or in another manner, additional information which is essential from the point of view of protection of persons or the lawful rights of entrepreneurs; particular elements (information, visual representations, audio or other special effects) are requested to be deleted from the advertising; dissemination of the advertising is prohibited; recall of the advertising is requested.

There are 4 articles (202-205) in the Criminal Code, which establish criminal liability for violations in the field of consumer rights protection. Criminal Code establishes criminal liability for failing to ensure quality of goods and services, failing to observe requirements regarding safety of goods and services, defrauding purchasers and ordering parties and violation of trading provisions. The applicable sentence is deprivation of liberty for a term not exceeding six years, or custodial arrest, or a fine not exceeding one hundred times the minimum monthly wage, with or without deprivation of the right to engage in specific forms of entrepreneurial activity for a term of not less than two years and not exceeding five years.

Under the Administrative Offences Code Consumer Rights Protection Centre shall apply the administrative penalty provided for the relevant violation according to the procedures specified by law.

There are 24 articles (166/9-166/26) in the Administrative Offences Code protecting consumer rights. Possible punishments are a fine of up to 300 LVL (€ 416,20) for natural person and up to 10.000 LVL (€ 13,900) for legal persons.

Article 166.13 on advertising provides the fines up to 150 LVL for natural persons and up to 500 LVL for legal persons for violations regarding specified rules in providing and disseminating of advertising. For providing and disseminating of the prohibited advertising (for example, misleading advertising) it provides the fines up to 150 LVL for natural persons and up to 500 LVL for legal persons 10 000 LVL.

The system for the enforcement of the provisions on fair commercial practices in Latvia should be developed according to the Directive, including specific article on violations concerning unfair commercial practices and specifying the amount of fines for specific violations. The upper level of the fines would be the same as for prohibited advertising.

For the unfair competition (according to the Article 19 of the Competition Act) the Competition Council may impose penalties up to 5 % from the net turnover in previous financial year, but not less than 250 LVL.

**e. How would the Directive be delimited to the following fields of law?**

**i. Contract and Tort Law**

The provisions on contract and tort law are included mainly in the Latvian Civil Code. According to the Act “On the announcement, publication, enactment and validity of the Acts and other normative acts adopted by the Parliament, State Presidents and the Cabinet of Ministers” in cases when there exist specific law, that specific law prevails the provisions of the Civil Code, as it is the case when consumer protection is concerned.

Article 1440 Civil Code to consider legal transaction as valid it is not enough if parties express their will, but it is necessary that this will is not influenced by misrepresentation, falsehood or duress.

The most important articles of the Civil Code concerning liability are following:

**1593.** In each contract of refundable alienation as: change of purchase, division of inheritance and undivided property, mortgage and reconciliation an alienator shall have liability against obtainers for following:

- 1) that a thing will not be alienated by trial;
- 2) that a thing have no any hidden defect and it has all declared or presumptive good properties.

**1594.** Liability obligation exists although nothing about that would be defined in a contract.

**1618.** When alienator has directly declared that a thing has certain good properties he shall be liable for them even in the case when he would declared that already after alienation.

Praising of a thing in “general expressions” does not impose on an alienator any other obligations besides liability brought by every alienator.

## **ii. Competition law (aiming at the protection of the consumer)**

The Competition Act regulates business to business relations and it does not protect directly consumers – natural persons.

Under article 11 of this Act agreements between markets participants, which agreements have as their purpose or consequence the hindrance, restriction or distortion of competition in the territory of Latvia, are prohibited and null and void from the moment of being entered into, including agreements regarding:

- 1) the direct or indirect fixing of prices and tariffs in any manner, or provisions for their formation, as well as regarding such exchange of information as relates to prices or provisions regarding sale;
- 2) restriction or control of the scope of production or sales, markets, technical development, or investment;
- 3) the division of markets, taking into account territory, customers, suppliers, or other conditions;
- 4) provisions in accordance with which the conclusion, amendment or termination of a transaction with a third person is made dependent on whether such third person accepts obligations which, according to commercial usage, are not relevant to the particular transaction;
- 5) the participation or non-participation in competitions or auctions or regarding the provisions for such actions (inactions), except for cases when the competitors have publicly announced their joint tender and the purpose of such a tender is not to hinder, restrict or distort competition;
- 6) the application of unequal provisions in equivalent transactions with third persons, creating for them disadvantageous conditions in terms of competition; and
- 7) action (inaction), due to which another market participant is forced to leave a relevant market or the entry of a potential market participant into a relevant market is made difficult.

If the Competition Council determines that there is a violation above mentioned in the activities of market participants, it shall take a decision regarding the determination of a violation, legal obligations and imposition of a fine.

Under article 18 of Competition Act unfair competition is prohibited. Actions, as the result of which regulatory enactments or the fair practices of commercial activities are violated and which have created or could create a hindrance, restriction or distortion of competition, shall be deemed to be unfair competition.

If the Competition Council determines that there is a violation of fair competition in the activities of market participants, it shall take a decision regarding the determination of a violation, legal obligations and imposition of a fine.

### **iii. Intellectual Property Law (e.g. Imitation)**

There should not be any incompatibilities with the Act on Intellectual Property. But under the article 68 Copyright Act violations of copyright and neighbouring rights shall be deemed to be activities, by which the personal or economic rights of the holders of copyright and neighbouring rights are infringed, including:

- 1) fixation of copyright and neighbouring rights objects, their publication, communicating them to the public, their reproduction or distribution in any form without the consent from the holder of the copyright and neighbouring rights;
- 2) activities, by which, without the permission of the holders of copyright and neighbouring rights, electronic information regarding the administration of rights attached by holders of copyright and neighbouring rights have been extinguished, amended or transformed;
- 3) activities, by which an object of rights for which the electronic information regarding the administration of rights has been extinguished, amended or transformed without permission is distributed, broadcast, communicated to the public or published;
- 4) the destruction or circumvention of such effective technological measures used by the holder of copyright and neighbouring rights, which were intended in order to restrict or not allow any activity with the copyright and neighbouring right object, or other activities with technological measures if such have occurred without the permission of the holder of copyright and neighbouring rights;
- 5) the manufacture, importation, distribution, sale, lease, advertisement or use for other commercial purposes of such devices or the components thereof, as well as the provision of such services, which are directed towards the circumvention of effective technological measures or the destruction thereof.

### **iv. Protection of Enterprises (esp. SME)**

There are no special regulations on the protection of SME's In Latvia. There are some provisions in special normative acts, for example Article 36 of the Consumer Rights protection law - if it is determined that the goods were unjustifiably confiscated, their manufacturing, offering or sale was unjustifiably suspended, a prohibition to manufacture, offer and sell goods or provide services was unjustifiably set, or if other violations of the powers of supervisory and control institutions are determined resulting in losses to the manufacturer, seller or service provider, the manufacturer, seller or service provider has the right to bring an action in court regarding compensation for losses and lost profits.

Article 10 of the Competition Act specifies as well liability of the officials of the Competition Council – not to disclose information received and liability for losses to competitors because of illegal activities of the officials.

#### **v. Product Safety and Product Liability**

According to the Act on the Safety of Goods and Services (article 1) the purpose of this Act is to achieve the production and circulation of goods and the provision of services that is safe, non-harmful to human life, health and the property of a person, as well as non-harmful to the environment.

The Act declares (article 4) that the duty of a producer is to produce and put into circulation only safe goods, which are non-harmful to human life, health and the property of a person, as well as non-harmful to the environment. The producer shall be responsible for the safety of the goods put into circulation. The duty of the service provider shall be to provide only safe services, which are non-harmful to human life, health and the property of a person, as well as non-harmful to the environment. The service provider shall be responsible for the safety of the service provided.

According to the article 8 the duty of a producer and service provider is to provide true and complete information regarding the goods or services (including warnings) in order to enable the assessment of risks related to the use of the commodity or the utilisation of the service throughout the normal or reasonably foreseeable period of the use or utilisation thereof, if such risks are not immediately obvious without adequate warnings, and to take precautionary measures. A warning does not provide an exemption from the fulfilment of duties and responsibilities specified in the Act.

Compliance with this Act is supervised and controlled by the Consumer Rights Protection Centre and other State supervision and control bodies, the competence of which includes the supervision and control (market supervision body), as well as the customs authorities and the Sanitary State Border Inspection of the Food and Veterinary Service under the competence thereof.

Article 13 declares rights of the market supervision bodies. If a commodity or service may cause risk under certain conditions, the relevant market supervision body is entitled to:

- 1) request that the producer, service provider or distributor ensures the labelling of the commodity or that the service is provided with appropriate, clearly worded and easily comprehensible warnings regarding the possible risks; and
- 2) require the producer, service provider or distributor to take particular measures for guaranteeing the safety of the commodities or services and to forbid the sale of such goods or the provision of such services before the implementation of such measures.

If a commodity or service may cause risk to certain categories of persons, the relevant market supervision body is entitled to request that such persons are warned regarding the possible risks at an appropriate time and in an appropriate way, including by publishing special warnings.

If there is suspicion that the commodity or service may be unsafe, the relevant market supervision body is entitled to prohibit the supply, offer to supply or display thereof for a time period necessary for the assessment, examination and expert examination of the safety thereof.

If a commodity or service is unsafe the relevant market supervision body is entitled to:

- 1) prohibit the sale of the commodity or production batch of the commodity or the provision of services, as well as to perform activities in order to ensure the implementation of such a prohibition; and
- 2) if the commodity or service has already been placed on the market:
  - a) request effective and immediate withdrawal of the goods from the market or discontinuance of the provision of services, as well as the warning of consumers regarding the existing risks,
  - b) request or organise, in co-operation with the producers, distributors or service providers the withdrawal of goods or properties from consumers and the destruction of the commodities or properties under suitable conditions.

#### **vi. Criminal law**

Consumer rights protection from the Criminal Code is examined in part II (d) of this Report.

#### **vii. Public policy (questions of decency)**

There are not any specific rules on questions of decency in Latvian legislation. However Criminal Code provides criminal liability (article 231) for a person who commits a gross disturbance of the public peace, which is manifested in obvious disrespect for the public or in insolence, ignoring generally accepted standards of behaviour and disturbing the peace of persons or the work of institutions, undertakings (companies) or organisations (hooliganism). Under the Act on Trademarks and Geographical Indications (Article 6) as trademarks may not be registered the signs which are contrary to public order or to socially accepted principles of morality. Advertising Act (Article 3) provides that only such announcements or visual representations as do not breach generally accepted ethical, humanitarian, morality, decency and propriety norms, shall be permitted to be included in advertising. According to Latvian Civil Code (Article 1415) an impermissible or indecent action, the purpose of which is contrary to religion, laws or moral principles, or which is intended to circumvent the law, may not be the subject-matter of a lawful transaction and such a transaction is void.

#### **f. Is there any national unfair commercial practices' law, including case law, which may constitute a barrier to the Internal market, for example case law which raises questions similar to *Estee Lauder*, *Clinique* and *De Agostini*.**

There are no national provisions concerning unfair commercial practices, which could constitute barriers to the internal market.



## **Lithuania**

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**I. Existing National Law****a. General Provisions on Unfair Commercial Practices****i. Could you describe the general legal framework of the law on unfair commercial practices in your country (e.g. structures, main acts/statutes, leading cases, codes of conduct, self-regulation)?**

It should be noted that unfair commercial practices in respect of consumer rights protection in the Republic of Lithuania are not regulated by the Law on Competition. The purpose of the Law on Competition is to protect freedom of fair competition in the Republic of Lithuania and regulate the actions of the public and local authorities and undertakings, which restrict or may restrict competition as well as actions of unfair competition (Art. 1). This Law prohibits undertakings from performing actions, which restrict or may restrict competition, regardless of the character of their activity, except in cases where this Law or laws governing individual areas of economic activity provide for exemptions and permit certain actions prohibited under this Law (Art. 2). Under this Law 'economic activity' means any type of manufacturing, commercial, financial or professional activity, associated with purchase or sale of goods, *except for acquisitions by natural persons intended for personal and household needs* (Art. 3). This provision shows that any consumer rights' protection questions are outside the scope of this law.

General consumer rights protection provisions are set in three documents: the Constitution, the Civil Code and the Law on Consumer Protection. According to Article 46(5) Constitution the State shall protect the interests of consumers. The Civil Code regulates civil liability for damages raised by not qualitative products or services and by misleading advertising (Art. 6.292-304), as well as peculiarities of consumer contracts (Art. 6.350-370), unfair terms prohibition in consumer contracts (Art. 6.188), application of foreign law concluding consumer contracts (Art. 1.37), consumer rent (Art. 6.504-511) and consumer credit (Art. 6.886-891). The Civil Code also regulates provisions of repayable services. These provisions are as important as provisions related to sale of goods in respect of consumer protection. Tourism services also fall under the legal regulation of the Civil Code. Specific fields of the general consumer rights protection provisions in the Civil Code are legal regulation of public purchase – sale contracts – energy purchase – sale contracts (Articles 6.380, 6.383-391). The Law on Consumer Protection regulates different aspects of consumer rights protection – information for consumers, quality and safety of goods, unfair terms in sales or services contracts, contracts negotiated away from business premises, distance contracts, acquisition of the right to make use, at a certain, of residential space, consumer credit, distance marketing of consumer financial services, protection of public interests of consumer, consumer protection institutions and liability for infringement of law.

Considering this particular research the central issue is *general requirements for proper relations between consumer and purchaser or service provider before entering into the contract*. This position is based on the definition of unfair commercial practices under the Directive of the Unfair Commercial Practices, whereas misleading advertising, marketing and wrong information relating to products or services for consumers, also aggressive commercial practices defines *the conception of unfair commercial practices* (Preamble, 11a, 12).

Accordingly it should be noted, that there is no general clause in legal acts of the Republic of Lithuania prohibiting unfair commercial practices towards consumers. Very indirectly such



clause could be interpreted from Article 6.188 Civil Code and Article 11 Law on Consumer Protection (see below).

Legal acts of the Republic of Lithuania do not contain any regulation on special marketing techniques like distance marketing, face to face marketing or price reduction techniques or aggressive commercial practices.

The main provisions concerning consumer information are Article 6.353 Civil Code and Article 5 Law on Consumer Protection, which are supplemented by provisions on specific issues regarding proper alcohol, tobacco, pharmaceutical, product safety control and the prohibition of misleading advertising. Accordingly advertising is regulated in the Civil Code and the Law on Advertising. Special provisions contain Law on Alcohol Control, Law on Tobacco Control, Law on Pharmaceutical Activities and Law on Product Safety.

## ii. Does a general clause on unfair commercial practices exist?

Article 11 Law on Consumer Protection exceptionally regulates the prohibition of unfair terms in consumer contracts concluded in the Republic of Lithuania as well as Article 6.188 Civil Code and foresees the provisions to indicate them. Provisions of these documents adopt Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts<sup>36</sup> and are almost identical except that there is one new unfair term in the Civil Code.

According to both legal acts - any term inherent in the purchase-sales or service provision contract concluded between the seller or service provider and consumer if it *has not been individually negotiated* and made in a *good faith* and infringes the balance of rights and obligations of both parties to a contract and especially the rights of a consumer, may be regarded as unfair. *Not individually negotiated conditions* are defined as conditions, which the consumer has no power to influence, especially if the seller or service provider already decides these conditions in a typical contract leaving only two possibilities for consumer – whether to sign or not to sign the contract (Article 6.160(2) Civil Code). Most of unfair conditions are included in typical contracts. Article 6.185 (1) Civil Code foresees that standard conditions are those which are prepared by one party to a contract not negotiated before or after with consumers. However, it should be noted, that Article 6.161 (5) enacts very important rule - conditions, even in consumer contracts, are not kept as not being individually negotiated if they are defined by the government. Under the recommendations of the annex of Directive 93/13/EEC, legal acts of the Republic of Lithuania define consumer contracts' conditions unfair if they are aimed at the following: excludes or restricts legal liability of a seller or service provider in the event of the death of a consumer or personal injury to the latter or damage to his property; excludes or restricts legal rights of the consumer vis-à-vis the seller or service provider or another side in the event of total or partial non-performance or inadequate performance by the seller of service of any of its contractual obligations; makes an agreement binding to the consumer whereas implementation of such an agreement by the seller or service provider is subject to other conditions and these are implemented solely by the will of the seller or service provider himself; grants the right to the seller or service provider to retain the sums paid by the consumer when the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or

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<sup>36</sup> After the Republic of Lithuania signed the Association Agreement with the European Union (1995), every national statute of the Republic of Lithuania is interpreted in the light of regulations, directives and jurisprudence of the European Court of Justice.

service provider where the latter is the party cancelling the contract; requires any consumer, who fails to fulfil his obligation or fulfils it in an inadequate fashion, to pay a disproportionately high sum in compensation; authorizes the seller or service provider to terminate a contract on a discretionary basis where the same facility is not granted to the consumer, or permits the seller and service provider to retain the sums paid by the consumer prior to implementation of the contract where it is the seller or service provider himself who unilaterally terminates the contract; enables the seller or service provider to terminate a contract of indeterminate duration without reasonable notice made to the consumer; grants the right to the seller or service provider to extend unilaterally a contract of fixed duration or fixing an unreasonably early deadline for the consumer to express his opinion on extension of the contract; irrevocably binds the consumer to terms with which he had no real opportunity of becoming familiar before the conclusion of the contract; enables the seller or service provider to alter the terms of the contract unilaterally and without a valid reason; enables the seller or service provider to alter unilaterally and without a valid reason any characteristics of goods supplied or services provided; provides for the price of goods to be determined by the seller at the time of sale or allows the seller or service provider to increase their price without, in both cases, giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed upon when the contract has been concluded<sup>37</sup>; gives the seller or service provider the right to determine unilaterally whether the goods or services supplied are in conformity with the contract, or gives them the exclusive right to interpret any term of the contract; limits the seller's or service provider's obligation to respect commitments undertaken by their agents or determines that implementation of the commitments shall be subject to certain conditions; obliges the consumer to fulfil all his obligations whereas the seller or service provider fails in part or in whole, to perform his; gives the seller or service provider the possibility of transferring to another person his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the consent of the latter; excludes or hinders the consumer's right to take legal action by lodging complaint in court or to make use of any other means of defending violated rights; eliminates or aggravates the implementation of consumer right to sue the purchaser or service provider in other legal ways providing only a few opportunities. These provisions are obligatory in the Republic of Lithuania.

According to these provisions it would be possible *very conditionally* to state that infringement of these consumer contracts' conditions would cause unfair commercial practice. Nonetheless this interpretation is not adequate to the definition of unfair commercial practices set in the Directive of the Unfair Commercial Practices. Having in mind the aim of this Directive - to fill the gap of consumer rights protection regulating relation among consumers and purchasers or service providers *before* concluding a consumer contract (contractual relations are already regulated by the above mentioned Directive 93/13/EEC) – we state that there is no general clause on unfair commercial practice in the legal acts of the Republic of Lithuania.

A little bit closer to the Proposed Directive is Article 6.305 Civil Code. This Article sets forth some prohibitions to the seller to make any impact on the consumer insistently offering products or services by way of indicating in the pricelists, on labels, at showcases or windows assumed discounts or by any other way that could contradict the rules of good morality or public policy. Still this legal norm also only *conditionally* could be treated as the general clause prohibiting

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<sup>37</sup> This provision shall not apply to transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation that the seller or service provider does not control as well as for contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;

unfair commercial practices towards the consumer, because it does not define aggressive practices what is provided by the Proposed Directive (Article 5).

Notwithstanding it should be noted that there is already prepared and submitted to the Government of the Republic of Lithuania a Draft Law amending the Law on consumer rights protection. Article 6 of this draft law sets forth the principle of fair commercial practice. This Article expressly states that sellers and service providers must obey fair commercial practice while offering and providing goods and services to the consumers. Goods and services have to be offered in a proper manner that consumer could clearly understand the commercial nature of such an offer. It is planned that this draft law will be passed by the Parliament of the Republic of Lithuania this year.

Until the draft law is not adopted, consumer is able to claim against an unfairly acting business on the basis of general tort law provisions. To be more precise Article 6.716 of the Civil Code states that when a client of the service provider is a natural person – consumer – special legal provisions regulating the consumer contracts *mutatis mutandis* should be applied to the service provision contracts as well.

**iii. *Who or what is protected by these provisions (e.g. consumers, customers in general, and competitors, functioning of markets)?***

The legal Acts of the Republic of Lithuania define these categories as follows:

*Customers in general:* Many articles of the Civil Code very generally defines customer as a party to a contract and provides broad regulation on different types of contracts<sup>38</sup>.

*Competitors:* Law on Competition states that „competitors“ means undertakings, which face or may face mutual competition in the same relevant market. Accordingly „undertaking“ means an enterprise, a combination of enterprises (associations, amalgamations, consortiums, etc.), an institution or an organization, or other legal or natural persons, which perform or may perform economic activity in the Republic of Lithuania or whose actions affect or whose intentions, if realized, could affect economic activity in the Republic of Lithuania. Public administration and local authorities of the Republic of Lithuania shall be considered to be undertakings if they engage in economic activity. As we have already stated before, „economic activity“ under the Law on Competition means any type of manufacturing, commercial, financial or professional activity, associated with purchase or sale of goods, except for acquisitions by natural persons intended for personal and household needs.<sup>39</sup>

*Functioning of markets:* Under the Law on Competition we do not find this specific term. But Law provides relative definitions: 1) *relevant market*, which means the market of certain goods in a relevant geographic territory; 2) *product market*, which means the aggregate of goods, which from the customers' point of view are appropriate substitutes according to their characteristics, application and prices and 3) *market share*, which means the proportion of total sales or purchase in the relevant market accounted for by an undertaking or a group of associated undertakings.<sup>40</sup>

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38 Articles of the Civil code defining consumer: 1.38, 1.39, 2.152, 2.160, 6.161, 6.193, 6.293, 6.294, 6.301, 6.302, 6.353, 6.356, 6.357, 6.366, 6.368, 6.370, 6.383, 6.384, 6.385, 6.387, 6.390, 6.416, 6.504, 6.681, 6.716, 6.796, 6.799, 6.803, 6.806, 6.886, 6.887.

39 Articles 3.1, 3.4, 3.9.

40 Articles 5.5, 5.6, 5.13.

*Consumers.* The Civil Code and Article 2.1 Law on Consumer Protection provides similar conception of the consumer – a natural person, who expresses the intention to buy, buys and uses goods or services to meet his own personal or household needs. Article 2.27 Law on Payments provides that „user/consumer“ means a natural person who concludes a contract with a credit institution on the provision of services for satisfying personal, family or household needs not connected to his/her profession or business. Article 3.11 Law on Product Safety provides that consumer is a person who buys manufactured goods and makes use of services for personal or household needs. Article 2.32 Law on Heat Economy provides that ‘heat consumer’ is a legal or natural person who is connected to heat network. Law on Advertising provides that ‘consumer of advertising’ means a person for whom the advertisement is intended or whom it can reach. The Law on Alcohol Control, Law on Tobacco Control and Law on Pharmaceutical Activities do not provide any definition of consumer.

**iv. Are there definitions of consumers, specific groups of customers, such as „vulnerable consumers“ or „children“, are there definitions of „business“, „trader“ or similar terms?**

Lithuanian law defines these categories as follows:

*Vulnerable consumers.* There is no specific definition of this particular term. As a vulnerable consumer our law excludes only *a child*.

*Children.* Article 7 Law on Advertising contains a provision defending child as a consumer and provides that it shall be prohibited to cause moral and physical detrimental influence to children by advertising by: 1) exploiting children’s trust in parents, guardians (providers), teachers or other adults; 2) directly exhorting children to persuade their parents or other persons, to purchase the advertised goods or services, taking advantage of their inexperience and credulity; 3) forming children’s opinion linking consumption of certain goods or services with the enhancement of their physical, psychological or social advantages before the members of their peer group; 4) unreasonably showing children in situations which pose danger to their health and life. Article 7 of the Law on Advertising defines *a child* as a consumer. However, this law doesn’t explicit the precise age of the child. From the general context of legal enactment it can be understood, that the term *child* is applied to persons under 18.

*Business* is not specifically defined.

*Trader* is defined as another party to a contract who sales purchases or services. The term *trader* as another party to contract who sales purchases or services is presented by the Law on Consumer Protection Art. 2.

**v. How are rules on fair commercial practices interpreted (e.g. by public authority, case law, codes of conduct)**

According to the definition of *unfair commercial practices* set in the Proposal for the Directive of the Unfair Commercial Practices, there is *no clear* general clause on unfair commercial practice in the legal acts of the Republic of Lithuania (see part I.a.ii), so, naturally, there is no official interpretation on it neither by public authorities, nor by national courts. Today consumer rights in the Republic of Lithuania are protected by the following institutions - State Food and Veterinary Service; State Inspection of Non-Food Products; National Control Commission for Prices and Energy; Competition Council Republic of Lithuania; National Consumer Rights Protection Board; Courts. Of course, such a situation that these institutions do not have

interpretation on unfair commercial practices is temporal. Changes depend on the legislation processes.

As far as codes of conduct are concerned, such codes are getting more and more popular in the Republic of Lithuania. For example, in September 2004 the members of the associations uniting Lithuanian pharmaceutical companies adopted Code of marketing of pharmaceuticals in order to ensure equal and ethical pharmaceuticals' marketing practices. In December 2004 Lithuania brewers' association passed Lithuanian brewers' code. This code regulates brewers' and traders' advertising, sponsorship and fair competition practices. The code was subject to review by the National consumer rights' protection board. Moreover the Chairman of the National consumer rights protection board has been elected as the member of the arbitral institution that solves disputes according the above-mentioned code. It is worth to mention also the Advertising code that was passed by the Association of Lithuanian communication agencies KOMAA<sup>41</sup> and operates in practice successfully. This code specifies the rules of fair advertising practices (general rules as to the question are set by the Law on advertising of the Republic of Lithuania) of the companies members of the KOMAA. Finally, it should be noted that Lithuanian insurers are also at the process of passing code of conduct. The National consumer rights protection board has submitted its observations and remarks to this Code as well.

## **b. Provisions on specific Issues**

### **i./ii. Are there other provisions and case law prohibiting misleading and comparative advertising?**

The main legal basis for misleading advertising in national law is the Law on Advertising, which is targeted to improve consumer information concerning goods and services, protect consumer interests, protect freedom of honest competition and create conditions for the development of advertising activity. Moreover, this Law is serving as a background for the requirements of the use of advertising, liability of advertising activity operators, and the legal basis for the control of advertising. Referring back to the process of the evaluation of information if the advertising is misleading, the Law on Advertising sets exact criteria (which were presented to you in the report) helping to identify the breach of law.

Preparing to the accession to the EU, Lithuania was working on harmonization issues adopting the laws and legal acts according to the EU *acquis communautaire*. Lithuania, adopted the *Law on Advertising* in 2000 (doc. nr. VIII-1871). This Law provides the legal background for the improvement of consumer protection, related to fair competition and advertising. However, no provisions on aggressive practice regulation are included. In the very short term Lithuania is about to terminate the *acquis communautaire* and national laws adjustment process, necessary for advanced consumer protection and health care level. In the meantime, the Law on Advertising sets forth the main definitions and principles of advertising, including *Misleading Advertising* (art. 5) and *Comparative Advertising* (art. 6).

The Law on Advertising defines *Misleading Advertising* as 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 harm another person's capabilities in competition.

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41 [http://www.komaa.lt/index.php?show\\_content\\_id=64](http://www.komaa.lt/index.php?show_content_id=64).

The law continues with definition of *Comparative Advertising* as any advertising, which explicitly or by implication identifies a competitor of the advertiser and the goods or services offered by the competitor.

Moreover, the law gives definitions of *Comparative Advertising*, which is understood as any advertising which explicitly or by implication identifies a competitor of the advertiser and the goods or services offered by the competitor and *Surreptitious Advertising* defining it as information disseminated in any form and by any means, about the producer or service provider, his name or activities, mark of goods or service, presented in such a way which may confuse advertising consumers as to the actual purpose of presenting this advertising. Such presentation of information is considered as surreptitious advertising in all instances when it is paid or otherwise compensated for.

The previously mentioned law sets the main principles of advertising, denoting that advertising must be 1) proper and accurate; and 2) clearly recognizable. Basic requirements of advertising are found in the article 4, stating that the requirements of the Law on the state language shall apply to the written and sound text of advertising.

Moreover, seeking to ban the irrelevant information, published in the advertisement and excludes the cases of the information abuse, the law bans the advertisement if it violates public and moral principles or degrades human honour and dignity; as well as if it incites national, racial, religious, gender-related or social hatred and discrimination as well as defames or misinforms; promotes force and aggression, gives rise to panic; promotes behaviour which presents a threat to health, security and environment; abuses superstitions, people's trust, and their lack of experience or information; mentions the name and surname of a natural person without his permission, his opinion, information about his private or public life, property, are presented and his physical picture is used; uses special subliminal measures and technologies in advertising dissemination; uses advertising material which has been prepared in violation of authors' rights in literature, art, science and (or) related rights.

The Law on Advertising in Article 5 sets the special detailed provision on *misleading advertising*, banning the use of it and clarifying the case when judging whether or not an advertising is misleading, account shall be given to the accuracy, comprehensiveness and the following presentation criteria thereof claims presented in advertising are false, if the provider of advertising can not substantiate accuracy of the assertion during the time of use.

A decision regarding whether there are there enough documents substantiating accuracy of claims present in the advertising, shall be based upon the consideration of an individual case. The evidence and recommendations by persons, whose competence is not linked with the content of the information being submitted, shall not be recognized as data substantiating the accuracy of claims being submitted.

Referring to the previously mentioned case, the account is to be given if the information supplied in the advertising is incomplete or (if) a certain part has been omitted, the supplying whereof, is taking into account other information presented in this advertising is certainly needed in order to avoid misleading of the consumers of advertising.

It is important to keep in mind, that judging whether or not an advertising is misleading, in addition to the accuracy and comprehensiveness, the account shall be given to manner or form

of supplying advertising are such that, the consumer of advertising may perceive an understandable inaccurate (misleading) advertising claim<sup>42</sup>.

The particular attention in judging whether an advertising is misleading, should be paid to the information contained regarding the supplier of the advertising or another person, activity, firm's name, mark of goods or service, authors' rights and related rights, patents and licenses; or the goods or services, location and origin of their production, time of manufacture, manner of manufacture, purpose, quantity, content, energy value, consumption (use) suitability, testing time, location, type and assessments, way of consumption (use), whether it meets the established standard, certification, official goods recognition and prizes at fairs and exhibits; or conditions of acquisition and consumption (use) of goods and services that is, the price or the manner of calculation thereof, terms of payment, guarantees, term of delivery, exchange, repair, service and refund.

In the case of judging whether the advertising is misleading, it is necessary to ensure that consumers shall form an opinion regarding the accuracy of the claims presented in the advertising, comprehensiveness of the advertising, manner or form of presenting the advertising and shall adopt such decision, which may be expected from an average advertising consumer.

Article 6 of the Law on Advertising permits the use of *comparative advertising* if it is not misleading, the goods or services compared in it, that meet the same need or are intended for the same purposes, one or more basic, examined and typical goods or services characteristic is being objectively compared therein, and the price may also be compared.

Comparative advertising can also be used if it does not mislead the consumer regarding the supplier of the advertising or his competitor as well as the goods or services of the consumer or those of his competitor and characteristics of their goods or services, marks firms and services and identity of other distinguishing marks; and does not discredit or belittle the goods and services of a competitor, the marks of his goods or services, the name of firms, other distinguishing marks, activity, his legal, financial or other circumstances; and goods, having the mark of origin, are compared only with the goods having the same mark of origin.

Furthermore, the comparative advertising is allowed if no attempt is made to dishonestly make use of the reputation of the goods' mark, firm's name, goods' origin or other distinguishing marks of a competitor and if it does not provide goods or services having imitations or copies of goods which possess protection of the mark or name of goods or services.

It is important to ensure that specific offer should be provided in the comparative advertising, the date of the validity cessation of the offer must be clearly indicated, and if necessary, it must be stated that this offer depends on the quantity of the goods on hand or possibilities of providing the services. Should the offer be not yet valid at the time of the publication of the advertising, the date of its coming into force must be indicated.

The law clearly referring to *vulnerable consumer groups* excludes *children*, prohibiting to cause children moral and physical detrimental influence by exploiting children's trust in parents, guardians (providers), teachers or other adults; or directly exhorting children to persuade their parents or other persons, to purchase the advertised goods or services, taking advantage of their inexperience and credulity; or forming children's opinion linking consumption of certain goods or services with the enhancement of their physical, psychological or social advantages before

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42 Commentary of the Civil Code of the Republic of Lithuania, Book VI, pages 403 - 412

the members of their peer group; or unreasonably showing children in situations which pose danger to their health and life (Article 7 of the Law on Advertising).

Seeking for advanced level of consumer protection, Law on Advertising prohibits to advertise the activity, which is prohibited or is illegal, or goods or services, the production whereof and (or) sale (supply) are banned by laws.

Benefiting for consumer protection, the Article 12 of the Law on Advertising sets forth the requirements on outdoor advertising, and prohibits it in motorways and their sanitary protection areas, as well as in streets and along the side thereof, if it might block technical traffic regulation means and road signs, decrease visibility thereof, blind traffic participants, detract attention thereof, thus increasing the danger to traffic participants, and it is also prohibited to use advertising that imitates road signs, as well as on sculptures and monuments. Moreover, the outdoor advertising is prohibited if it is being erected without permission of the owner of the land, structures, immovable cultural property.

Outdoor advertising in protected areas and immovable cultural properties is allowed only upon co-ordination with the state institution, that is responsible for the protection of the cultural properties, and the authorized institution of the protected area's founder.

Chapter IV of the Law defines the requirements of advertising individual goods and provision of services. Special attention is paid to foodstuffs advertising, seeking to prohibit in advertising indication or mentioning those foodstuffs characteristics, which it does not possess, and also about the healing or disease prevention characteristics, if no certificate of a special purpose food registration issues according to the procedure established by the Ministry of Health, exists confirming this information.

The law does not allow promoting a certain food product, that it has extraordinary characteristics, if in effect all similar products possess the same characteristics. Moreover, mother's milk substitutes may be advertised only in publications intended for health care experts and on the packaging of these products in accordance with legal acts of the Republic of Lithuania.

Up to adoption of the new Civil Code in 2000, there was no legal act, regulating responsibility and claim on the compensation damage inflicted. Book VI of the Civil Code sets the provisions related to the compensation of damage, assuring the verity of information of provided goods and services as well as fair competition in the market.

#### **Case law (1)**

Under the Law on Advertising, the Competition Council of the Republic of Lithuania<sup>43</sup> is an authorized institution which controls the implementation of bans and requirements established by this Law. In 2003 the Competition Council investigated 13 cases, related to misleading and comparative advertising. In 8 cases failure to comply with advertising use requirements was stated and the operators of advertising activities were obliged to cease the use of misleading

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<sup>43</sup>The main task of the Competition Council is to apply the Law on Competition. In addition to the supervision of the Law on Competition, the Competition Council performs supervision of the Law on Monitoring of State Aid to Undertakings and also carries out functions assigned by the Law on Prices and the Law on Advertising. <http://www.konkuren.lt/english/index.htm>



advertisement. In 2 cases the Council of Competition had issued corrective statement on unsuitable implementation and assigned fines.<sup>44</sup>

#### *Misleading advertisement*

Joint Stock Company 'Tele 2' is a mobile connection operator. In June and July, 2003 'Tele2' made an announcement in the press promoting a 'Joker' service. The advertisement was formulated as invitation to become user of this service by July 20<sup>th</sup>. The special clause was included stating that in the case of joining the service, the user would be granted free call to any mobile connection net up to 20 litas. This service supposed to be valid during 3 months: July, August and September. However, the advertisement failed to inform consumers that this service is valid for new clients/users only. The Competition Council after investigating this case reached the conclusion that the "Tele 2" failed to provide complete information for consumers. This mistake was essential for failure to protect consumer rights and could have an influence on a consumer's decision to become the user of "Joker" service. The Competition Council declared this advertisement as misleading.<sup>45</sup>

#### *Comparative advertisement*

The case law under Article 6 Law on Advertising (comparative advertisement) is rare. In 2003 the Competition Council had just one case to investigate<sup>46</sup>. The case was dealing to JOC *Rubikon apskaitos sistemos* published advertisement in newspaper Lietuvos Rytas, in September and October 2002. The advertisement presented the non-existing JSC *Islaidlita* which in its nature resembled to some of existing companies. The applicant claimed that the image used in the advertisement is seeking to discredit the image of existing companies and asked to acknowledge the advertisement as misleading. After the investigation, the Competition Council stated that JSC *Rubikon apskaitos sistemos* had breached Article 6 of the Law on Advertising, indirectly using the image of competitor who provides insufficient services. Moreover, the advertisement used in the newspaper should be regarded as comparative advertisement. Referring to Article 6, comparative advertising shall be permitted if it does not discredit or belittle the goods and services of a competitor, the marks of his goods or services, the name of firms, other distinguishing marks, activity, his legal, financial or other circumstances. The aforementioned case was found as discrediting the trademark of other companies and humiliates services provided by those companies. The JSC *Rubikon apskaitos sistemos* was obliged to cease the use of misleading advertisement.

#### **Case law (2)**

The Lithuanian legal system does not know precedent law as it is understood in the Anglo-American legal tradition. However, some decisions made by High Court can be considered as follow-example for courts of lower instances. The High Court in its practice deals with comparative and misleading advertising issues as well.

Most complaints, registered in the Court are based on violation of Articles 5 and 6 of Law on Advertising. In the cases *M. Vaupša v. UAB (Kalba)* (3K-3-32/2003), *AB Anykščių vynas v. Valstybinė tabako ir alkoholio kontrolės tarnyba* (3K-3-7000/1999), the Court found a breach of the Law on Advertising in that the advertisements were misleading.<sup>47</sup>

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44 <http://www.konkuren.lt/reklama/nutarimai.htm>.

45 <http://www.konkuren.lt/reklama/nutarimai.htm>.

46 <http://www.konkuren.lt/reklama/nutarimai.htm>.

47 <http://www.litlex.lt/lat/>; <http://ovada.tic.lt/lat/paieska.aspx>

Therefore, it must be mentioned that the latter cases cannot be considered as key cases in the field of advertising, as the Court does not give the new concept or definitions of the misleading and comparative advertising, as it deals mainly with the application of national laws in general.

*Special provisions regulating advertising practices in the Law on Tobacco Control*

The Law on Tobacco Control<sup>48</sup> includes certain provisions reflecting the European Union position on Tobacco Control issues. The Law on Tobacco Control sets forth the principles of State Tobacco Control Policy recognizing protection of the human rights to a life without smoking, the rights to a smoke free environment and reduction of smoking product availability through taxation. The law prohibits of use of state and local budget funds for growing tobacco, manufacture of its products and development of domestic trade and import thereof and other.

Seeking for decrease and control of tobacco products consumption, the law indicates strict requirements regarding the prohibition of promotional practices of tobacco products. This law excludes the possibility to issue part of its production gratis or as a bonus or apply discounts to owners by way of coupons published by the mass media, as well as circulate tobacco products or new samples thereof, gratis. Referring a person under 18, the law prohibits to promoting events intended for persons under 18 and also invites persons under 18 to engage in activity promoting tobacco products. Article 18 of the Law on Tobacco Control recognises the person under 18 as belonging to vulnerable consumer group. To sum up, the level of protection, directly targeting children is compatible to the EU and national law.

**iii. Are there other provisions and case law regulating aggressive practices?**

It must be noted that there are no national provisions regulating aggressive practices. These provisions are not developed in Lithuanian legal practice. Under the general contract law and tort law, which is a part of the Civil Law of the Republic of Lithuania, consumer does have special rights and is able to defend them against unfair commercial practices of purchaser or service provider. General provisions of VI book XXII chapter apply in this case providing general provisions of civil liability (Articles 6.245-255), contractual liability (Articles 6.256-262), non-contractual (delictual) liability (Articles 6.263-291), liability to compensation for damage caused by defect of products or services (Articles 6.292-300), compensation of damage resulting from misleading advertising (Articles 6.301-304).

**iv. Are there provisions and case law regulating special marketing techniques?**

**1. Distant Marketing and distant selling**

The provisions of Directive 85/577/EEC on door-to-door selling are included in the Law on Consumer Protection, however there is no special provision on this issue. The Civil Code does not regulate those questions as well. The seller who is willing to buy the goods away from business premises is obliged to give the buyer the document stating the date of document, the title of service or good, the name of seller, person, to whom the buyer can transfer the good in order to give it back or exchange if the good/service is damaged. The buyer can breach the contract if the goods are defected.

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<sup>48</sup> Official Journal, 1996, Nr. 11-281.

The Civil Code and the Law on Consumer protection deal with issues of distant marketing and distant selling. Article 6.366. of Civil Code deals with Sale of Things under Distance Contracts, stating that:

1. A distance contract of purchase and sale of things concluded by means of communication is a contract for the sale of things concluded between the seller and the buyer (consumer) exclusively by means of communication (one or several). The provisions of this Article shall apply *mutatis mutandis* to consumer contracts for the supply of services and other consumer contracts.
2. The regulations for the sale of things and supply of services under distance contracts concluded by means of communication shall be approved by the Government or the institution authorized by it.
3. The provisions of this Article shall not apply to contracts concluded:
  - a. for the provision of financial services;
  - b. by auction;
  - c. for the sale-purchase and/or delivery of food products or other things intended for everyday consumption;
  - d. for the provision of accommodation, transport, catering or leisure services, where the provider of services undertakes to provide the services on a specific date or within a specified time period;
  - e. for sale by automatic vending machines (Article 6.358 of this Code);
  - f. through the operator of the means of communication, i.e. the person whose business consists of provision of one or several communication services which may be used by the seller or provider of services for concluding with the consumer a contract for the purchase-sale of things or supply of services.
4. Before the conclusion of the contract the seller must submit to the buyer through the means of communication used by him relevant information containing:
  - a. information about the seller
  - b. main characteristics of the thing;
  - c. the selling price of the thing;
  - d. price of delivery of the thing;
  - e. procedure of payment, delivery or provision;
  - f. procedure for exercising the buyer's rights to repudiate the contract in accordance with the provisions of Article 6.367 of this Code;
  - g. rates of charges for the use of means of communication, when calculated otherwise than in the regular manner;
  - h. period of validity of the offer and price;
  - i. shortest period of the contract, where a contract is concluded for the supply of things or supply of services on the continuing basis.
5. The commercial character of the information specified in paragraph 4 of this Article must be expressed unequivocally and clearly and correspond to the means of communication used. Where the telephone is used, the seller must clearly describe the commercial goal of conversation.
6. The buyer must be provided information in writing before the conclusion of the contract and, where the things are subject to delivery, before the delivery (if the things are delivered by the third person authorized by a person other than the buyer), unless the buyer has been provided such written information before the conclusion of the contract, on:
  - a. the offered thing (name, principal characteristics);
  - b. the seller; the buyer is informed to what address and to whom he may address any of his complaints;

- c. procedure for exercising the buyer's rights to repudiate the contract in accordance with the provisions of Article 6.367 of this Code;
- d. procedure of payment, delivery or performance, the services of maintenance of the thing provided by the seller and warranties, if given;
- e. conditions of contract repudiation where the contract is of indefinite duration or its duration is over one year.
7. The onus duty of proving delivery to the buyer of written information specified in paragraph 6 of this Article shall be on the seller.
8. Unless the contract provides otherwise, the seller is bound to deliver the things within 30 calendar days from the date of conclusion of the contract.

Moreover, Article 6.367 of Civil Code explicit The Buyer's Right to Repudiate a Distance Contract Concluded by Means of Communication:

1. The buyer shall have the right to repudiate the distance contract of purchase-sale concluded by means of communication by notifying the seller thereof in writing within seven working days from:
  - a. the date of delivery of the thing, where the contract is for the sale of a thing;
  - b. the date of conclusion of the contract for the supply of services.
2. If information specified in paragraph 6 of Article 6.366 is not delivered to the buyer in writing, he shall be entitled to repudiate the contract within three months from the date of conclusion thereof.
3. It shall be prohibited to subject the buyer's right to repudiate the contract, provided under this Article to any restrictions in the form of additional undertakings or payments or to any other limitation or rescission except in cases provided for in this Article.
4. The buyer shall not be entitled to exercise the right specified in paragraphs 1 and 2 of this Article if the contract has been concluded:
  - a. for delivery of audio and video works and phonograms in any video or audio media or computer programmes and the buyer has broken the seal integrity of packaging;
  - b. for delivery of newspapers, magazines or other periodicals;
  - c. for participation in games and lotteries.
5. In case of purchase-sale of things the buyer may exercise the right to rescind the contract if the thing is not damaged or there are no material changes in its appearance. Changes in the thing or its packaging that were necessary in order to examine the received thing may not be treated as material changes in the appearance of the thing. An expert examination may be ordered in the event of a dispute about the appearance of the thing. The expenses incidental to the expert examination shall be born by the guilty party.
6. If the buyer exercises the right to repudiate the contract where the price of the thing is paid in part or in full under the consumer credit agreement concluded for the purpose between the seller and the buyer, or the seller and the third party, the said consumer credit agreement shall be rescinded without any additional obligations being imposed on the buyer.
7. Upon receipt of the notice of repudiation of the contract, referred to in paragraph 1 of this Article, the seller must within 15 days take back the thing and refund the buyer the amount paid for the thing.

Directive 97/7/EC on the protection of consumers in respect of distance contracts, falls within the scope of the Law on Consumer protection. Article 17 explicitly provides the possibility of Purchase-Sales or Service Provision Contracts Concluded by Using Distance Communication Means.

Art. 1 Law on Consumer Protection introduces the notion of the *means of communication*, stating that there are the means which can be employed in the physical non-participation of the seller, service provider or consumer, to draw up a contract. The present notion does not resemble the notion presented on the directive 97/7/ EC.

Art. 17 Law on Consumer Protection holds:

1. A purchase or service provision contract is concluded by using distance communication means shall be treated as distance contracts between the seller or service provider and the consumer on selling (delivery) of goods or provision of services, that are concluded (including signing thereof) by using exclusively (one or more) distance communication means.
2. Either the Government of the Republic of Lithuania or the duly authorized institution thereby, shall approve the rules governing sales and service provision procedure based on the contract concluded by using exclusively distance communication means.
3. The provisions of this Article shall not apply to contracts which shall be concluded:
  - a. for provision of financial services;
  - b. for auctions;
  - c. for purchase-sales and (or) delivery of food products and other goods intended for everyday consumption;
  - d. for provision of accommodation, transport, catering or leisure services where the service provider undertakes to provide these services on a specific date or within a specific date or within a specific period;
  - e. for using automatic vending machines;
  - f. for contracts concluded via telecommunications operator.
4. The seller or service provider must, prior to concluding the contract with the consumer, submit by using distance communication means, suitable information for the consumer, which is to indicate:
  - a. information about the seller or service provider;
  - b. main characteristics of the goods or services;
  - c. cost of the goods) sales price;
  - d. procedure of payment, delivery or performance;
  - e. the procedure on exercising by the consumer the right of withdrawal pursuant to provisions of Article 18;
  - f. the cost of using the distance communication means, where it is calculated other than at the basic rate;
  - g. period for which the offer or the price remain valid;
  - h. minimum duration of the contract when it is concluded for permanent supply of goods or provision of services.
5. The commercial nature of information specified in paragraph 4 of this article, must be indicated clearly and understandably and must be in conformity with the communication means being used. Should the telephone be used to communicate, the seller or service provider must clearly state the commercial goal of the conversation.
6. Prior to performance of the contract, or in case of delivery of goods, at the latest at the time of delivery (where goods are delivered by a person other than the third party authorized by the seller) the consumer must receive information in writing regarding the following (unless such information has already been given to the consumer in writing prior to concluding the contract) concerning:
  - a. goods being offered the goods or service offered (denomination, major characteristics);

- b. seller or service provider; (by specifying where and to whom the consumer may address a complaint if any);
  - c. the procedure on exercising the right of withdrawal granted to the consumer pursuant to the provisions of Article 18;
  - d. the procedure of payment, delivery and performance, the services that may be provided in relation to maintenance of goods and any guarantees as provided by the seller, if any;
  - e. contract termination terms provided the contract is of indefinite duration or its validity term is in excess of one year.
7. The burden of proof that the information in writing, as specified in paragraph 6 of this Article, has been submitted to the consumer, shall be imposed on the seller or service provider.
8. The seller shall be committed to deliver the goods within 30 calendar days following the date of signing the contract, unless otherwise specified in the contract.

## 2. Unsolicited Goods

The Civil Code of Lithuania includes the Article 6.368, which is targeted to the Supply of Unsolicited Things. The Article prohibits supplying unsolicited things if payment is demanded therefore. In case of delivery of unsolicited things the Article sets the rule that the consumer may use them at his own pleasure without payment.

The Law on Consumer protection covers the directive 97/7/EC. Article 19 repeats the provisions in the Civil Code. The Article 19 confirms the prohibition to deliver goods or provide services without the consent of the consumer, given a payment should be made for it. And makes possible in the event of delivery of goods without consent of the consumer, the latter may dispose of them at his own discretion free of charge.

### v. **Are there specific provisions and case law regarding information requirements (e.g. rules that impose on traders a duty to disclose to the consumer all “material information”)?**

Bearing in mind that freedom of information covers both the right to be informed and the right to present information, Article 6 of Proposal for a Directive states that “a commercial practice shall be regarded as misleading which contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would have taken otherwise:

- a. the existence or nature of the product;
- b. the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and the 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 on the product;
- c. the extent of the trader’s 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 trader or the product;

- d. the price or the manner in which the price is calculated, or the existence of a specific price advantage;
- e. the need for a service, part, replacement or repair;
- f. the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property right or his awards and distinctions;
- g. the consumer's rights or the risks he may face.

Referring back to existing national laws, it must be noted that Article 5 of the Law on Consumer protection corresponds to latter provision of the Directive proposal. Article 5 lists consumer's rights to be informed about in the nature of the product in the state language and written form. If the trader fails to satisfy the provisions set in this article, the consumer has right to apply either to State Food and Veterinary Service, State Non Food Products Inspectorate under the Ministry of Economy of the Republic of Lithuania or to the Court claiming the violation of his rights

Moreover, article 14 includes the provision on requirements for the information with regards to distant contracts. The provisions of this article are identical to the provisions of Directive 97/7/EB, which obliges trader to provide the following information to consumer in the case of an invitation to purchase: a) the main characteristics of the product, to an extent appropriate to the medium and the product; b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting; c) 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 additional charges may be payable; d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence; e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

Furthermore, the provisions of the Civil Code also set requirements to provide the all necessary information to buyer. Article 6.353 indicates that the seller must provide complete information about the good and denotes that provided information cannot be misleading. It must be noted that all requirements set in the previously mentioned article of the Civil Code are compatible **to (with)** provisions of the draft directive 9667/04.

**vi. Are there specific provisions and case law concerning specific sectors (e.g. final consumers)?**

Lithuanian law contains various specific provisions on consumer rights protection especially concerning advertising and information requirements, which have already been dealt with above.

As far as *final consumers* are concerned, there is no clear definition of this term in the laws of the Republic of Lithuania.

Differently from other provisions on *consumer* definitions (see part I.a.iii) only one provision of the Civil Code providing energy supply contracts (Article 6.383) defines consumer as a *subscriber* and one provision in the Law on Heat Economy specifically defines the *heat consumer* (Article 2(32)). Earlier these two provisions caused serious legal misunderstandings if

a subscriber may also be a legal person, namely many-flats house association dealing with accounts for electric energy or heat supply. Today we do not have any problems answering this question. Firstly, under Lithuanian law a many-flats house association is not a real legal person. Secondly, the European Court of Justice in Joined Cases C-541/99 and C-542/99 *Cape Snc v. Idealservice Srl* and *Idealservice MN RE Sas v. OMAI Srl* [ECR [2001] I-09049] emphasised that consumer may only be a natural person and Lithuanian courts are following this ruling. According to it the High Court of the Republic of Lithuania in case *Specialios paskirties AB "Vilniaus šilumos tinklai" v. B.Giedraitienė* (3K-3-1137/2002) has made its first step explaining a heat consumer/subscriber not as a many-flats house association, but as a *final consumer*. Today Lithuanian case-law defines final consumer in telecommunications sector (*Ž.Budros individuali įmonė "Sėkmės Sistemos" v. AB "Lietuvos telekomas"*(3K-3-927/2001)), heat supply sector (*Specialios paskirties AB "Vilniaus šilumos tinklai" v. B.Giedraitienė* (3K-3-1137/2002)), electric energy supply sector (*Dėl vandens tiekimo daugiabučio namo savininkų bendrijai sutarčių, kaip vartojimo sutarčių, ir dėl butų savininkų pareigos padengti vandens nuostolius, atsiradusius tiekiant vandenį vartotojams priklausančiais tiekimo tinklais* (3K-3-579/2003) and *UAB "Vilniaus energija" v. B.Giedraitienė* (3K-3-651/2004) (already mentioned above)) and water supply sector (*257-oji DNSB v. Specialios paskirties UAB "Vilniaus vandenys"* (3K-3-579/2003) and *UAB "Klaipėdos bendrabutis" v. AB "Klaipėdos vanduo"* (3K-3-283/2004)).

**vii. What are the national laws of post-contractual and after-sale commercial practices?**

Special by-law provisions such as Orders of minister of Economy on approval of Rules on return and exchange of products, on approval of rules on marketing of products away from business premises, on approval of Rules on marketing of products and delivery of services when contracts are concluded by means of distance communication implies certain requirements with regards to buyer continues with the setting of the special provisions related to post-contractual and after-sale commercial practices. The orders impose the sanctions on supplier if he tries to affect the behaviour of consumer offering him gifts or trying to limit buyer's choice by setting additional conditions.

The Resolutions of Government serving as by – law acts set forth legal obligation for seller to follow a few criteria for selling good: 1) the good must be safe; and 2) it must be good quality. For example, after buying certain electronic devices, the seller must provide warranty as well as full technical supervision within the period indicated in the warranty (it can be 1 year, 3 months, 12 days or other time limit depending on good). The buyer must be informed and also entitled to get the discount if the good is damaged. In the case of consumer rights violation, he can apply to National Consumer Rights Protection Board or to the court to claim the violation of his rights asking to terminate the contract and get his money back as well as claim the damages.

**viii. Are there provisions and case law on handling complaints?**

More precisely civil, administrative and criminal provisions handling consumer complains including possible sanctions are dealt in *part II.d*. Provisions on civil procedure for filing a claim for damages before a civil court are in the Civil Code and in the Law on Consumer rights protection.



Article 6.256 provides grounds for arising of contractual liability and states that every person shall have a duty to perform his contractual obligations in a proper way and without delay. Where a person fails to perform his contractual obligation or performs it defectively, he shall be liable to compensation for damages caused to the other contracting party and/or pay a penalty (fine, interest). Where the performance of a contract falls within professional activities of one of the parties, the party concerned must perform the contract in accordance also with the requirements attached to that professional activity. Where an enterprise (businessman) fails to perform its/his contractual obligation or performs it defectively, it/he shall be liable in all cases unless it/he proves that non-performance or defective performance of the obligation has resulted from a superior force unless it is otherwise provided for by laws or the contract. Accordingly, Article 6.263 provides grounds for non-contractual (delictual) liability and states that every person shall have the duty to abide by the rules of conduct so as not to cause damage to another by his actions (active actions or refraining from acting). Any bodily or property damage caused to another person and, in the cases established by the law, non-pecuniary damage must be fully compensated by the liable person. In cases established by laws, a person shall also be liable to compensation for damage caused by the actions of another person or by the action of things in his custody.

The Articles 6.292 and 6.293 provide liability of a producer and a supplier of services and foresees that a producer or a supplier of services shall be bound to compensate for damage caused by defective products or defective services. A “producer” means the manufacturer of a finished product, a component part of a product, or of raw materials, or the supplier of services who marks the product (services) with his name, trade mark or any other distinctive sign. Any person who in effectuation of his commercial activity imports into the Republic of Lithuania a defective product with the aim of selling, leasing or distributing it in any other way shall be held liable as a producer. In the event where it is impossible to identify the producer of a product, any person involved in the sale of the product shall be regarded as producer unless he provides the aggrieved person with information about the producer or the supplier of the product. This rule shall also apply in the cases where a product was imported into the Republic of Lithuania without its importer being indicated though the producer of the imported product is known. Provisions of this Section shall apply only where the products (services) are obtained for the purposes of consumption but not for commercial purposes. As far as definitions of product and services is concerned “a product” means any movable thing (property), including primary agricultural products and game, as well as a movable thing (property) incorporated into another movable or immovable thing. Electricity shall also be regarded as a product. “A service” means any activity by which a concrete material or non-material need of a consumer is being satisfied, with the exception of health services, legal services, education services, heating, gas and water supply, waste water disposal and transport services. Close to these provisions Article 6.363 provides that in all cases the buyer shall be entitled to be reimbursed for the expenses sustained due to the sale of a thing of improper quality. The institutions protecting the rights of consumers shall be entitled under law to offer protection, on their own initiative, to consumers whose rights have been violated through the sale of things of improper quality.

The Articles 6.302, 6.303 and 6.304 Civil Code provide a set of basic provisions on compensation of damage resulting from misleading advertising. These articles provide that damage resulting from misleading advertising shall inflict liability either on the advertiser, producer, intermediary or publisher of advertising. The advertiser shall be liable unless he proves that the damage has resulted not through his fault. The advertiser, intermediary in advertising, or publisher shall be liable for damage resulting from misleading advertising only in that event if they knew or should have known that the advertising was misleading or that the

consumers were deceived by their actions in producing and publishing the advertisement, or if the producer, the intermediary or the publisher of the advertisement fail to prove the identity of the advertiser (producer). As far as conditions of liability is concerned, Article 6.303 provides that persons indicated in Article 6.302 shall be liable for damage resulting from misleading advertising unless they prove that the published information corresponds to reality, and that there is no fault of theirs in relation to the content or presentation of the information and the occurrence of damage. Article 6.304 states that upon the request of the interested persons, the court hearing the case on the compensation for damage may order prohibition of further promulgation of misleading advertising or the prohibition of misleading advertising which has not yet been published but publication of which is imminent; the court may likewise order to publish an adequate denial of the misleading advertising.

Also there are specific sectors of the Civil Code for consumer rights protection, which provides consumers' rights to sue an action. Section four of the sixth book of the Civil Code named Specifics on consumer contracts of purchase-sale in Article 6.350 provides that if the seller has violated the buyer's rights, the buyer shall be entitled to apply to the institutions protecting consumers' rights or the court according to the procedure prescribed by law for the protection of his rights. This is a very general provision concerning all the consumer contracts.

There are also very important civil provisions on filing a claim for damages before a civil court concerning peculiarities of conditions in consumer contracts (Art. 6.188), consumer lease (Art. 6.504), consumer independent work (Art. 6.680) and consumer credit (Art. 6.891).

Article 6.188 states that a consumer shall have the right to claim within the judicial procedure for invalidity of conditions in a consumer contract that are contrary to the criterion of good faith. The institutions for the protection of consumer rights shall be entitled within the procedure established by laws to effectuate control over the standard conditions of contracts and challenge unfair conditions in the consumer contracts.

Article 6.504 provides that a contract of consumer lease is a consumption contract and shall be regulated, *mutatis mutandis*, by the rules governing consumer contracts established by the Civil Code, whereas general provisions of the section Specifics on consumer contracts of purchase-sale apply.

Article 6.680 foresees that in the event of failure of the independent work contractor to fulfil the work indicated in the contract of consumer independent work, or improper fulfilment thereof, the customer shall have the right to take advantage of the rights of a purchaser established in Article 6.334 of this Code. Article 6.334 of the Code provides rights of buyers of things of unsatisfactory quality. This Article states that where the things sold do not correspond to the quality requirements and the seller did not discuss the defects with the buyer, upon buying things of unsatisfactory quality the buyer shall be entitled to demand, at his own choice: 1) to replace the thing which is characterised in the contract by its kind by the thing of satisfactory quality unless the defects are minor or appeared due to the fault of the buyer, 2) to reduce the purchasing price, 3) that the seller eliminates the defects within a reasonable time without any additional payment or reimburses the buyer's expenses for the elimination of defects if these may be eliminated, 4) to restore the price and repudiate the contract, where the sale of things of unsatisfactory quality is an essential breach of contract. If the bought things perished by reason of a latent defect that existed at the time of conclusion of the contract of purchase-sale, the seller is bound to restore the price. If the loss results from superior force, or is due to the fault of the buyer, the buyer shall deduct from his claim the value of the things in the

condition they were in at the time of the loss. If the things perished by reason of a latent defect of which the seller was aware or could not have been unaware, he is bound not only to restore the price, but also to pay all damages suffered by the buyer. The conditions of the contract excluding or limiting the seller's liability for the defects of the things shall be null and void unless he has disclosed to the buyer the defects of which the seller was aware or could not have been unaware or in the case where a buyer buys things at his own risk from a seller who is not a professional seller.

Article 6.891 provides the credit agreement concerning the purchase of a certain thing or service. This Article states that the debtor whose rights have been infringed shall be entitled to defend them in judicial procedure or through institutions protecting consumer rights.

Furthermore, there are special provisions in respect of filing complains to the civil court in Law on consumer rights protection. General provisions are set in Article 3, which provides that consumers have a right to defend his/her impaired rights and restitution of loses, also get support from state and local institutions and agencies in restitution of impaired rights. Further articles of the Law on consumer rights protection provides a right of every consumer to file a claim to the civil court in if his or her rights are infringed in the following sectors: information of consumers (Art. 5(11)), quality and safety of goods and services (Art.7(10)), unfair terms in consumer contracts (Art. 12), sale of goods or provision of services away from business premises (Art. 16), sales of goods or provision of services based on distance contracts (Art. 20), acquisition of the right to make use, at a certain time, of residential space (Art. 23), consumer credit (Art. 28(3)), financial services based on distance contracts (Art. 28<sup>4</sup>), protection of consumer public interest (Art. 28<sup>5</sup>(3)) and consumer protection institutions and liability for infringement this law (Art.30).

As far as specific case-law is concerned, the main cases of the High Court of the Republic of Lithuania are mentioned above. Most of them deal with telecommunications, electric energy, heat and water supply services. Also there are few very important cases in alcohol and tobacco advertising sectors. Unfortunately, there is no real possibility to give a precise analysis of the hole Lithuanian case-law on handling consumer complains because electronic Lithuanian national courts' data bases are not finished yet. For the same reason it is not possible to give the statistics of case law on consumer rights protection in specific sectors. National Courts Administration is in the process of dealing with these questions and plans to solve them during the next year.

## **II. Possible obstacles to the Directive on Unfair Commercial Practices from the national law perspective**

### **a. What are the main obstacles from the point of view of your country, which might result, complicate transposition and implementation of the Directive?**

The Directive is providing for maximum harmonization.<sup>49</sup> The legal system of the Republic of Lithuania belongs to the continental system of law. This system is based on the strict hierarchy of the legal acts. Examples are Constitution, Constitutional Acts, Codification Acts, Acts of Parliament, Acts of Government, other legal acts. The basic aim is to find a legal act for implementation of the Proposed Directive.

According to the analysis of the Lithuanian legal acts, the principle of consumer protection is realised in the Constitution of the Republic of Lithuania alongside with the guarantees realized in the Civil Code, Legislation Acts of Parliament and Governmental Acts.

Various states of continental law tradition have Civil Law Codification or Commercial Law Codification and separate legislation acts for regulation of unfair competition cases (similarly to the law system in Germany and Austria).

The Lithuanian system has regulations of consumer protection law in the Civil Code and separate Acts of Legislation. This provides the best way to implement the Directive into separate Act of Legislation or to implement into Civil Code. This way of implementation is also based on the political reasoning. It is, in any case, a necessary condition for enforcement of the Directive.

European Community Law influences the Law on Consumer Protection. Especially the National Private Law belongs to the domain that national institution wants to keep without changes. The traditional legal acts are about 200 years old (German BGB/Austrian ABGB/France Code Napoleon). The negotiation at the EC level is always a long process. It was one of the reasons for a long negotiation and preparation of the Directive project, after a long discussion about it with national states and EC Institutions.

The enforcement of EC directive needs the separation of regulations for consumers and companies. It means the differentiation of legal regulation. The criterion should be the aim of the regulation. Law on Consumer Protection norms detailed regulation (for example, liability for defective products, unfair terms in consumer contracts, package travel, package holidays and package tours, the protection of consumers in respect of distance contracts or purchase of the consumer goods). It means, that the legal terminologies of the Consumer Law are now becoming stable and in separate cases correctly applied.

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<sup>49</sup> Having in mind that the main purpose of the directives in general is a harmonization of the different national law systems, without making laws identical. Directives are binding according to article 249 of European Community Treaty, so that as to the result be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Article 249 of European Community Treaty stipulates the obligation for the state to enforce the legal requirements of the directive. The national legal act must be according to praxis of the European Court of Justice binding and guarantee the enforcement for directive rules in the national legal order. The form of legal act is the prerogative of the national legislator. It depends on the legal tradition in the country and the requirement of the directive.

Additionally, the question about the consequences of the domestic implementation of the regulation specifications has to be considered. The main interest of the research is to elaborate a specific plan of the common principles for the implementation of the European Consumer Protection Directives into domestic law. The European Consumer Protection Law builds upon a principle of compensation of the market. The intention of the social justice is achieved without direct national (state) check of the provider's behaviour. However, a preferential position of the consumer causes a break - up of the uniform Codification of the Civil Law. The continental private legal order is based on the formal equality of the subjects under abstraction of the intended purposes. The concretion of subjects in the consumer protection law relation's leads, therefore, inevitably to a special private law and, in the long run, to the three - division of the private law (civil law/company law/consumer protection law). Already the question, who will be protected by the consumer law needs careful reasoning. The implementation of the EC - Directives must consider the problem that the legal protection must only extend to the actual needs.<sup>50</sup>

Whether one can achieve this limitation to consumers by a conversion in a Civil Codification Act (German BGB/Austrian ABGB/Lithuanian CC), is not undisputed.

It is necessary to fixate the systematic survey of the consumer protection rules in relation to the system of private law. The questions about the emergence, authentication, the subject and the private components of the consumer protection law, concretion of the regulation place of the consumer protection in the national legal order, the directives character and on the primary authorization bases in the EC – Treaty law play an outstanding role<sup>51</sup>.

The Lithuanian system has regulations of the consumer protection law envisaged in the Civil Code and separate Acts of Legislation (Law on Consumer Protection). This provides the best way to implement the EC Directive into a separate Act of Legislation (Law on Consumer Protection) or to implement into the Civil Code.

It is more technical question of enforcement of EC Directive, because the Lithuanian Consumer Protection Law is identical to the European Consumer Protection Law. We do not expect any specific problems in the Lithuanian Legal System in regard to the transposition of the Directive into the Lithuanian Law. The implementation of EC Directive into Civil Code or into Legislation Act of Consumer Protection do not have influence on the Effectiveness power of EC Directive, because the legal sources of the Civil Code and of the Legislation Act of Consumer Protection have the similar purpose – to protect rights of Consumers.

It is a usual way for Legislator in Lithuania to apply the Executive power to the implementation of the detailed-technical requirements of EC Directive. The form of the implementation could be the governmental regulation act or ministerial regulation act.

#### **b. Do you see any incompatibilities within your national legal system?**

The Lithuanian Consumer Law is based on the EC legal requirements. The Lithuanian legal order is, at this point, open for changes, but the double regulation for consumer protection is severable.

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50 Ravluševičius, Pavelas. Umsetzungskonzepte der EG-Verbraucherschutzrichtlinien, EVW 2002, page 226ff.

51 Ravluševičius, Pavelas. Umsetzungskonzepte der EG-Verbraucherschutzrichtlinien, EVW 2002, page 19ff.

The next point is the problem of personification of enterprises (recognition of legal personality). The Lithuanian legal order (esp. Lithuanian civil law) recognizes the enterprise as the object of law (property). It is not a subject of law according to the Civil Code. The enterprise is the opposite in the relation to the consumer. The subject doctrine could be changed under influences of the tendency to have consumer and enterprise as the subjects of Consumer Law. The continental legal order has two subject of modern private law: consumer and enterprise.

The new tendency of commercialization of private law has required two new subjects with legal capacity. The Lithuanian Legal Order must take into account the regulation from continental European Countries like Germany and Austria.

**c. How could the Directive be transposed into your national law**

The Consumer Protection Directives have developed a special private law for consumer protection. The example based on the Proposed Directive reaches deeply into the national legal system of law and cannot be transferred in conformity with the Community Law without systematic structural changes in the Lithuanian Civil Law.

However, it is difficult to reconcile the specifications of the directives with the basic principles of civil law. Accordingly, the thesis deals with the following issue: which regulation programme of the Directive is obligatory for the national legislator?

Thus, the technical transposition of the Directive into national law must be considered: Either the Directive is inserted into a Civil Codification Act, or transformation takes place in an Act of the law, or an implementation is not necessary due to a directive - conform interpretation according to the criterion of the aims and purposes of the directive? The national legislator can select these different methodologies for domestic implementation.

The enforcement of consumer protection requirements depends not only on the implementation into Civil Code or separate Legal Acts, but on the existing rules of Competition in the Lithuanian Republic.

Measures for the enforcement of the Proposed Directive into Lithuanian Legal Order could be the following:

Firstly, the implementation of the Proposed Directive into Civil Code is to be analyzed. The prohibition of unfair commercial practices can find place between the rules of Civil Codification. The Civil Code is to be understood as a universal legal act for the purposes of consumer rights protection in the Republic of Lithuania.

Secondly, the implementation of the Proposed Directive into the Law on Consumer Protection should be analyzed as well. This law is a special legal act, supplementing the norms of the Civil Code on consumer rights protection.

Thirdly, it would be possible to implement the Proposed Directive into the Law on Competition, because the objective of this Law is partly similar to the subject of the Proposed Directive: restrictive practices, abuse of a dominant position, control of concentration, unfair competition, institution controlling actions restricting competition, investigation of restrictive practices and

hearing of cases, hearing of restrictive practices cases, liability for infringement of the law on competition. This Act must be adapted with regard to the consumer, because now its scope of regulation is based on the conception of only *business-to-business* relations. Business-to-consumer relations in the Republic of Lithuania are regulated in Law on Consumer Protection. It is a special rule in the Lithuanian Law System.

The position of the National Consumer Rights Protection Board at the Ministry of Justice as well as the position of certain officers of the Ministry of Justice is that directives falling under the scope of regulation of the Civil Code have to be implemented into that legal act. Moreover, the Law on consumer rights protection should not repeat provisions that are already implemented into the Civil Code. Basically, the Draft Law on consumer rights protection does not contain the provisions of the directives that are transposed into the Civil Code and the Legislation Act of Consumer Protection.

**d. What would be – from the perspective of your national law – the appropriate sanctions in case of infringement of the general clause of the Directive? Is there a system to enforce the provisions on fair commercial practice? How is this organized?**

The system for defending the consumers' rights is based on civil, administrative and criminal law. The legal sources are the Civil Code,<sup>52</sup> the Code of Violation of Administrative Law,<sup>53</sup> the Criminal Code<sup>54</sup> and various legal acts for consumer rights protection.<sup>55</sup> Sanctions for enforcement of consumer rights are to be realised on the principles of civil, administrative and criminal liability. These sanctions are applicable by court or by the national administrative authorities. The usual way is to claim damages. The requirements of the Civil Code, the Code of Violation of Administrative Law and the Criminal Code are applied over similar types of infringement that could rise from the Directive.

*Civil law and Consumer Law*

According to Lithuanian Civil law, it is possible to file a claim for damages before a civil court. The Civil Code with the Consumer Protection Legislation provides a legal basis for filing a claim for damages. It is a civil procedure between two parties – an enterprise and a consumer. The legal categories of contract and tort are mostly to apply. The Consumer rights can be represented by National consumer rights protection board or by non – governmental consumer rights organisations.

National consumer rights protection board may confirm that particular consumer rights have been infringed. On that basis a consumer may apply to the court requesting to adjudge damages that occurred as the consequence of the particular infringement. Moreover, National consumer rights protection board is a state institution that could provide official conclusions to the court.

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52 Official Journal, 2000 Nr. 74-2262; Actual red. Since 2004-11-11

4 Official Journal, 1985, Nr. 1-1; Actual red. Since 2005-06-16

54 Official Journal, 2000, Nr. 89-2741; Actual red. Since 2005-06-23

55 Law on Consumer Protection, Official Journal, 2000, Nr. 85-2581; Actual red. Since 2004-04-27; Law on Product Safety, Official Journal, 2001, Nr. 64-2324; Actual red. Since 2001-07-25; Law on Advertising, Official Journal, 2000, Nr. 64-1937; Actual red. Since 2002-12-03; Law on Alcohol Control, Official Journal, 1995, Nr. 44-1073; Actual red. Since 2004-05-01; Law on Tobacco Control, Official Journal, 1996, Nr. 11-281; Actual red. Since 2003-11-20.

According to the paragraph 6 part 1 of the Article 1.138 of the Civil Code, only the court may adjudge material as well as non-material damages in the Republic of Lithuania.

Under certain circumstances, some cases are subsumed not only to the civil liability but to the administrative and criminal liabilities.

#### *Administrative Law*

The administrative action, according to the Code of Violation of Administrative Law is the public action of State. Code of Violation of Administrative Law stipulates responsible Institutions for investigation and punishment of violations [This part of research presents the list of institutions; jurisdictions, applicable sanctions with a description of violation matters and concentrates upon the most applicable cases].

This part of the topic presents a list of Lithuanian official Institutions, according to the Code of Violation of Administrative Law:

Art. 221 Administrative Commission;

Art. 224 Court;

Art. 235/1 State Energy Inspectorate under the Ministry of Economy;

Art. 235/2 The State Price Regulation Commission of Energy Resources;

Art. 239 State Food and Veterinary Institution - jurisdiction in the following cases: Art. 42 Concerning Violation of Regulation Acts about Safety and Quality of Non Food Products; - Art. 89/1 Concerning Violation of taking to the Market genetically transformed organisms and genetic apply transformed products; - Art. 189 Concerning Violation at the Food Domain; - Art. 214/2 Concerning Violation about Information of Alcohol;

Art. 239/3 Self – Government Inspection of Sanitation;

Art. 239/4 State Council about Control of Public Health at the Ministry of Health - jurisdiction in the following cases: Art. 79 / 84 Concerning Violation of legal requirements about hygiene of atmosphere;

Art. 241 Institutions of State Veterinary Control – jurisdiction in the following cases: Art. 166 Violation concerning requirements of veterinary;

Art. 241/1 The State Non Food Products Inspectorate under the Ministry of Economy - - jurisdiction in the following cases: Art. 42 Concerning Violation of Regulation Acts about Safety and Quality of Non Food Products; Art. 152/4 Concerning Violation of Regulation of Telecommunication; - Art. 189 Concerning Violation of Non - Food Product Domain; - Art. 214/2 Concerning the Information about Tobacco Product;

Art. 247/4 Competition Council of the Republic of Lithuania - jurisdiction in the following cases Art. 189 part. I Violation of trade regulation of service.

The Code of Violation of Administrative Law holds the following typical sanctions: warning, fines (100-5000 lt., i.e. € 30-1500); confiscation of goods, losing of licenses; abolishment of rights.

#### *Criminal Law*

Some criminal cases could be related indirectly to the consumer protection but it is more exemption in the law practice.

Criminal liabilities cases are strictly regulated, according to the Criminal Code of the Republic of Lithuania. The Criminal Code XXXI part Criminal Violation and Criminal Oversteps against economy and business order. The following articles of Criminal Code are important - Art. 202 Illegal business commercial financial, professional activity; sanctions for punishment – public



work, punishment fees, restrictions of movement / freedom, imprisonment to 2 years; Art. 203 Illegal actions of legal persons; sanctions for punishment - punishment fees, arrest, imprisonment to 1 year or to 2 years; Art. 204 Illegal use of trade and service mark; sanctions for punishment - abolishment of the right, punishment fees, imprisonment to 1 year or to 2 years; Art. 205 Wrong statement on activity of a legal person; sanctions for punishment - abolishment of the right, punishment fees, arrest, imprisonment to 2 years.

According to the Criminal Code and Criminal Procedure Code Institutions of Investigation before the Court and the Court are responsible for criminal procedure. They have jurisdiction to apply the rules of the Criminal Law.

**e. How would the Directive be delimited to the following fields of law?**

**i. Competition Law**

Lithuanian Competition Law is based on the principles of relations business to business. The consumer protection doesn't belong to direct matter of regulation. This separation into two Legislation Acts – Law of Competition and Law on Consumer Protection – belongs to the special points of Lithuanian legal system. The integration of consumer protection law into competition changes the scope of the application of legal acts on competition.

The economic activity under the Act of Competition means any type of manufacturing, commercial, financial or professional activity, associated with purchase or sale of goods, except for acquisitions by natural persons intended for personal and household needs. Consumer Law isn't included.

Article 5 Act of Competition stipulates the following rules. All agreements which have as their object the restriction of competition or which may restrict competition shall be prohibited and shall be void from the moment of conclusion thereof, including: 1) agreements to directly or indirectly fix prices of certain goods or other conditions of sale or purchase; 2) agreements to share the product market on a territorial basis, according to groups of buyers, suppliers or in any other way; 3) agreements to fix production or sale volumes for certain goods, as well as to restrict technical development or investment; 4) agreements to apply dissimilar (discriminating) conditions to equivalent transactions with individual undertakings, thereby placing them at a competitive disadvantage; 5) agreements to make conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their commercial nature or according to usage, have no direct connection with the subject of the contract; 6) agreement between competitors to participate or not to participate, or to submit co-ordinated bids for public procurement contract, for tender or other procurement of a similar type.

The prohibition provided according Law of Competition (Article 5(3)) should not be applied, if a bid is officially submitted for the award of public procurement contract, for a tender or other similar purchase, drawn up on the basis of a joint activity contract or other contract, which does not contradict the law. EC Treaty Law is integrated into national competition act (Article 81; 82 EC Treaty).

According Article 6 Act of Competition block or individual exemption may be granted to the agreements specified in Article 5 of this Law, provided the agreement promotes investment, technical or economic progress or improves the distribution of goods, thus allowing all consumers to get additional benefit.

According to Article 9 of the Act of Competition, it shall be prohibited to abuse a dominant position within the relevant market by carrying out actions which restrict or may restrict competition, limit without cause the possibilities of other undertakings to act in the market, or violate the interests of consumers, including: 1) direct or indirect imposition of unfair prices or other purchase or selling conditions; 2) limitation of trade, production or technical development to the prejudice of consumers; 3) application of dissimilar (discriminating) conditions to equivalent transactions with certain undertakings, thereby placing them at a competitive disadvantage; 4) making the conclusion of a contract subject to acceptance by the other party of supplementary obligations which, by their commercial nature or usage, have no connection with the subject of such contract.

## **ii. Intellectual Property Law**

The domain of Intellectual Property Law consists of unfair advertisements and unfair competition as humbug.

Undertakings shall be prohibited from performing any acts contrary to honest business practices if such acts may be detrimental to the competition interests of another undertaking, this action could be as follows: “unauthorized use of a mark identical or similar to the name, registered or unregistered well known trade mark or other reference having a distinguishing feature of another undertaking, if this causes or may cause confusion with that undertaking or its activity or where it is sought to take undue advantage of the reputation of that undertaking (its mark or reference) or where this may cause injury to the reputation (its mark or reference) of that undertaking or reduction of the distinguishing feature of the mark or reference applied by that undertaking.”

To the category of unfair competition belongs “simulating the product or product packaging of another undertaking by copying the external shape or packaging colour or other distinguishing feature of the product, if this can be misleading in determining the identity of the product or if the acts are intended to obtain the benefits by taking undue advantage of the reputation of another undertaking”.

The unfair competition includes “providing incorrect or unsubstantiated information about its own or another undertaking’s managing personnel, skills of the employees, legal, financial or other position if damage may thereby be inflicted on another undertaking”

The rules of unfair advertisements were subject of investigation in the first part of work. The new legal act on Trade Marks is harmonized with the Council Regulation Nr. 40/94 because of Community Trade Mark.

The Grounds for the Invalidation of a trade mark are as follows: 1) identical with an earlier mark, and the goods and/or services for which the mark is registered are identical with the goods and/or services for which the earlier mark is applied for or is registered; 2) identical with or similar to the earlier mark and because of the identity or similarity of the goods and/or services covered by the marks there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association with the earlier mark; 3) identical with the mark recognized as well-known in the Republic of Lithuania in the manner prescribed by Article 9 of this Law, the proprietor of which is another person, or because of its

similarity to the mark it is liable to mislead the public; 4) identical with the name of a firm or possessing a misleading likelihood to the name of a firm, whose proprietor is another person who acquired the right to the name of the firm in the Republic of Lithuania before the date of filing of the application for the registration of the mark or the date of the priority, if on the specified date the firm had a right to engage in identical or similar trade to which the goods and/or services covered by the registered mark may be attributed; 5) identical with the geographical indication protected in the Republic of Lithuania or possessing a misleading likelihood thereto, except for the indication incorporated in the mark as the disclaimer, for which registration is applied for by a person entitled to use the geographical indication; 6) identical with the protected industrial design or any other object of industrial property, literary, scientific or artistic work protected under the copyright, the name or surname or artistic pseudonym of a famous person, or the portrait of another person or its likelihood to the above is misleading, except for the cases where consent has been granted by the owner of the rights or the successor to them; 7) identical with the previous Community Trade Mark.

The protection of consumers determinates civil liability and under special conditions the administrative and criminal liability. It is applicable when the enterprises have used trademark illegally.

### **iii. Criminal Law**

Criminal provisions of Criminal Code of the Republic of Lithuania, which can be relevant in respect to unfair commercial practices, are not very rich and are the following:

Article 202 “Illegal economic, commercial, financial and professional activity”;

Article 203 “Illegal activity of juridical persons”;

Article 204 “Taking advantage of foreign trademarks for goods and services”;

Article 205 “False statement of juridical persons’ activities”.

Under these provisions, possible applicable criminal sanctions are confinement, doing work for public purposes, penalty and hold up of permit.

### **iv. Product safety. Food safety<sup>56</sup>**

The product safety has in the Lithuanian legal order a special regulation. It is called the Law on Product safety. This Legal Act shall establish general requirements for product safety, the principles of state and public control of product safety, the procedure for providing and communicating information about dangerous products, the duties and liability of producers, sellers and suppliers of services for placing dangerous products on the market of the Republic of Lithuania (hereinafter - the market) and damage caused by them to consumers. The purpose of the Law is to ensure that only safe products are placed on the market.

The requirements for food are in the Legal Act “Law on Food”. This Law lays down the requirements for food placed on the market and its handling, the competence of state institutions and public organizations for the protection of consumers’ rights in ensuring food safety; it also regulates duties and liability of food producers, food service operators and food traders.

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<sup>56</sup> Europos link. Vartotojų vadovas. Lietuvos vartotojų institutas, 2004, p. 16-38.

EC Law in this area is partly implemented by Orders of the Ministry of Health of the Republic of Lithuania. In terms of product safety the enforcement of the Directive should not cause problems for the legislator.

#### **v. Protection of Enterprises. SMEs legal regime**

Enterprise law developed in Lithuania as a result of the transition from a centrally planned to a market economy. Due to the role of commercial units as extremely important actors in a market economy, basic legal acts regulating entrepreneurial activity were adopted in the first years of independence. Changing legal and economic environment has caused numerous changes in Lithuanian enterprise law. Development of the enterprise legislation in Lithuania has also been oriented towards the requirements of the EC law in line with the European Agreement Establishing an Association between the European Communities and their Member States and the Republic of Lithuania (effective from 1 February 1998).

Enterprise law covers all legal forms of organising business in Lithuania with the exception of individual activity by natural persons regulated by tax law. Natural persons who want to pursue economic-commercial activities without establishing an enterprise can undertake individual activity and gain income or any other economic benefit. This right is provided in the Civil Code and the Law on Income Tax of Individuals defines individual activities.

Laws of the Republic of Lithuania provide incorporation of the following legal forms (types) of companies: the individual enterprise, the general partnership, the limited partnership, the public company, the private company, the investment company, the agricultural company, the cooperative society, the state-owned enterprise, the municipal enterprise. For a purpose other than profit-making non-profit organisations may be established. The undertakings are divided into limited and unlimited liability enterprises. The individual enterprise and partnership are unlimited liability enterprises while undertakings of all other legal forms (types) are limited liability enterprises. The limited liability enterprise is liable for the obligations solely by the enterprise's property. The unlimited liability enterprise is liable for the obligations to the extent of the enterprise assets, and if the latter is not sufficient to cover the obligations the owner of the individual enterprise is liable for the obligations of the enterprise by way of all his property, in the partnership the general partner is liable for the obligations by way of all his property.

The concept of SMEs currently used in Lithuania fully complies with the recommendations of the European Commission. Having taken into consideration the European Commission's Recommendation of 6 April 1996 concerning the definition of SMEs (96/280/EC), the Seimas of the Republic of Lithuania on 22 October 2002 adopted a revised version of the Law On Small and Medium-Sized Business Development which came into force on 1 January 2003. The revised Law provides the definition of small and medium-sized entities in compliance with the recommendations of the European Commission and defines the forms of possible state support to these entities as well as other related provisions. It is established in the revised version of the Law that SMB entities comprise medium-sized enterprises, small enterprises (including micro-enterprises) and natural persons who shall, in the manner prescribed by law, enjoy the right to engage in independent commercial, production, professional or similar activities, including the activities which require a business certificate.

Also, during the same year 2002 Small and Medium-Sized Business Development Measures for 2002-2004 were adopted. The Law on Small and Medium-Sized Business Development

defining small and medium-sized business entities also defines the forms of State aid applied. State aid is a temporal measure. Article 3 provides that State aid shall be granted to small and medium-sized business entities in accordance with small and medium-sized business development programmes of the Government, counties or municipalities. This Law foresees that preparation and implementation of small and medium-sized business development programmes shall be financed from the State or municipal budgets and financial funds. When preparing and implementing small and medium-sized business development programmes which are financed from the State budget, priority shall be given to small enterprises (micro-enterprises including).

**vi. Public policy**

Article 6 of the Law on Trade Marks of the Republic of Lithuania provides absolute grounds for refusal of registration or invalidation of a trade mark. One of these grounds is if the sign is contrary to accepted principles of morality or public policy, including ethics of society and humanitarian principles. In the same manner Law on Advertising regulates. Article 4 of this legal act provides general requirements of advertising. Under these requirements advertising in the Republic of Lithuania shall be banned if it violates public and moral principles, degrades human honour and dignity, incites national, racial, religious, gender-related or social hatred and discrimination as well as defames or misinforms, promotes force and aggression, gives rise to panic, promotes behaviour which presents a threat to health, security and environment, abuses superstitions, people's trust, and their lack of experience or information, mentions the name and surname of a natural person without his permission, his opinion, information about his private or public life, property, are presented and his physical picture is used, uses special subliminal measures and technologies in advertising dissemination, uses advertising material which has been prepared in violation of authors' rights in literature, art, science and (or) related rights.

In general, public policy at the domain of consumer protection depends on the policy of the European Union. The transposition of EC *acquis* is a positive measure for the formation of national policy of consumer protection in our country because of the consolidation of the national consumer protection measures.

**f. Is there any national unfair commercial practices' law, including case law, which may constitute a barrier to the Internal market, for example case law which raises questions similar to *Estee Lauder*, *Clinique* and *De Agostini*?**

As far as *De Agostini* case is concerned, legal regulation and case law on misleading advertising and children protection are already analysed in Part I. There is no other similar practice in respect of this question.



## **Malta**

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**I. Existing National Law****a) General Provisions on Unfair Commercial Practices****i. Could you describe the general legal framework of the law on unfair commercial practices in your country (e.g. structures, main acts/statutes, leading cases, codes of conduct, self-regulation)?**

There is no law specifically prohibiting all forms of unfair commercial practices but there are various laws dealing directly or indirectly with certain practices that might be considered as unfair commercial practices:

i. Articles 32-37 of the Commercial Code, Chapter 13 of the Laws of Malta, prohibit various forms of unfair competition between traders such as the use of names, marks or distinctive devices that might create confusion with the names, marks and devices used by others in the market; or the use of firm names or fictitious names to mislead others as to the real importance of the firm; or the use of false indications of origin of goods; or the spreading of news that is prejudicial to other traders; or the subornation of other traders' employees. Such practices carry a civil law sanction. The injured trader may either resort to an action for damages and interest or request the Civil Court to impose a penalty on the offending trader that would be paid to the injured trader in settlement of all his claims for damages and interest (but the law sets a maximum limit for such penalty). Moreover, the injured trader may seek a court order to stop such practices and to order the destruction of the infringing material.

Two things are clear. These provisions go to protect other traders (competitors). Secondly, a damages claim under the civil law is likely to lead to effective compensation.

ii. Various provisions of the Trademarks Act, Chapter 416 of the Laws of Malta, complement the abovementioned provisions of the Commercial Code by prohibiting the registration or use of trademarks that being identical or similar to earlier trademarks would enable the holder to take unfair advantage of or to damage the distinctive character or the reputation of the earlier trademark (Articles 6 and 10). Use of such trademarks in such circumstances would amount to a criminal offence punishable by a fine and/or imprisonment (Article 72). Art 14 states that an infringement of a registered trademark is actionable by the proprietor of the trademark before the Civil Court First Hall and that in such an action all such relief is available as is available in respect of the infringement of any other property right. Moreover Art 85 states that the provisions in the Act on criminal offences apply without prejudice to the right of any person to claim damages in consequence of any act constituting an offence.

A damages claim for unfair commercial practices can be based on the general tort law provisions if it can be shown that there was fault on the part of the trader and damages were suffered as a result of such practices. Under Tort Law, Articles 1031-1033 of the Civil Code provide that a person is liable for the damages caused through his fault. A person is deemed to be in fault if in his own acts he does not use the prudence, diligence or attention of a bonus paterfamilias. Moreover, any person who, with or without intent to injure, voluntarily or through negligence, imprudence or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law is liable for any resulting damage. This right to a remedy under tort law is specifically stated in Article 37 of the Commercial Code for the injured trader



in instances concerning unfair competition but the right to this remedy exists in all other instances to any aggrieved person, be he a trader or consumer, in terms of the abovementioned criteria set in Articles 1031-1033 of the Civil Code.

Articles 1424-1432 of the Civil Code also provide that the seller is bound to warrant the thing sold against any latent defects which render it unfit for the use for which it is intended or which diminish its value to such an extent that the buyer would not have bought it or would have tendered a smaller price, if he had been aware of them. If the defects of the thing sold were known to the seller, he is not only bound to repay the price received by him but he is also liable in damages towards the buyer. If the defective thing perishes in consequence of its defects, the loss is borne by the seller who still has to repay and indemnify the buyer.

iii. The Trade Descriptions Act, Chapter 313 of the Laws of Malta, likewise makes the application of false trade descriptions and the provision of false or misleading price indications and the making of false or misleading representations and statements a criminal offence punishable even by a custodial sentence. Moreover, the importation of goods carrying such indications or representations when they include a false indication of origin is prohibited. The Act also empowers the Minister responsible for Consumer Affairs to impose requirements relating to the information that should appear on or accompanying goods and in advertisements and to the markings that should feature on goods being offered for sale for the better information of consumers.

iv. Article 298 of the Criminal Code, Chapter 9 of the Laws of Malta makes the use of misleading advertising and false trade descriptions a criminal offence leading to a custodial sentence.

v. The main piece of legislation for the protection of consumers against unfair commercial practices is the Consumer Affairs Act, Chapter 378 of the Laws of Malta. Passed in 1994, the Act set up the office of the Director of Consumer Affairs, the Consumer Affairs Council and tribunals to be known as the Consumer Claims Tribunals, and speaks of Consumer Associations (Parts II, III and IV), as well as so-called ancillary matters. The Act sets out General Principles in Part V, and deals with 'unfair practices in Part VI, liability for defective products in Part VII, sale of goods to consumers in Part VIII, and compliance orders and enforcement in Parts IX and X. Part XI is titled 'miscellaneous matters' and provides simply that the Director of Consumer Affairs is charged with the administration of the Trade Descriptions Act and the Doorstep Contracts Act.

Articles 44 to 47 of the Consumer Affairs Act prohibit the use of unfair terms in consumer contracts, whether or not individually negotiated, and make such terms null and unenforceable against the consumer. Apart from this private law sanction, the Director of Consumer Affairs, a public officer who heads the government department on competition and consumer affairs, is also empowered to issue a compliance order, of his own motion or on a written application by a consumer association, requiring any person to delete or alter a term in a consumer contract that he considers to be unfair to consumers and/or requiring him to incorporate in a consumer contract such terms as he considers necessary for the better information of consumers or for preventing a significant imbalance between the rights and obligations of the parties in order to benefit consumers (Article 94). These provisions implement the Unfair Contract Terms Directive but go beyond by providing a wider scope (extending to individually negotiated contracts) and stricter protection for consumers (the unfairness test is easier to satisfy).

Article 48 prohibits all forms of misleading advertising while Articles 49 and 50 permit and regulate the content of comparative advertising. All three provisions faithfully implement the Misleading Advertising Directive and the Comparative Advertising Directive. The Director of Consumer Affairs is here also empowered to issue a compliance order requiring any person engaging in any misleading advertising or in comparative advertising that is not compliant with the criteria set by law to discontinue or refrain from such advertising.

It should be noted, however, that the Act encourages voluntary compliance by traders since in Article 100 it obliges the Director whenever he considers it to be possible and reasonable to do so to seek first to achieve voluntary compliance with the provisions of this Act and with regulations made under it and consumer-related legislation, before proceeding with the issue of a compliance order.

Article 51 makes the promotional offer of gifts, prizes and other free items a criminal offence in circumstances where the trader fails to provide them or fails to disclose all the terms and conditions for obtaining them or fails to give a clear and full description of the gifts, prizes or items being offered. Likewise, Article 52 prohibits all forms of pyramid selling schemes and makes the operation or promotion of such schemes a criminal offence. Moreover, participants in the scheme are entitled to demand a full refund of the monies paid by them into the scheme. The scope of the prohibition of selling schemes in Article 52 is very wide, covering all forms of pyramid selling schemes, however described, and includes schemes or activities in which a significant or material element consists of a pyramid selling activity.

Another unfair commercial practice that is considered a criminal offence by the Consumer Affairs Act is the making of misleading representations about the profitability or degree of risk involved in work from home schemes and similar schemes or activities (Article 53).

The Consumer Affairs Act also empowers the Director to issue public statements identifying and giving warnings or information about trading practices detrimental to the interests of consumers and about the persons who engage in such practices (Article 8).

vi. The Doorstep Contracts Act, Chapter 317 of the Laws of Malta, implements the Doorstep Selling Directive by providing for a fifteen day cooling off period and the related right of cancellation. Article 5A thereof even makes it a criminal offence for a door-to-door salesman to refuse to leave the home or place of work of the consumer when requested to do so. The Act gives greater consumer protection than the directive since it provides that a consumer may not be required to pay for the goods prior to their delivery except for a 10% deposit payable only after the expiry of the cooling off period (Article 9). Moreover, it also regulates the content of the doorstep contract (Articles 6, 7 and 11). The sanction for a breach of the provisions of this Act (or indeed of any of the provisions of the Consumer Affairs Act or any regulations made under it) is that in respect of the person infringing the provisions the Director of Consumer Affairs may withdraw or suspend or refuse to renew the licence to act as a door-to-door seller.

vii. The Distance Selling Regulations, LN 186 of 2001, adopted under the Consumer Affairs Act implement the Distance Selling Directive (Dir. 97/7/EC) by imposing information and transparency requirements and providing for a fifteen day cooling off period. They also regulate inertia selling and unsolicited communication and lay down obligations concerning delivery and performance of distance contracts and protect consumers against fraudulent use of credit cards through provisions that follow very closely the provisions of the Directive. Failure to comply with these requirements and obligations constitutes a criminal offence. Moreover, the aggrieved

consumer may also request the court finding the trader guilty of an offence to make a compensation order condemning the trader to pay the consumer in full or partial compensation for the damages suffered by the consumer as a result of the offence (Article 14 of the Consumer Affairs Act). The Malta Financial Services Authority Act, Chapter 330 of the Laws of Malta, in Article 20A empowers the Minister responsible for Finance to issue regulations on the distance selling of financial services that would establish a cooling-off period and minimum consumer rights and impose information requirements but as yet these have still not been published. It is reported that though these are still in draft form it is envisaged that very shortly they will be adopted.

viii. The Consumer Affairs Act (Price Indication) Regulations, LN 283 of 2002, also adopted under the Consumer Affairs Act, implement the Product Price Indication Directive (Dir. 98/6/EC) by ensuring that consumers receive correct and adequate information on the price of goods. Failure to comply with the information requirements prescribed in the regulations constitutes a criminal offence.

ix. The Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations 2000, LN 269 of 2000, as amended by LN 151 of 2001 and LN 80 of 2002, adopted under the Malta Travel and Tourism Services Act, Chapter 409 of the Laws of Malta, implements the Timeshare Directive (Dir. 94/47/EC) by imposing information and transparency requirements and repair and maintenance obligations on the seller, providing for a ten day cooling off period, regulating the content of the timeshare contract and prohibiting advance payment before expiry of the cooling off period. Failure to comply with these regulations constitutes a criminal offence. Moreover, the Director of the Enforcement Directorate of the Malta Tourism Authority is entrusted with the monitoring of practices covered by these regulations and empowered to stop any practices that are done in contravention of the obligations imposed by these regulations. However, these regulations do not regulate the conduct of timeshare sellers nor protect consumers against aggressive selling techniques, though the latter might constitute a contravention under the Criminal Code, Chapter 9 of the Laws of Malta. Moreover, Article 974 of the Civil Code, Chapter 16 of the Laws of Malta, makes any contract where the consent of one of the parties has been extorted by coercion, violence or fraud null and void.

x. The Package Travel, Package Holidays and Package Tours Regulations 2000, LN 157 of 2000, as amended by LN 258 of 2001, also adopted under the Malta Travel and Tourism Services Act, implements the Package Travel Directive (Dir. 90/314/EEC) by imposing information requirements and ensuring against false or misleading information, regulating the content of the contract, protecting consumers against price and programme changes after conclusion of the contract and providing adequate remedies in such an eventuality. Non-compliance is a criminal offence and the Malta Tourism Authority is empowered to suspend the licence of travel agents in cases of repeated contraventions. Moreover, an organiser or retailer who supplies a consumer with false or misleading information would be liable to compensate the consumer for any loss which the consumer suffers as a result.

xi. The Broadcasting Act, Chapter 350 of the Laws of Malta, by implementing the TV Without Frontiers Directive (Dir.89/552/EEC as amended by Dir 97/36/EC) contains various provisions prohibiting numerous forms of unfair advertising on broadcasting services. It carried a code for advertisements, teleshopping and sponsorships that has now been replaced by a more detailed code in the Broadcasting Act (Substitution of Third Schedule) (Code for Advertisements, Teleshopping and Sponsorships) Regulations, 2001, LN 245 of 2001, as subsequently amended, that the Authority issued under the Act. Moreover, the Authority has also published a

Broadcasting Code for the Protection of Minors, 2000, LN 160 of 2000, that protects minors against advertising that may cause moral or physical detriment to them and against misleading advertising specifically targeting minors and advertising that exploits minors in any way. Observance of these obligations is secured by the Broadcasting Authority which is empowered to give directions imposing prohibitions on persons providing such services and may impose administrative fines for non-observance.

xii. The Food Safety Act, Chapter 449 of the Laws of Malta, and the Labelling, Presentation and Advertising of Foodstuffs Regulations, 2004, LN 483 of 2004, issued under the Act prohibit misleading claims on labels attached to foodstuffs, advertising and other forms of presentation regarding the characteristics of the foodstuff or attributing to it effects and properties that it does not possess. Non-compliance is a criminal offence.

In Malta as yet self-regulation by traders is virtually non-existent but regulated professions do have codes of ethics and codes of conduct and rules drawn up by their associations regulating their practice for example in the financial services sector. The Broadcasting Authority is empowered by the Broadcasting Act to publish codes of practice regarding programmes and transmissions that would be binding on broadcasters and which it would enforce and the Act itself contains an Advertising and Sponsorship Code but this is not self regulation.

Where the relevant law makes a practice or conduct a criminal offence, the Police or in certain instances the Director of Consumer Affairs conducts the prosecution before the Court of Magistrates which may impose a fine. However, proceedings for an offence under the Consumer Affairs Act may only be instituted at the instance of the Director of Consumer Affairs.

Disputes between consumers and traders are heard by the ordinary civil courts but small claims can be heard by the Small Claims Tribunals (set up by the Small Claims Tribunal Act, Chapter 380 of the Laws of Malta) and the Consumer Claims Tribunal (set up by the Consumer Affairs Act), both tribunals having jurisdiction to hear and determine money claims (in the case of the latter tribunal only when brought by consumers against traders) where the value of the claim does not exceed Lm 1500 (equivalent to 3400 Euro).

Although these tribunals determine disputes expeditiously (generally in one sitting) by not following the regular court procedures and rules of evidence they are nevertheless bound to determine issues according to the substantive merits and justice of the case and in accordance with equity. The Consumer Claims Tribunal may also award a very limited amount of moral damages to the aggrieved consumer. The decisions of these tribunals need not be fully reasoned and only the decisions of small claims tribunals are published in full – in the case of the Consumer Claims Tribunal only the outcome of the case is reported on the website of the tribunal. There is a right of appeal from the decisions of these tribunals to the Court of Appeal. It is at the option of the consumer whether to bring his claim before the ordinary courts or small claims tribunal or before the consumer claims tribunal.

As mentioned above, the Consumer Affairs Act encourages amicable settlement of disputes and voluntary compliance. So Article 23 thereof concerning the procedure before the Consumer Claims Tribunal requires that every claim, before being presented before the tribunal, must first be referred by the party making the claim to the Director or a consumer association which shall attempt to bring the parties to an amicable settlement of the dispute.

**ii. Does a general clause on unfair commercial practices exist?**

No, there is no general clause on unfair commercial practices in any of the abovementioned legislation or in any other legislation. However, Article 43 of the Consumer Affairs Act lays down a set of basic consumer rights (General Principles) that though not directly enforceable in any court or tribunal must be adhered to in the interpretation and implementation of this Act and any regulations under it and amongst the consumer rights listed therein there is the right of protection against unlawful or unfair trading practices.

The only general clause on unfairness to be found in the law refers to the unfairness of terms in consumer contracts in the Consumer Affairs Act. Although these provisions generally follow the provisions of the Unfair Contract Terms Directive, in relation to the unfairness test they go beyond the directive by laying down four alternative criteria – unfairness results when the term (a) creates a significant imbalance between the rights and obligations of the contracting parties to the detriment of the consumer; or (b) causes the performance of the contract to be unduly detrimental to the consumer; or (c) causes the performance of the contract to be significantly different from what the consumer could reasonably expect; or (d) is incompatible with the requirements of good faith. However, the provisions give no definition or guidance on the good faith requirement.

Articles 32-37 of the Commercial Code, Chapter 13 of the Laws of Malta, prohibit various forms of unfair competition between traders such as the use of names, marks or distinctive devices that might create confusion with the names, marks and devices used by others in the market; or the use of firm names or fictitious names to mislead others as to the real importance of the firm; or the use of false indications of origin of goods; or the spreading of news that is prejudicial to other traders; or the subornation of other traders' employees.

**iii. Who or what is protected by these provisions (e.g. consumers, customers in general, competitors, functioning of markets)?**

Legislation listed above – the provisions in the Commercial Code, the Trademarks Act and the Trade Descriptions Act protect competitors and the functioning of the market but the provisions of the Trade Descriptions Act also protect customers in general; the provisions in the Consumer Affairs Act on unfair terms in consumer contracts and on pyramid selling schemes protect consumers only while the provisions on misleading and comparative advertising, on promotion through free gift schemes and prizes and on the making of misleading representations about the profitability or degree of risk involved in home schemes protect customers and society in general, competitors and the functioning of the market; the Doorstep Contracts Act, the Distance Selling Regulations and the Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations protect consumers only; the Consumer Affairs Act (Price Indication) Regulations protect any final purchaser not just consumers and the Package Travel, Package Holidays and Package Tours Regulations 2000 protect any person who takes or agrees to take a package not just consumers; the Broadcasting Act, the Food Safety Act and the Labelling, Presentation and Advertising of Foodstuffs Regulations, 2004 protect society in general.

**iv. Are there definitions of consumers, specific groups of customers, such as “vulnerable consumers” or “children”, are there definitions of “business”, “trader” or similar terms?**

The only laws from the abovementioned list containing a definition of ‘consumer’ are the following: the *Consumer Affairs Act* has a definition of ‘consumer’ that is not limited to ‘any individual who in transactions and other matters covered by this Act or any regulations made there under, is acting for purposes which are not related to his trade, business, craft or profession’ but also extends to ‘any other individual not being the immediate purchaser or beneficiary, and whether or not a member of the consumer’s household, who having been expressly or tacitly authorised or permitted by the consumer, may have consumed, used or benefited from any goods or services provided to the consumer by a trader acting in the course of a trade, business, craft or profession, including goods or services provided as part of gift schemes and similar or analogous inducements’ (Article 2). However, the Act also empowers the Minister responsible for Consumer Affairs, by regulations, to extend even further this definition for all or any of the purposes of this Act to any other class or category of persons whether natural or legal. The *Distance Selling Regulations* issued under the Act merely refer to the definitions given in the Act to ‘consumer’ and ‘trader’ but the *Consumer Affairs Act (Price Indication) Regulations* also issued under the Act extend the definition for the purposes of the regulations to ‘any final purchaser’.

The *Doorstep Contracts Act* carries the narrow definition of ‘consumer’ of ‘a person who ... acts otherwise than in a commercial or professional capacity’ but the *Package Travel, Package Holidays and Package Tours Regulations 2000* carry a very wide definition of ‘consumer’ – ‘the person who takes or agrees to take the package (“the principal contractor”) or any person on whose behalf the principal contractor agrees to purchase the package (“the other beneficiaries”) or any person to whom the principal contractor or any of the other beneficiaries transfers the package (“the transferee”)’.

*The Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations 2000* do not contain a definition of ‘consumer’ but of ‘buyer’ defined as ‘any natural person who, act(s) ... for purposes which may be regarded as outside his professional capacity’.

As for definitions of other terms, a definition of a ‘trader’ is to be found in the *Commercial Code* and he is defined as ‘any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership’ (Article 4). The *Consumer Affairs Act* refers to this definition in the Code but adds that a trader means ‘any person, including any body corporate or incorporate who in relation to any transactions or other matters covered by this Act or regulations made hereunder is acting for purposes relating to his trade, business, craft or profession’. Article 5 of the Commercial Code specifies which activities are deemed to be ‘acts of trade’ – i.e. it gives an exhaustive list that excludes activities of a professional nature – so the CCA through this addition widens the scope of the definition for consumer law purposes.

However, the Minister responsible for Consumer Affairs is also empowered, as in the case of the definition of ‘consumer’ to extend the notion of ‘trader’ for all or any of the purposes of the Act to any category or class of persons or any legal entity. *The Doorstep Contracts Act* refers to this definition in the Consumer Affairs Act but extends the notion further to include ‘any person acting in the name, on behalf or in the interest of a trader or under the trader’s direction, and further includes a person who is acting in furtherance of a professional activity’. *The Trademarks Act* though not defining ‘business’ states that this ‘includes a trade or profession’.

Though some laws such as the Distance Selling Regulations (Regulations 4 and 10) and the Broadcasting Act contain provisions protecting minors, they do not contain a definition of any class of vulnerable consumers. However the Broadcasting Code for the Protection of Minors issued under the Broadcasting Act contains a definition of 'minor' as someone who is under sixteen years of age.

**v. How are rules on fair commercial practices interpreted (e.g. by public authority, case law, codes of conduct)?**

The above-mentioned provisions of the Commercial Code, Trademarks Act, Trade Descriptions Act, the Criminal Code and the provisions of the Food Safety Act and related regulations would be interpreted by the courts; the provisions of the Consumer Affairs Act by the Director of Consumer Affairs, the Consumer Affairs Tribunal and the courts; the provisions of the Package Travel, Package Holidays and Package Tours Regulations 2000 by the courts and the Consumer Affairs Tribunal; the provisions of the Broadcasting Act and the Codes issued under it by the Broadcasting Authority.

**b) Provisions on Specific Issues**

**i. Are there other provisions and case law prohibiting misleading advertising?**

Articles 32-37 of the Commercial Code, the provisions of the Trade Descriptions Act and the Trademarks Act, Article 298 of the Criminal Code, Regulation 4 of the Package Travel, Package Holidays and Package Tours Regulations 2000, Regulation 18 of the Food Safety Act, Regulation 4 of the Labelling, Presentation and Advertising of Foodstuffs Regulations, 2004, Article 48 of the Consumer Affairs Act and the Broadcasting Code for the Protection of Minors, as explained above.

The Consumer Affairs Act does not go beyond the Misleading Advertising Directive in terms of protection but it is not absolutely clear that it fully transposes Article 6 of this Directive as amended by the Comparative Advertising Directive since, although it provides (Article 104) wide powers to the Director of Consumer Affairs to require information it falls short of stating expressly that the Director (who is the administrative authority entrusted with the power to issue compliance orders for the cessation of misleading or comparative advertising) is empowered to consider factual claims as inaccurate if the evidence demanded is not furnished or is deemed insufficient. However, an interpretation of the law in line with the Directive might well yield the result.

There were several judgments concerning trademarks and trade names and other distinctive marks that cause confusion in the market and deceive consumers in terms of the unfair competition provisions of the Commercial Code and the provisions of the Trademarks Act and in these judgments (in particular *Prof JA Micallef et noe v Silvio Camilleri et noe* 23 February 2001 and *Gino sive John Cutajar noe v Kevin Caruana* 23 January 1998) the standard used as yardstick to gauge the deceptiveness of the mark was that of the average ordinary consumer, not too circumspect nor too distracted and of average intelligence.

To date there have been no judgments concerning Article 48 of the Consumer Affairs Act that deals specifically with misleading advertising, in force since 1<sup>st</sup> January 2001, but in a case involving a complaint alleging a misleading label/advertisement before the Department responsible for Consumer Affairs, the Department applied a test that seemed to be based on the average educated consumer to conclude that there was no ground to proceed further with its investigations albeit ordering some minor changes to the wording on the label (*Acqua Azzurra case* – letter of 13<sup>th</sup> October 2003 published in the Sunday Times).

*Article 48 of the Consumer Affairs Act* provides: (1) Any form of misleading advertising is prohibited; (2) An advertisement is misleading if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches, and if by reason of its deceptive nature, it is likely to affect their economic behaviour or is one which for those reasons, injures or is likely to injure a competitor of the person whose interests the advertisement seeks to promote; (3) In determining whether an advertisement is misleading account shall be taken of all its features, and in particular of any information it may have about - (a) the characteristics of goods or services, including 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; (b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the service provided; (c) the nature, attributes and rights of the advertiser, including his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or any awards and distinctions made to him; (4) Any person who makes a misleading advertisement shall be guilty of an offence against this Part of this Act.

## ii. Are there other provisions and case law regulating comparative advertising?

Article 34 of the Commercial Code and Articles 49-50 of the Consumer Affairs Act as explained above. A landmark judgment dealing with the application of these provisions to comparative advertising was delivered in *World Marketing Services Ltd v Crosscrafts Company Ltd* (Civil Court, First Hall 11 April 2001) where an injunction was sought to stop a comparative advertisement on the basis of unfair competition in terms of Article 34 of the Commercial Code. The defendant, claiming that the advertisement was compliant with Articles 49-50 of the Consumer Affairs Act argued that there was a conflict between the provisions of the two pieces of legislation – while the provisions of the Consumer Affairs Act that were enacted specifically to implement the Comparative Advertising Directive clearly allow comparative advertising provided the conditions (reproduced from the Directive) set in the law are satisfied, the provisions of the Commercial Code dating back to 1927 (Ordinance XXX of 1927) are stricter in their approach to comparative advertising and according to prevailing case law prohibit comparative advertising even when this is based on true factual information if there is an intent to denigrate or harm competitors and cause unfair competition (see *Loug. Kur. George Curmi OBE v Spiridione L. Mizzi noe et* 18 October 1997, *Frank Scicluna noe v Frank Cachia noe* 11 March 1987, *Joseph Falzon v Neg. Paolo Nani* 27 March 1953 and *Louis M Grech v Charles Micallef* 26 October 1937). Furthermore, referring to Article 55 of the Consumer Affairs Act that states that the provisions of the Act shall prevail over anything to the contrary contained in the Civil Code, the Commercial Code and the Trade Descriptions Act, the defendant argued that the Commercial Code was no longer applicable to comparative advertising.



However, the Court held that Article 55 does not deny the applicability of Article 34 of the Commercial Code to comparative advertising but merely makes the Consumer Affairs Act prevail over the Commercial Code in cases of conflict and to the extent of the conflict. Moreover, after considering the Comparative Advertising Directive and Commission documents and commentaries written in its regard the Court concluded that there is in fact no conflict between the provisions of the Consumer Affairs Act and the Commercial Code as far as comparative advertising is concerned since the provisions of the former (in particular Article 50) read in the light of the Directive also require that the comparative advertising, even when based on true facts, refrain from passing unfair and denigrating comments on competitors.

**iii. Are there other provisions and case law regulating aggressive practices?**

The only specific provision regulating aggressive practices in relation to consumers is to be found in the *Doorstep Contracts Act* where Article 5A makes it a criminal offence for a door-to-door salesman to refuse to leave the home or place of work of the consumer when requested to do so. More general provisions are to be found in the Criminal and Civil Codes – under Article 251 of the Criminal Code any person who uses violence to compel another person to do, suffer or omit anything would be guilty of a criminal offence liable to a custodial sentence while Article 974 of the Civil Code makes any contract where the consent of one of the parties has been extorted by coercion, violence or fraud null and void.

**iv. Are there provisions and case law regulating special marketing techniques?**

**Distance marketing, face to face marketing and price reduction techniques**

The Doorstep Contracts Act (Chapter 317, Laws of Malta), the Distance Selling Regulations (that cover also transactions via electronic mail involving consumers with the Electronic Commerce Act, Chapter 426 of the Laws of Malta, applying more generally), the Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations 2000 and Articles 51-53 of the Consumer Affairs Act, as explained above. Moreover, sub-article (2) of Article 50 of the Consumer Affairs Act in the context of comparative advertising requires any comparison referring to special offers, be it in relation to price or any other specific condition, to indicate in a clear and unequivocal way the date on which the offer ends or the duration of the offer or where appropriate that the offer is subject to the availability of the goods and services. The Broadcasting Code for the Protection of Minors requires that all references to 'free gifts' for minors in advertisements should include all qualifying conditions, such as any time limit and how many products must be purchased, and any other relevant information.

**v. Are there specific provisions and case law regarding information requirements (e.g. rules that impose on traders a duty to disclose to the consumer all “material information”)?**

Articles 10-12 of the Trade Descriptions Act empower the Minister responsible for Consumer Affairs to impose information requirements, irrespective of the origin of the product, as explained above. Article 83 of the Consumer Affairs Act requires certain information to appear on commercial guarantees while Article 94 empowers the Director of Consumer Affairs in respect of consumer contracts to require traders via a compliance order to insert those terms that

he deems necessary for the better information of consumers. The Distance Selling Regulations, the Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations 2000, the Consumer Affairs Act (Price Indication) Regulations, the Package Travel, Package Holidays and Package Tours Regulations 2000 and the Broadcasting Act impose information requirements as the respective Directives that they transpose. The Food Safety Act and all regulations regulating the labelling of products, in particular the Labelling, Presentation and Advertising of Foodstuffs Regulations, 2004 and the Nutrition Labelling of Foodstuffs Regulations, LN 247 of 1998, contain detailed information requirements. The Product Safety Act, Chapter 427 of the Laws of Malta, requires producers and importers to furnish consumers with the relevant information to enable them to assess the risks inherent in the product and distributors to pass on such information to consumers.

The Doorstep Contracts Act requires that the contract be concluded by private writing and regulates its minimum content. Other rules as to the supply of information prior to or at the time of the conclusion of the contract or immediately thereafter are to be found in insurance and financial services legislation; an example is the Investment Services Act and regulations made there under such as the Investment Services Act (Linked Long Term Contracts of Insurance Statutory Notice) Regulations which provide for the giving of information as to the cooling-off period and the right of withdrawal, calling attention to the need on the consumer's part to seek out all information as required for the making of an informed decision.

**vi. Are there specific provisions and case law concerning specific sectors (e.g. final consumers)?**

It has to be noted that the notions/concepts in the UCP Directive are not alien to the Maltese legislation or case law. There might be difficulties foreseen with regard to the transposition of the Directive (because it will necessitate an overhaul of a number of laws), but not incompatibilities.

**vii. What are the national laws of post-contractual and after-sale commercial practices?**

Articles 72-92 of the Consumer Affairs Act in line with the Sale of Consumer Goods Directive (Dir. 1999/44/EC) require traders to deliver to consumers goods that are in conformity with the descriptions and specifications in the contract of sale, and grant various remedies to consumers if a trader defaults. They also regulate the content, form and legal effects of commercial guarantees in a much more detailed and consumer-protective manner and with wider scope than the Directive. The consumer may institute civil proceedings against a guarantor to enforce observance of any of the terms or undertakings stipulated in a commercial guarantee. Moreover, Article 93 provides that if the goods that are the object of a contract of sale to a consumer are of a nature that may require maintenance, or possible replacement of parts, then the trader is obliged to make available the replacement parts and appropriate repair service for a reasonable time from the date of the delivery of the goods to the consumer, unless the consumer is specifically and expressly warned before the contract is concluded that such replacement parts or repair service is not available.

As regards obligations relating to performance of contract or delivery of goods, Article 7 of the Distance Selling Regulations requires the trader to execute the order received from the

consumer via distance communication within a maximum of thirty days and if goods or services ordered are unavailable the consumer is entitled to a refund.

Concurrently there are general provisions relating to delivery and performance of contracts as well as in respect of warranties against latent defects for goods in the contract law section of the Civil Code – Articles 1424-1432 provide that the seller is bound to warrant the thing sold against any latent defects which render it unfit for the use for which it is intended or which diminish its value to such an extent that the buyer would not have bought it or would have tendered a smaller price, if he had been aware of them. Should the buyer discover such a latent defect he has two options – either to return the thing and receive a refund of the price or retain the thing and receive a partial refund. If the defects of the thing sold were known to the seller, he is not only bound to repay the price received by him but he is also liable in damages towards the buyer. If the defective thing perishes in consequence of its defects, the loss is borne by the seller who still has to repay and indemnify the buyer. These provisions are applicable to any purchaser, irrespective of whether he is a ‘consumer’ or not – the Civil Code does not distinguish between private purchasers and non-private purchasers.

Tying practices by undertakings in a dominant position involving the aftermarket might constitute an abuse of a dominant position under the Competition Act 1994, Chapter 379 of the Laws of Malta.

#### **viii. Are there provisions and case law on handling complaints?**

Under the Consumer Affairs Act, one of the functions of the Director of Consumer Affairs is to investigate complaints from consumers and to take action by initially trying to settle the matter amicably and if this fails by imposing a compliance order, if appropriate. If he finds that an offence has been committed under the Consumer Affairs Act he may commence proceedings before the Court of Magistrates. It is at the discretion of the Director whether or not to issue a compliance order when requested by a consumer association but the latter may appeal from this decision to the Court of Magistrates in its civil jurisdiction. Otherwise, a registered consumer association enjoys the rights, benefits, privileges and exemptions provided by Part IV of the Act. It may in its own name make a report or complaint to the Director relating to the breach of the Act, of any law administered by the Director or any such laws or regulations as may be designated by the Prime Minister (Article 37). This can lead to criminal proceedings being brought under the Act. Under Part IX of the Act, the Director, acting in the public interest, may issue a compliance order on the application of a ‘qualifying body’. Both the qualifying body and the person against whom the compliance order has been made have the right to appeal to the ordinary courts. The Director may order the publication of a compliance order or of a corrective statement. The Consumer Affairs Act also contains provisions, in Part X, granting and regulating powers of entry and search and for obtaining information in order to enable the Director to conduct his investigations.

Under the Broadcasting Act, the Broadcasting Authority has issued a Code for the Investigation and Determination of Complaints, LN 161 of 2000, as subsequently amended, while the procedure for complaints in relation to timeshare and package travel are governed by the provisions of the Malta Travel and Tourism Services Act (Article 40-42) under which the respective regulations were issued.

If the matter concerns a financial services transaction, the Authority responsible for the protection of the consumer is the Malta Financial Services Authority set up by the Malta Financial Services Authority Act – one of its functions according to Article 4 is ‘to investigate allegations of practices and activities detrimental to consumers of financial services, and generally to keep under review trading practices relating to the provision of financial services and to identify, and take measures to suppress and prevent, any practices which may be unfair, harmful or otherwise detrimental to consumers of financial services’. The complaint would be initially handled by the Consumer Complaints Manager whose role is specifically that of looking after the interests of private investors and in serious cases he may refer the case to the Supervisory Council of the Authority. Article 20 sets out the procedure for the handling of complaints. In such cases the Authority is empowered to issue specific directives to the holder of the licence to do or refrain from doing any act and in case of non-compliance it may impose an administrative penalty.

## **II. Possible obstacles to the Directive on Unfair Commercial Practices from the national law perspective**

### **a. What are the main obstacles from the point of view of your country, which might result, complicate transposition and implementation of the Directive?**

A low-key consultation exercise between the Department of Consumer Affairs and identified interested parties was carried out in summer of 2004 but the result was not made public and as far as we are able to determine there were no issues of contention. In our view, the Directive will enhance consumer protection in Malta because a) for the first time there will be a general prohibition of all forms of unfair commercial practices thereby covering the gaps left by our piecemeal legislation – the interpretation and application of such a general clause should not pose problems for our courts as they are familiar with general clauses in our civil code such as ‘good faith’ and likewise the use of standards such as ‘professional diligence’ should not pose problems as courts are familiar with the application of similar standards in respect of the law of tort and in relation to other aspects of civil law such as the standard of ‘bonus paterfamilias’ etc while the notion of ‘average consumer’ is already known in our case law; b) it will provide a proper general sanction against all types of aggressive commercial practices that is currently missing in our legislation which merely provides protection in door-to-door selling instances and indirectly through the criminal code; c) it will inject a greater sensitivity towards vulnerable consumers – a sensitivity that is currently lacking in most of our legislation; d) it will provide an opportunity for a re-evaluation of the sanctioning and remedies policy followed in our consumer protection legislation to ensure that penalties and remedies are effective.

### **b. Do you see any incompatibilities within your national legal system?**

It has to be noted that the notions/concepts in the UCP Directive are not alien to the Maltese legislation or case law. There might be some difficulties foreseen with regard to the transposition of the Directive (because it will necessitate an overhaul of a number of laws), but not incompatibilities.

### **c. How could the Directive be transposed into your national law?**

Through amendments to the legislation mentioned above as well as through the issue of regulations under the Consumer Affairs Act which already empowers the Minister responsible for Consumer Affairs in Article 7 to prescribe regulations ‘in relation to any aspect concerning the provision of any service, or the sale or hire of any goods offered or supplied to consumers’, ‘regulating advertising and similar practices in order to ensure that advertising and similar practices are fair and that they do not take undue advantage of consumers’ and ‘regulating trading stamps schemes, gift schemes, special offers, sale promotional activities and other similar schemes, arrangements and activities’.

**d. What would be – from the perspective of your national law – the appropriate sanctions in case of infringement of the general clause of the Directive? Is there a system to enforce the provisions on fair commercial practice? How is this organised?**

Our general comment on the first question is that it would not be appropriate to attach a criminal (in addition to a civil) sanction to the general clauses as such due to the generality of the concept of ‘fairness’ in the light of the general principle of legal certainty in criminal law. However, criminal sanctions would continue to be appropriate where this imperative was fulfilled in particular cases through the specificity in the relevant provisions of the nature of the ‘unfairness’.

In line with existing legislation described above, a combination of public and private enforcement would be available. The Director of Consumer Affairs would monitor these practices and investigate complaints and following attempts at voluntary compliance, issue compliance orders, briefly stating his reasons, to stop such practices. These orders would be reviewable by a Court of Magistrates in civil jurisdiction on an appeal by the person to whom the order is addressed.

As under present legislation, registered consumer associations would be able to request the Director to issue a compliance order without having to prove an interest in the matter or that it is affected by it and though it is at the Director’s discretion whether to accede to the request or not they would be able to appeal against his negative decision.

In issuing the compliance order the Director need neither prove actual loss or damage nor actual recklessness, negligence or fault on the part of the trader concerned.

Under the present regime, if the person against whom a compliance order has been issued challenges it before the Court of Magistrates, the order is stayed pending the outcome of the case. However, the Director may request the Court to issue an interim compliance order so that the Director’s compliance order would remain in force pending the final determination of the case, subject to any modifications the Court might deem necessary.

The Consumer Affairs Act already empowers the Director, in order to eliminate or reduce the continuing effects of any non-observance of consumer protection legislation, to require the trader concerned to publish a copy of the compliance order issued against him and to publish a corrective statement in relation to any contravention in the daily newspapers. Furthermore, any person who fails to comply with a compliance order would be guilty of a criminal offence punishable by a lump sum penalty or a daily fine.

In addition to all this, as described above, most unfair commercial practices are considered as criminal offences by the various relevant laws so that prosecution before the Court of Magistrates could also ensue.

Moreover, in terms of the present regime, the aggrieved consumer or competitor would also be able to seek compensation before a civil court or a Small Claims Tribunal (or in the case of the consumer before the Consumer Claims Tribunal) for the damage incurred by the unfair commercial practice.

Thus the enforcement mechanism envisaged in Articles 11 and 13 of the Directive is already in place through the provisions of the Consumer Affairs Act. However, Article 12 would require amendments to current legislation to introduce the burden of proof on the trader to adduce evidence on the accuracy of factual claims.

**e. How would the Directive be delimited to the following fields of law?**

**i. Contract and Tort Law**

The provisions of contract and tort law which are to be found in the Civil Code would complement the provisions of the Directive that are likely to be implemented through amendments to the Consumer Affairs Act. Moreover, the Consumer Affairs Act expressly states that the part of the Act dealing with misleading and comparative advertising, unfair contract terms and forms of promotion and selling techniques such as gift schemes and pyramid selling schemes prevails over the provisions of the Civil Code in case of conflict.

Under Contract Law, there is a general provision in the Civil Code - Article 974 – that provides that consent in relation to contracts that has been given by error or extorted by violence or procured by fraud shall not be valid.

Under Tort Law, Articles 1031-1033 of the Civil Code provide that a person is liable for the damages caused through his fault. A person is deemed to be in fault if in his own acts he does not use the prudence, diligence or attention of a bonus paterfamilias. Moreover, any person who, with or without intent to injure, voluntarily or through negligence, imprudence or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law is liable for any resulting damage.

**ii. Competition law (aiming at the protection of the consumer)**

The Competition Act, Chapter 379 of the Laws of Malta, is modelled closely on Articles 81 and 82 of the EC Treaty and therefore like the EC Treaty provisions condemns the imposition of unfair prices or other unfair trading conditions by dominant undertakings and prohibits tying practices that directly harm consumers while indirectly benefiting consumers by prohibiting anti-competitive practices that hinder or distort competition and thereby raise prices, reduce consumer choice or stifle innovation.

**iii. Intellectual Property Law (e.g. Imitation)**

As shown above the Trademarks Act is consistent with what is regulated in the Directive in relation to trademarks that may deceive or confuse the consumer due to their similarity with other trademarks on the market.

**iv. Protection of Enterprises (esp. SME)**

Enterprises are protected against unfair commercial practices by the aforementioned provisions of the Commercial Code, the Competition Act, the Consumer Affairs Act (where the scope of

the Act extends beyond consumers), the Trademarks Act and the Civil Code. There are no provisions that protect specifically small and medium sized enterprises.

**v. Product Safety and Product Liability**

As shown above the provisions of the Product Safety Act impose information requirements on producers and distributors that are complementary to the provisions of the Directive.

**vi. Criminal law**

Various provisions of the Criminal Code complement the provisions of the Directive. Article 298 condemns commercial or industrial fraud and under this category of offences it includes the use of any mark, device, signboard or emblem bearing an indication calculated to deceive a purchaser as to the nature of the goods; the sale of goods with such mark, device etc; and the application of false trade descriptions to any goods. Another offence carrying a custodial sentence is the use of false weights and measures (Article 307). Article 251 condemns any person who uses violence to compel another person to do, suffer or omit anything.

**vii. Public policy (questions of decency)**

Under the Trademarks Act, a trademark may not be registered if it is contrary to public policy or to accepted principles of morality (Article 4). Article 985 of the Civil Code provides that things that are contrary to morality or to public policy may not be the subject-matter of a contract. Likewise, any condition in an agreement that is contrary to morals or to public policy is void and annuls the agreement (Article 1054). The Broadcasting Act (Substitution of Third Schedule) (Code for Advertisements, Teleshopping and Sponsorships) Regulations, 2001 prohibits advertising and teleshopping that prejudice respect for human dignity.

**f. Is there any national unfair commercial practices' law, including case law, which may constitute a barrier to the Internal market, for example case law which raises questions similar to *Estee Lauder*, *Clinique* and *De Agostini*.**

Articles 32-37 of the Commercial Code on unfair competition and the provisions of the Trademarks Act may constitute a barrier to the Internal Market in the sense that, as in other countries, traders in Malta might seek to use rules on unfair competition or trademark law in order to block imported products on the basis that the imported product causes confusion in the market or infringes their trademark rights. However, in one of its judgments the Court of Appeal in applying the average consumer test for assessing confusion and deception in the market actually cited an ECJ judgment. In *Avv Dr Pio Valletta noe v Joseph Busuttill et noe and Comptroller of Industrial Property* 19<sup>th</sup> November 2001 the Court of Appeal while noting that the Trademarks Act transposes the Trademark Directive (Council Directive 84/104) cited the ECJ ruling on the interpretation of the relevant Article 5(1)(b) of the Directive in Case C-342/97 *Lloyd Schuhfabrik Meyer and Co GmbH v Klipsen Handel BV* ([1999] ECR I-3819). The case concerned the registration of a trademark 'NUTINA' by a local firm that was opposed by the plaintiff acting for the foreign firm 'Ferrero SpA', owner of the internationally renowned trademark 'NUTELLA' that was also used in Malta, on the basis that it would create confusion



in the mind of the consumer and deceive consumers with its trademark. Referring to the ECJ ruling mentioned above, the Court concluded that applying the average consumer yardstick there was likelihood of confusion and therefore it upheld the first Court's judgment blocking the registration of the local trademark. One would assume that this pre-accession approach of the superior court will be maintained and the notion of consumer 'confusion' or 'deception' will be interpreted in the light of the European Court's average consumer benchmark as reflected in the Directive.



## **Poland**

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## I. Existing National Law

### a) General Provisions on Unfair Commercial Practices

#### i. Could you describe the general legal framework of the law on unfair commercial practices in your country (e.g. structures, main acts/statutes, leading cases, code of conduct, self-regulation)?

#### Introduction

Unfair commercial practices have been the subject of attention of Polish legislators and courts for some time now, even before the changes from Socialism to market philosophy and democracy, and the influences of the European Union, resulted in the greater need for protection of consumer interests. These practices have been considered as a part of the general topic of fair commercial practices and the fulfilment of contractual obligations. They extended beyond the problems consumer protection<sup>57</sup> – into the sphere of protection of all actors in the market.<sup>58</sup> Without delving too far into these general issues of commercial practices, it is of utmost importance to say a few words of the challenges faced by Polish consumers during Socialism and at present. For a long time, provisions such as those contained in the draft Directive did not, and could not, exist in Poland. Both the existence and non-existence of particular legal provisions and, even more crucial, their practical application and proper understanding (by the legal profession including judges and by the society), were influenced by these very peculiar challenges faced by consumers in Socialist markets.

Socialist markets, where the shortage of the available goods and services was remarkable, had very irregular features as regards business conduct. It seems there was no need for any aggressive behaviour of businesses, or any specific advertising campaigns.<sup>59</sup> Virtually any products or services which appeared in the market were accepted – as there were no alternatives. On the other hand, the main problems faced by consumers were concerned with lack of products and services of good quality. The key challenge was how to ensure that a consumer actually entered into a contract, and how to ensure that the contract was performed correctly.<sup>60</sup> The authorities attempted dealing with these problems by means of administrative control over business practices, which proved to be largely ineffective because of lack of economic incentives for improvement in quality (lack of competition in the market). The consumer laws that did emerge were mostly relating to after-sales practices, such as legal and commercial guarantees. Quite a large number of court judgements involving product liability appeared. In

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57 In fact, the notion ‘consumer’, although sometimes mentioned in legal literature and judgments of the Socialist époque, was not a legally defined notion until the 1990s.

58 Until 1990, cases involving two business parties were excluded from the jurisdiction of civil courts and subject to a kind of economic arbitration. As a result, the rules governing business relations evolved in a different manner than the rules governing relations involving those who could now be referred to as consumers.

59 The author of this report recalls a number of advertisements in Polish television. However, it seems that they were aimed to sell products which, even in the circumstances of general shortage, did not sell in shops. Łętowska pointed out to the social distrust to advertisements and the advertised products resulting from this situation, the distrust which rapidly vanished with the change into market economy and the appearance of true ‘Western-style’ advertising campaigns of ordinary products (E. Łętowska (2002) *Prawo Umów Konsumentkich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, p. 6).

60 E. Łętowska (2002) *Prawo Umów Konsumentkich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, at p. 5.

spite of the efforts of the authorities and the courts, however, the position of consumers was not satisfactory.

At present the challenges faced by consumers are slowly becoming similar to the typical consumer problems of capitalist markets. With the birth of liberal market, unfair commercial practices such as misleading or aggressive conduct appeared. The law and practice gradually commenced following these developments. These efforts have been additionally enforced by the obligations of the membership in the European Union. Most of the legal provisions concerning fair commercial practices appeared after the demise of Socialism, and especially in the course of attempts to approximate Polish law to the requirements of the European Community *acquis*. Nevertheless, the position of consumers still needs to be improved. This issue will be explored in more detail in the part of this report concerning the possible difficulties in transposing the new Directive into Polish law.

It must be acknowledged that the author of this report encountered some problems in assessing the true picture of consumer protection law and practice in Poland. Above all, compiling a comprehensive report of the up-to-date laws was particularly complicated because of a large number of fragmented provisions, rapid amendments to the existing legislation, and even some references to acts which were no longer in force. While it is not surprising that this should be so considering the speed with which Polish authorities have attempted to implement the plethora of Community Directives on the topic, such a situation is intolerable from the point of view of consumers. The number of cases decided on the basis of the new provisions is negligible, and the judgements which actually appear do sometimes demonstrate lack of experience and understanding of the aims, nature and exact implications of the consumer protection laws.

As specified above, the main legal provisions regulating the area appeared during 1990s. They are accommodated within the area of civil law, the most important source of which is the Civil Code of 1964.<sup>61</sup> Whenever possible, the new consumer law provisions (especially those implementing Community Directives) were inserted into the Code. Those provisions which could not be placed within the Code appeared in separate Acts of Parliament which are *lex specialis* in relation to the Code. A number of criminal law provisions also refer to the area of unfair commercial practices.

Constitution of the Republic of Poland of 1997 contains Article 76 which expressly stipulates that “public authorities protect consumers, users and tenants from activities jeopardizing their health, privacy and safety and from unfair commercial practices”.<sup>62</sup> Although this is a crucial provision according to many representatives of the doctrine of law,<sup>63</sup> it does not give the consumers direct constitutional right to sue the authorities in the vertical dimension, or to sue the businesses in the horizontal dimension. The Article indicates that the level of protection provided shall be determined in Acts of Parliament, and Article 81 of the Constitution further

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61 Dziennik Ustaw (Journal of Laws) 1964, No. 16, poz. 93, with later amendments.

62 Emphasis added by the author of the Report. The Article has been placed in the chapter of the Constitution concerning individual rights and freedoms (more precisely - economic, social and cultural rights and freedoms). Translated by the author of the Report.

63 E. Łętowska (2002) *Prawo Umów Konsumenckich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, p. 64-66. However - M. Jagielska and M. Jagielski (1999) *Możliwości interpretacyjne art. 76 Konstytucji RP w świetle europejskiego prawa ochrony konsumenta* (The possibilities for interpretation of article 76 of the Constitution of the Republic of Poland in the light of the European law of consumer protection), in C. Mik (ed.) *Konstytucja Rzeczypospolitej Polskiej z 1997 r. a członkostwo Polski w Unii Europejskiej* (The Constitution of the Republic of Poland of 1997 and the Polish membership in the European Union), Toruń: TNOiK (p. 411 et seq.) give a very negative opinion of the Article. In their view, it does not contribute anything new to the rules and practice of consumer protection and it would be as well if it did not exist at all (p. 414, 425, 426).

specifies that the Article 76 rights may only be ensured within the limits set by such Acts of Parliament. It has also been said that Article 76 cannot, as for the time being, constitute a basis for abstract control of Acts of Parliament.<sup>64</sup> It has been said to create an obligation for the public authorities, or rather to set guidelines concerning their legislative and administrative activities.<sup>65</sup> However, it is believed that Article 76 cannot be a direct legal basis for liability of public authorities for inaction with respect to protection of the rights of consumers, users or tenants.<sup>66</sup> The Article has been used, albeit modestly and without detailed analysis, in court judgements – the Constitutional Tribunal mentioned it on a few occasions.<sup>67</sup> Although this modesty in the use of the Article earned it the criticism from some representatives of the doctrine of law, the possibility for its wider use undoubtedly exists. The crucial role of Article 76 can therefore be seen in its potential rather than in what it directly changes at the moment. The Article may in future be used as an interpretation guideline to control Acts of Parliament or the activities of authorities (by the Constitutional Tribunal or the General Administrative Court), or for ordinary courts in deciding upon cases involving the protected persons.<sup>68</sup> It also demonstrates that Polish law is to some extent ready for the appearance of general clauses with respect to protection of consumers' rights.

Commercial activities infringing the collective interests of consumers – these have been referred to by the Act *on the Protection of Competition and Consumers* (amended by the Act of 2003 implementing the Injunctions Directive 98/27).<sup>69</sup> The Act is to protect the interests of traders and consumers. In its definition of a 'trader' the Act refers to the Act of 19 November 1999 – the Law on Economic Activity (see below in the part concerning definitions),<sup>70</sup> and in its definition of a 'consumer' – to the definition provided by the Civil Code of 23 April 1964 (see below).<sup>71</sup> Examples of practices infringing the collective interests of consumers were given in Article 23a. 2 of the Act (containing a non-exhaustive list) – using unfair contractual clauses which were included in the Unfair Clauses Register (see below for an analysis of the rules regulating unfair contractual clauses), or imparting misleading, false and partial information onto consumers (see below for the rules governing information). The Act also regulates proceedings in cases of activities infringing the collective interests of consumers (a single consumer does not have the *locus standi* to bring a case to the court based on the provisions of this Act). This is described in further detail below, in the part concerning procedure.

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64 E. Łętowska (2002) *Prawo Umów Konsumenckich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, p. 63 predicts the possible evolution of approach of the Constitutional Tribunal in this respect in the future. So far, however, the Tribunal has not accepted the approach that this particular part of the Constitution created a set of minimum rights which can be sought in court.

65 Ibid.

66 E. Łętowska (2002) *Prawo Umów Konsumenckich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, p. 67 – 69.

67 Judgement of 12 January 2000 (P 11/99, Orzeczenia Trybunału Konstytucyjnego, Zbiór Urzędowy (Judgements of the Constitutional Tribunal, Official Register), Nr 1/2000, poz. 3 (legal question concerning protection of tenants from overcharging – the Tribunal took the view that Article 76 could give rise to the right to be protected from overcharging, as far as this overcharging could be classified as an unfair commercial practice). Analysed and commented by E. Łętowska (2002) *Prawo Umów Konsumenckich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, p. 66.

68 E. Łętowska (2002) *Prawo Umów Konsumenckich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, p. 72, 73.

69 Dziennik Ustaw (Journal of Laws) 2003, No. 86, poz. 804. No class action mechanism exists in Poland, and thus initially it was considered difficult to implement the Directive 98/27.

70 Inconsistency (so far not verified by the Polish authorities)! The Act *on Economic Activity* has now been replaced by the Act *on the Freedom of Economic Activity* of 2 July 2004 (Dziennik Ustaw No. 173, poz. 1807). See below in the part concerning definitions.

71 Dziennik Ustaw (Journal of Laws) 1964, No. 16, poz. 93, with later amendments.

With regard to unfair terms in consumer contracts, Poland has implemented the Unfair Contract Terms Directive by means of the *Act on certain consumers' rights and the liability for damage caused by an unsafe product* of 2 March 2000.<sup>72</sup> The Act inserted new provisions into the Civil Code of 1964. Articles 384 to 385.4 regulate clauses used in contracts concluded with 'consumers' (see the part concerning definitions).<sup>73</sup> Article 384 para 1 establishes an obligation to make sure the consumer is given the details of all the clauses in the contract before the contract has been concluded.<sup>74</sup> This obligation does not apply to commercial transactions if the other party could have easily found out about the clause, and if use of the particular clause is customary in the type of transactions in question; and to consumer transactions if they are 'commonly concluded contracts concerning small, current matters of everyday life' (Article 384 para 2). In 2003 the protection provided by the provisions on prohibited contractual clauses was also extended to the non-consumer insured (in insurance contracts) (Article 384 para 4). Article 385 para 2 contains an obligation for contractual clauses to be clear and understandable. It also establishes the *in dubio contra proferentem* rule. The provision prohibiting the use of unfair terms<sup>75</sup> and giving the courts the power to conduct abstract control of the terms is Article 385.1 para 1.<sup>76</sup> The provision stipulates that contract terms which have not been individually negotiated (where the consumer had no influence upon their content) are not binding if they are contrary to the requirements of good faith and significantly infringe the consumer's interests.<sup>77</sup> Article 385.3 contains a non-exhaustive list of terms which may be considered unfair (following the Annex to Directive 93/13). The provisions of the Civil Code regulating unfair contractual clauses have also been supplemented by the Regulation of the Council of Ministers concerning a Model of the Register of Unfair Contractual Clauses of 19 July 2000.<sup>78</sup> This Register is being kept by the Office for the Protection of Competition and Consumers. The clauses are being added after having been declared unfair by the Court for the Protection of Competition and Consumers in Warsaw. The procedure to be followed by the Court was regulated by the same Act of 2 March 2000. The Act added new provisions into the Code of Civil Procedure of 1964<sup>79</sup> (Articles 479.36 – 479.45). This procedure is further analysed below. At the moment the Register contains over 200 clauses. Once the clause has been declared unfair and inserted into the Register, the judgement and the clause are effective *erga omnes*, and the use of such a clause is a criminal offence punishable by a fine (Article 138b para 1 of the Code of Criminal

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72 Ustawa o ochronie niektórych praw konsumentów i odpowiedzialności za szkodę wyrządzoną przez produkt niebezpieczny (Dziennik Ustaw (Journal of Laws) No 22, Poz. 271, entered into force on 1 July 2000).

73 The Code does not clearly state that the contracts should be concluded **between a trader** and a consumer, but the representatives of doctrine of law agree that this should be the interpretation of the Code - E. Łętowska (2002) *Prawo Umów Konsumentkich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, p. 313.

74 The notion used with regard to this obligation is 'doreczenie' (the literal meaning would be – delivery to own hands). The term denotes the need for the consumer to physically obtain the document containing all the contractual clauses, although it obviously exceeds the obligation of the trader to make sure that the consumer actually reads the document. See the part concerning information for further details.

75 The Code rather refers to 'prohibited terms'.

76 Before the amendment, the Civil Code did deal with the issue of unfair contractual clauses, but it did not contain the possibility of abstract control. Only incidental control of a particular clause incorporated into a particular contract was possible. Nevertheless, this possibility was not used in practice – the deepening crisis within the civil justice system (analysed in more detail in part II of this Report) and the lack of understanding of the provisions by courts resulted in a very insignificant number of judgements (E. Łętowska (2002) *Prawo Umów Konsumentkich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, p. 298–300). It was also not clear from the Civil Code who exactly ought to be protected by these provisions – consumers only, or all participants in the market.

77 The Civil Code does not follow the Directive entirely - it does not exempt financial service providers from the application of the same rules.

78 Dziennik Ustaw (Journal of Laws) No. 62, poz. 723.

79 Ustawa z 17 listopada 1964 – Kodeks Postępowania Cywilnego (Act of 17 November 1964 – Civil Procedure Code), Dziennik Ustaw No. 43, poz. 296, with later amendments.

Offences).<sup>80</sup> Further, using clauses which have been inserted into the Register is also classified as conduct infringing collective interests of consumers (*Act on the Protection of Competition and Consumers* of 15 December 2000).

The *Act on Combating Unfair Competition* of 16 April 1993<sup>81</sup> regulates 'acts of unfair competition', and among them misleading and aggressive conduct of 'traders'. The aim of the Act is to prevent and fight unfair competition in the interest of: the public, the traders, the customers and in particular the consumers (Article 1). Although the consumers are mentioned as the protected persons, they are unable to take a case to the court on the basis of the provisions of this Act. However, it is possible for them to use other provisions of Polish law: for instance Article 388 of the Civil Code of 1964 (referring to the law of contractual obligations and regulating undue influence/exploitation – if one party, by exploiting a difficult position, incapacity or lack of experience of the other party, accepts or demands a benefit disproportionately higher than the benefit he is obliged to serve onto the other party, the latter may demand the change in the benefits or rescind the contract). The provisions which can be used at least indirectly are: Article 5 of the Civil Code (referring to the general 'abuse of rights' – the use which is contrary to the socio-economic aim of the right and the principles of social cooperation<sup>82</sup>); and Article 387 of the Civil Code (referring to an impossibility of a contract the subject of which is some benefit which is impossible; such a contract is invalid; a party who knew about the impossibility of the benefit and did not inform the other party of it, is liable for losses caused to the latter).

Proceedings based on the *Act on Combating Unfair Competition* can, however, be commenced by certain bodies or organisations representing consumer interests. These issues are further explored below, in the part concerning procedures and remedies. The Act refers to 'acts of unfair competition', which have been defined as acts contrary to legal provisions or the principle of good faith, threatening or infringing the interests of other traders or the customers (Article 3.1). The Act regulates specific examples of such conduct – misleading indication of the company, misleading or untruthful indication of the geographic origin of the goods or services, misleading description of goods or services, inciting rescission or failure to fulfil a contract, counterfeiting products, criticising or unfair praises, unfair or prohibited advertising, organising a snowball system of sale of goods (under certain conditions), lottery sales (under certain conditions), some free gifts, consortium-type organisations aimed at buying rights, movable or immovable goods or services. These are analysed further below.

Among the acts of unfair competition, also misleading and aggressive advertising is regulated by the *Act on Combating Unfair Competition*. This is further analysed below, in the part concerning advertising. The *Act on the Protection of Competition and Consumers* mentions misleading or unfair advertising as an example of a practice which infringes collective interests of consumers (Article 23a 2).

Several Acts, mostly those implementing various EC Directives, contain an obligation for the trader to provide vital information to consumers. These are further analysed below, in the part concerning information.

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80 The Code of Criminal Offences of 20 May 1971 (Dziennik Ustaw No. 12, poz. 114), was amended by the same Act of 2 March 2000.

81 As later amended – the amended text published in Dziennik Ustaw (Journal of Laws) of 2003, No. 153, poz. 1503.

82 General clause being the reminder of the Socialist period, although at present interpreted in the light of the changes in the political and economic structure of the society.



**ii. Does a general clause of unfair commercial practices exist?**

A provision which could be treated as a general clause on unfair commercial practices exists in the Constitution of 1997, but its effect has so far been limited as described above.

**iii. Who or what is protected by these provisions (e.g. consumers, customers in general, competitors, functioning of markets)?**

As can be seen from the above analysis, the provisions concerning unfair commercial practices are fragmented. The scope of protection depends upon the nature of the particular Act. Most Acts mentioned above protect the interests of, at least, ‘consumers’ (for the definitions see below). For instance, the already mentioned Act *on the protection of certain consumers’ rights and liability for damage caused by an unsafe product* of 2 March 2000 (unfair contract terms regulation), also regulating the area of distance contracts and contracts concluded away from business premises, refers to ‘consumers’. Some Acts are slightly more specific in respect of those who are protected – for instance the Act on tourist services<sup>83</sup> implementing the Package Travel Directive 90/314 refers to ‘tourists’, ‘visitors’ and ‘customers’ (the latter are the main subjects of attention of the Act). The Constitution also refers to ‘users and tenants’, although it is likely that these persons would be protected even considering the existing definition of ‘consumers’ (Civil Code, see below).<sup>84</sup> The Act on Combating Unfair Competition, although said to protect the interests of consumers, gives direct right of action only to traders, associations representing traders, and the Head of the Office for the Protection of Competition and Consumers (the latter only if the ‘act on unfair competition’ in question endangers or infringes consumers’ interests). Its general aim is to protect the public interest, the interest of other traders and customers, in particular consumers (Article 1).

**iv. Are there definitions of consumers, specific groups of customers, such as “vulnerable consumers” or “children”, are there definitions of “business”, “trader” or similar terms?**

The Polish legal system can be seen as evolving in a direction of universal and consistent definitions of a ‘trader’ and a ‘consumer’. A ‘trader’ has now been defined in the chapter of the Civil Code concerning legal persons, and a ‘consumer’ – in the chapter concerning physical persons (the Act of 14 February 2003 amending the Civil Code and several other acts, entered into force on 25 September 2003).

In fact, the notion used to indicate a person who in the European Community law would be referred to as a ‘trader’ - ‘*przedsiębiorca*’,<sup>85</sup> although sometimes made more specific for the purpose of the particular situation,<sup>86</sup> is used by most legal provisions concerning protection of consumer rights. The notion was initially defined by the Act *on the Law of Economic Activity* of 1999 which at present has been replaced by the Act *on the Freedom of Economic Activity* of 2

<sup>83</sup> Act on tourist services of 29 August 1997, Dziennik Ustaw (Journal of Laws) No. 133, poz. 884. Later amended.

<sup>84</sup> Article 22 of the Civil Code defines consumers as those who conclude a contract with a ‘trader’ for the purpose not directly related to economic activity.

<sup>85</sup> The literal translation would be wider than simply a ‘trader’ – more like anyone who carries out economic activity related to some undertaking (undertaking in the meaning of a ‘company’ or some other economic unit).

<sup>86</sup> The acts use expressions such as: ‘the seller is a ‘trader’ who...’, or ‘the producer is a ‘trader’ who...’ (here the example used is the Act *on the General Product Safety* of 22 January 2000, published in Dziennik Ustaw (Journal of Laws) No. 15, poz. 179).

July 2004.<sup>87</sup> Article 4.1 of the latter defines a ‘trader’ as any physical or legal person, or a unit the legal personality of which has been confirmed by a separate legislative act, which in its own name carries out an economic activity. Economic activity, in turn, has been defined by Article 2 of the Act as professional activity of an organised and permanent nature, or carrying out production, building, trade, or services for profit (agricultural activity is excluded from the scope of application of the Act – Article 3). Articles 43.1 and 33.1 of the Civil Code, as amended by the Act of 14 February 2003 (in the chapter on legal persons) contain a similar definition, without excluding agriculture.<sup>88</sup>

The main definition of ‘consumer’ has been inserted into Article 384 para 3 of the Civil Code of 1964 by the Act of 2 March 2000.<sup>89</sup> The Article has now been repealed (Act of 14 February 2003 *on the amendment of the Civil Code and some other acts*) and the definition of ‘consumer’ appeared in the new Article 22.1 of the Civil Code. Such an amendment should be seen as a positive change. The definition of a consumer, now found in the chapter of the Code referring to physical persons, appears to be a universal definition, which can always be referred to. The Article defines consumers as those who conclude a contract with a ‘trader’ for the purpose not directly related to economic activity.<sup>90</sup> Article 4.1 of the Act *on the Protection of Competition and Consumers* of 15 December 2000 follows this definition of consumers.

The Acts which do refer to children<sup>91</sup> refrain from defining what they understand as a ‘child’. However, a ‘child’ has been defined by the Act *on the Children’s Ombudsman* of 2000<sup>92</sup> as any human being from the moment of conceiving until reaching the age of maturity (Civil Code of 1964 – Article 10 stipulates that those who reach 18 years of age have reached the age of maturity, although getting married earlier also gives rise to maturity). No specific definition in the area of consumer protection, e.g. in advertising, exists. Further, the Convention *on the Rights of a Child* also contains a similar definition of a child (Article 1).<sup>93</sup>

**v. How are rules on fair commercial practices interpreted (e.g. by public authority, case law, codes of conduct)?**

The limited effect of Article 76 of the Constitution has already been dealt with. So far it was only the Constitutional Tribunal which dealt with the rule, albeit briefly. Otherwise, the number of cases decided by courts of second instance or the Supreme Court is extremely low. The rationale for such a situation is explored below, in the part concerning the possible difficulties in the implementation of the new Directive. It is therefore extremely difficult to assess the true effect of the provisions which have appeared since the end of Socialism, and in particular all the implemented EC Directives. A significant amount of attention has been devoted to the provisions of the amended Civil Code in the part regulating the unfair contractual clauses. As

87 Dziennik Ustaw (Journal of Laws) No. 173, poz. 1807.

88 Other Acts of Parliament which deal with ‘traders’ either refer to the Civil Code or the Act *on Economic Activity* (still unchanged references in spite of the appearance of the Act *on the Freedom of Economic Activity*), or contain their own definition – very similar to the definitions provided in the Code and the Act on Freedom of Economic Activity – for instance, the Act *on Combating Unfair Competition* defines ‘traders’ as physical persons, legal persons and units without legal personality which conduct professional or profit-oriented economic activity (Article 2).

89 Dziennik Ustaw (Journal of Laws) No. 22, poz. 271.

90 Please note – by using the notion ‘directly related’, the Polish definition of ‘consumer’ may be wider than the definition present in some Community Directives, including the Directive in question.

91 The Act *on Combating Unfair Competition* classifies as an ‘act of unfair competition’ an advertisement which exploits the naivety of children (Article 16.1.3).

92 Dziennik Ustaw (Journal of Laws) No. 6, poz. 69.

93 Published in Dziennik Ustaw (Journal of Laws) of 1991, No. 120, poz. 526.

mentioned above, the Court for the Protection of Competition and Consumers in Warsaw makes decisions regarding unfair contractual clauses which are subsequently inserted into the Unfair Clauses Register. While initially the Court did not fully understand the exact nature of its own powers for abstract control and carried out what could still be seen as incidental control<sup>94</sup> (refusing to confirm unfairness if the term was not or could not be used in the particular contract – Judgements of the Court for the Protection of Competition and Consumers XVII Amc 2/00 and 3/00 of 7 May 2001), at present the case law is much more consistent with the true purpose of the provisions of the amended Civil Code. The Register contains over 200 clauses – this number demonstrates quite a dynamic approach of the Court to the issues of unfair clauses.

## b) Provisions on Specific Issues

### i. Are there other provisions and case law prohibiting misleading advertising?

Misleading advertising is regulated by the Act of 16 April 1993 *on Combating Unfair Competition*.<sup>95</sup> Here both the misleading and an aggressive advertising are considered to be ‘acts of unfair competition’ (*czyny nieuczciwej konkurencji*).<sup>96</sup> Advertising is considered unfair if it is contrary to the provisions of law, good manners or if it violates human dignity. Among the types of unfairness specified by the Act, Article 16.1 mentions advertising misleading the customer and thus capable of influencing his decision on whether to acquire a particular product or service,<sup>97</sup> exploiting the feelings of the customers by causing fear, exploiting superstitions or naivety of children, making an impression of neutral information while in fact encouraging acquiring goods or services (Article 16.1.1 – 4). Other types are: misleading indication of the name of the company (Article 5); misleading indication as to the geographic origin of the goods and services on any documents or in advertising (Article 8); misleading information or lack of information concerning the origin, quantity, quality, contents, means of preparation, use, purpose, repair, conservation, other crucial features of the goods or services, and lack of information concerning risk related to their use (Article 10.1); as well as untruthful or misleading information regarding the trader or another trader, aimed at gaining benefits or causing losses (Article 14.1). The Act, as mentioned above, is aimed to protect the public interest, and the interests of traders and clients (in particular – consumers). The regulation of misleading advertising, although fragmented (regulated in a number of articles, through various examples), has been concluded to be in compliance with the Community law covering this area.<sup>98</sup> However, the main problem was pointed out to be the effectiveness of the protection provided by the existing provisions – the problem which is articulated in the literature on consumer protection issues and clearly visible from the very small number of judgements.<sup>99</sup>

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94 M. Jagielska (2000) *Nowelizacja kodeksu cywilnego: kontrola umów i wzorców umownych*, (Amendment of the civil code, control of contracts and contractual terms) Monitor Prawniczy (Legal monitor) No. 11/2000, p. 701.

95 Published with amendments: Dziennik Ustaw (Journal of Laws) of 2003 No. 153, poz. 1503.

96 E. Traple, J. Preussner-Zamoyska (1996) *Interes konsumenta oraz instrumenty jego ochrony w dziedzinie reklamy* (Consumer interests and their protection in the area of advertising) KPP No. 1/1996, p. 15; I. Wiszniewska (1999) *Nowelizacja ustawy o zwalczaniu nieuczciwej konkurencji* (Amendment of the Act on combating unfair competition) PPH No 12/1999, p. 4 et seq.

97 Please note that the reference to an effect on the consumer’s decision is only present in Article 16 of the Act (E. Nowińska (1997) *Zwalczanie nieuczciwej reklamy* (Combating unfair advertising) Kraków: Universitas, p. 98). Other types of misleading conduct, including misleading advertising, do not seem to require such an effect on the consumer’s decision.

98 E. Łętowska (2002) *Prawo Umów Konsumentkich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, at p. 194.

99 E. Łętowska (2002) *Prawo Umów Konsumentkich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, p. 192 – 204.

## ii. Are there other provisions and case law regulating comparative advertising?

Comparative advertising was prohibited by Polish law since 1926.<sup>100</sup> However, under Article 16 of the *Act on Combating Unfair Competition* of 1993 such advertising was allowed if it was truthful and useful for consumers.<sup>101</sup> Unfortunately, no court judgements interpreting these two criteria appeared. Subsequently, the Act was amended in order to reflect the Directive 97/55, and the list of requirements for such advertising was made more detailed.<sup>102</sup> At present, Article 16.3 stipulates that comparative advertising ought to be in compliance with the requirement of good faith, and that means it should: not be misleading; in a fair and objectively verifiable manner compare goods or services satisfying the same needs or serving the same purpose; objectively compare some typical and verifiable features of the goods or services (one of these features may be the price); not cause confusion between competitors, their products or services and their markings; not discredit competitors' goods, services, their trademark and other markings; if concerning goods with geographical indication – only refer to goods of the same indication; not use the competitors' trademark, markings, or geographical indication unfairly, and not present the goods as an imitation of other goods protected by a trademark.

## iii. Are there other provisions and case law regulating aggressive practices?

Aggressive practices – there is no specific and unambiguous regulation of aggressive commercial practices as it exists in the draft Directive. However, some elements of such regulation already exist and may be a good basis for the future comprehensive regulation of the issue. The area of aggressive commercial practices is undoubtedly linked, as confirmed by some representatives of legal doctrine,<sup>103</sup> with the sphere of privacy of an individual. This area of law is very new in Poland, but it is undoubtedly being shaped, based upon two Articles of the Civil Code – Article 23 and 24.

First of all, aggressive advertising is prohibited as an 'act of unfair competition' by the *Act on Combating Unfair Competition* of 16 April 1993.<sup>104</sup> Article 16.1.5 of the Act prohibits advertising which constitutes a substantial invasion into privacy, in particular by hassling in public places disturbing the clients, sending unsolicited goods with the costs to be borne by the customer, or abusing technological means of transferring information. Further, the already mentioned Article 16.1.3 prohibits advertising which exploits the customers' feelings by causing fear, or exploits superstitions or the naivety of children (this provision was also mentioned in the analysis of misleading advertising, but the author of this Report considers that here the conduct may be misleading or aggressive, depending upon its nature and intensity).

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100 E. Łętowska (2002) *Prawo Umów Konsumentkich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, at p. 205. The Judgement of the Supreme Court of 8 May 1992, Orzecznictwo Gospodarcze (Economic Judgements) 1993, poz. 38 followed the old approach.

101 E. Nowińska, R. Skubisz (1995) *Reklama porównawcza* (comparative advertising) Państwo i Prawo (The State and the Law) No. 5.

102 Changed by the Act of 16 March 2000 *on the amendment of the Act on Combating Unfair Competition and on the amendment of the Act on Radio and Television*, published in Dziennik Ustaw (Journal of Laws) No. 29, poz. 356.

103 The idea of the right to privacy has first appeared in the Polish legal literature through the writings of A. Kopff (1972) *Koncepcja praw do intymności i prywatności życia osobistego (zagadnienia konstrukcyjne)* (The concept of the right to intimacy and privacy of private life (construction issues)) *Stosunki Cywilne (Civil Relations)* volume XX, pp. 3 et seq. Those linking privacy to commercial information are for instance: E. Łętowska (2002) *Prawo Umów Konsumentkich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, p. 167–176; I. Wiszniewska (1998) *Polskie Prawo Reklamy* (The Polish Advertising Law) Scholar, Warszawa, chapter I.6; E. Nowińska *Zwalczanie nieuczciwej reklamy* (Combating Unfair Advertising) Universitas, Kraków, pp. 130 et seq.

104 As amended, Dziennik Ustaw (Journal of Laws) of 2003, No. 153, poz. 1503.

Other provisions of Polish law referring to aggressive behaviour are: Article 388 of the Civil Code of 1964 (referring to the law of contractual obligations and regulating undue influence/exploitation – if one party, by exploiting a difficult position, incapacity or lack of experience of the other party, accepts or demands a benefit disproportionately higher than the benefit he is obliged to serve onto the other party, the latter may demand the change in the benefits or rescind the contract). If aggressive practices caused loss or damage, it would be possible for the general tort law provision in the Civil Code (Article 415 – “whoever by his fault caused damage to another, is obliged to repair it”) to be used. Article 23 a.2 of the Act *on the Protection of Competition and Consumers* of 15 December 2000<sup>105</sup> (referring to practices infringing collective interests of consumers), prohibits all acts of unfair competition infringing such collective interests). The provisions which can be used at least indirectly are: Article 5 of the Civil Code (referring to the general ‘use of rights’ – such use cannot be contrary to the socio-economic aim of the right and the principles of social cooperation<sup>106</sup>); and Article 387 of the Civil Code (referring to an impossibility of a contract the subject of which is some benefit which is impossible; such a contract is invalid; a party who knew about the impossibility of the benefit and did not inform the other party of it, is liable for losses caused to the latter).

#### iv. Are there provisions and case law regulating special marketing techniques?

##### 1. Distance marketing

Distance marketing - Poland implemented the Distance Selling Directive 97/7 by the Act of 2 March 2000 *on the protection of certain consumer rights and liability for damage caused by an unsafe product*.<sup>107</sup> The Act protects the interests of consumers in cases where contracts were concluded between a consumer and a trader using the means of communication such as printed or electronic forms, an advertisement with an included form, electronic advertisement, a catalogue, telephone, fax machine, radio, television, automatic calling machine, videophone, electronic mail and any other means of electronic communication as specified by the Act of 18 July 2002 *on the electronically provided services*.<sup>108</sup> The Act imposes an obligation upon the trader to provide the consumer with all the essential information before the contract is concluded, and for this information to be clear and easy to understand (Article 9) (see below in the part concerning information). It also gives the consumer the right to withdraw from the contract within 10 days from the day of obtaining the goods, or, in case of a contract for services, from the day of its conclusion (Article 10). Although the 10 days’ period is longer than the 7 days’ period prescribed by the Distance Selling Directive, it must be remembered that in Polish law time periods are calculated using all calendar days, not only working days. The Act contains some exceptions, following the text of the Directive, where the distance selling provisions do not apply. The same Act regulates the treatment of unsolicited goods – by virtue of Article 15 if a trader performs an unsolicited obligation, it is at his own risk and no obligations for the consumer arise.

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<sup>105</sup> As amended, published in *Dziennik Ustaw* (Journal of Laws) of 2003 No. 86, poz. 804.

<sup>106</sup> General clause being the reminder of the Socialist period, although at present interpreted in the light of the changes in the political and economic structure of the society.

<sup>107</sup> *Dziennik Ustaw* (Journal of Laws) No. 22, poz. 271.

<sup>108</sup> *Dziennik Ustaw* (Journal of Laws) No. 144, poz. 1204.

## 2. Face to face marketing

Face-to-face marketing – Poland implemented the Directive 85/577 on contracts concluded away from business premises by the same Act of 2 March 2000. The Act contains obligations for the trader to provide the consumer with the information as to his right to withdraw from the contract (Article 3.1), and the right for the consumer to withdraw within 10 days from the day when the contract was concluded (Article 2.1).

Snowball systems of sale have been prohibited by the Act *on Combating Unfair Competition* of 16 April 1993, as later amended. Article 17c describes such systems as arrangements whereby buyers of goods or services are promised material rewards for enticing others to conclude similar transactions. However, such systems are not unfair if the material rewards derive from resources gained from sale of the goods or services at a price not drastically exceeding their market price, and if anyone wishing to withdraw from the arrangement is able to return the goods, materials, samples or advertising materials obtained during the 6 months preceding the withdrawal to the organiser of the system in return for at least 90% of the price paid (Article 17c 2).

## 3. Price reduction techniques

Price reduction techniques – these are mainly regulated in the Act *on Combating Unfair Competition* of 16 April 1993. According to Article 15.1.1, sale at a loss is treated as an ‘act of unfair competition’. Small traders are also protected by the same Article, which stipulates that large stores (over 400 m<sup>2</sup> of trading space) cannot sell their products at a price which does not include any profit for them. However, the Article also contains exceptions, where sale at a very low price will not be treated as unfair competition – end of season sales (twice a year no longer than one month), end of ‘use-by period’ sales, and liquidation sales (no longer than 3 months, or no longer than 1 year if the trader is liquidating his entire trading activity). The issues related to free gifts or sales linked to some sort of lotteries where those buying a particular product are tempted with prizes, are still very problematic in Poland. Traders continue to take advantage of what is explored in the third part of this report - lack of experience and understanding of these techniques by courts, and the very slowly disappearing lack of sympathy for consumers and their position in the market. The legal provisions which are being used in cases involving such techniques are: the Civil Code provisions on mistake (if the trader misled the consumer as to the true nature of the contract concluded between them – Article 84 of the Code), the Act *on Combating Unfair Competition* of 1993 (Article 17a and 17b, analysed below), and the Civil Code provisions on unfair clauses in consumer contracts (Articles 384 and 385). While initially the consumers were unaware of the possibilities created by these legal provisions, they were making claims based upon a public promise of a reward.<sup>109</sup> These claims were struck down. However, at present the Act *on Combating Unfair Competition* of 1993 is widely used, although single consumers are unable to bring cases based upon it.<sup>110</sup> Article 17a of the Act stipulates that any sale of goods or services together with free gifts is unfair, unless the gifts are of small value or samples, or if the gifts have been won in a lottery (organised in compliance with the Act on games and betting<sup>111</sup>) or in a competition. Article 17b specifies further that making an

109 Judgement of the Court of Appeal of Wrocław of 27 November 1995, I ACr, or Judgement of the Court of Appeal of Warsaw of 27 November 1998, I ACa 1000/97.

110 Judgement of the Court of Appeal of Gdańsk of 6 November 1996, Przegląd Gospodarczy (Economic Review) No. 6/1997, p. 38, or Judgement of the District Court of Gdańsk of 27 June 1997, I C 1539/96.

111 Act of 29 July 1992, as later amended and published in Dziennik Ustaw (Journal of Laws) of 1998, No. 102, poz. 650.

impression of a certain win in such lotteries as long as the consumer orders certain goods or services or pays a certain sum of money is unfair.

**v. Are there specific provisions and case law regarding information requirements (e.g. rules that impose on traders a duty to disclose to the consumer all “material information”)?**

These requirements have been mentioned above. They exist in a large number of Acts, especially those which implemented EC Directives. First of all, failing to impart fair, truthful and full information onto consumers has been classified as a practice infringing the collective interests of consumers by the *Act on the Protection of Competition and Consumers* of 15 December 2000.<sup>112</sup> Further, the *Act on Combating Unfair Competition* also contains obligations to provide full and truthful information. It specifies what kind of information must be provided (analysed above in the part concerning misleading advertising), stipulating that failure to provide it is an ‘act of unfair competition’. However, the feature of both these Acts is lack of locus standi for consumers in cases involving their provisions (as specified above, and further analysed in the part concerning procedure).

Further obligations regarding information are contained in various Acts protecting consumers’ interests. The *Act on Research and Certification* of 3 April 1993<sup>113</sup> introduces an obligation to certify products and services which may be dangerous when in use (Article 13). The *Act on General Product Safety* of 22 January 2000<sup>114</sup> (implementing Directive 92/59) also prescribes obligations regarding information and warnings. The *Act on Prices* of 5 July 2001<sup>115</sup> and the Regulation of the Minister of Finance of 10 June 2002<sup>116</sup> based on it introduce obligations regarding clear indication of prices of goods and services. The Act of 2 March 2000 (mentioned above), implementing the Distance Selling Directive (97/7) and the Directive on contracts concluded away from business premises (85/577), introduces certain obligations for traders regarding information to be provided to consumers. In case of contracts concluded away from business premises the information should concern the identity of the trader and the contents of the contract, as well as the period of time during which the consumer may withdraw from the contract. In case of contracts concluded at a distance the information should be even more extensive, including all the crucial elements of the contract (listed in Article 9 of the Act), and again the period of time for withdrawal. There is also an obligation to provide clear and understandable information, both in the specific Acts, as well as in the provisions of the Civil Code concerning unfair contractual clauses (Article 385 para 2).

**vi. Are there specific provisions and case law concerning specific sectors (e.g. final consumers)?**

Specific sectors – no specific provisions concerning specific sectors (as exemplified in the questionnaire) exist in Poland.

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112 As later amended and published in Dziennik Ustaw (Journal of Laws) of 2003, No. 86, poz. 804.

113 Dziennik Ustaw (Journal of Laws) No. 55, poz. 250, with later amendments.

114 Dziennik Ustaw (Journal of laws) No. 15, poz. 179.

115 Dziennik Ustaw (Journal of Laws) No. 97, poz. 1050.

116 Dziennik Ustaw (Journal of Laws) No. 99, poz. 894.

**vii. What are the national laws of post-contractual and after-sales commercial practices?**

The provisions of the Civil Code on legal (*rekojmia*) and commercial guarantees (*gwarancja*), the Act on the particular conditions of consumer sales and on the amendment of the Civil Code of 5 September 2002, and the provisions of the Civil Code on product liability (introduced by the Act of 2 March 2000) can be applied here. Without the unnecessary details concerning these provisions which are not the primary focus of the draft Directive or this questionnaire, only their short summary is provided. Articles 556 – 576 of the Civil Code refer to the ‘legal guarantee’ rights of the buyer – if the goods have defects the seller is liable for these defects under certain conditions. Articles 577 – 581 concern commercial guarantees (specifying the buyers’ rights in case the guarantee itself does not clearly indicate something). The Act on the particular conditions of consumer sales implemented Directive 99/44.<sup>117</sup> It establishes the obligation for goods to comply with the contract, and provides relevant remedies to consumers. Articles 449.1 to 449.11 of the Civil Code follow the Product Liability Directive, although instead of a ‘defective product’ they refer to an ‘unsafe product’ – to avoid confusion with the rules on legal and commercial guarantees which refer to defects.

Further, the Act on General Product Safety of 22 January 2000 (implementing the General Product Safety Directive) introduces obligations for producers and sellers regarding safety of products – including an obligation to inform and warn (Article 9), and an obligation to monitor products already in circulation. The authorities (The Head of the Office for the Protection of Competition and Consumers and the Trade Inspection) have been given the powers to enforce the provisions of the Act, and in particular withdrawal unsafe goods from the market or their forfeiture.

**viii. Are there provisions and case law on handling complaints?**

Both the Act on Combating Unfair Competition and the Act on the Protection of Competition and Consumers contain procedures which may be used against traders suspected of unfair trade practices. As explored above, these two Acts refer to issues such as misleading or aggressive advertising, misleading information, practices infringing collective interests of consumers (for instance unfair clauses in consumer contracts) and other unfair commercial practices. However, consumers cannot bring court proceedings based upon the provisions of these Acts. The Act on Combating Unfair Competition of 1993 prescribes civil and also criminal liability of those traders who breach its provisions. Civil cases involving misleading or aggressive advertising can be brought by another trader, an association of traders, or the Head of the Office for the Protection of Competition and Consumers (the latter – if such illegal conduct endangers or infringes consumers’ interests) (Article 19.1 of the Act). Although the association of traders or the Head of the Office for the Protection of Competition and Consumers cannot seek damages (another trader is able to seek damages based upon the provisions of the Civil Code), they may request that the conduct is discontinued and its results eliminated, that the trader gives a statement or statements of particular contents, as well as – if the trader was at fault – payment of a particular sum of money for a specified charitable purpose related to supporting Polish culture or national heritage (Article 18.1). Ordinary courts have the power to consider these cases.

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<sup>117</sup> The Act replaced Articles 555 – 581 of the Civil Code in case of consumer sales.



The Act of 15 December 2000 *on the Protection of Competition and Consumers*<sup>118</sup> introduces the procedure in cases involving conduct infringing collective interests of consumers. The Head of the Office for the Protection of Competition and Consumers was given the power to make decisions concerning such conduct. Claims can be brought by: the Ombudsman, the Insurance Ombudsman, the Representative of Consumers,<sup>119</sup> a consumers organisation (both national and foreign – here those organisations inserted onto the list published in the Official Journal of the European Communities are entitled to bring claims if their statutory aims justify the claim concerning actions or omissions taking place in Poland but endangering collective interests of consumers in the Member State in which the foreign organisation is based) (Article 100a). The proceedings can last no longer than two months, and in particularly complicated cases no longer than three months (Article 100f). The proceedings are also free from any fees (Article 100h). The Act mentions the possibility of settlements during proceedings, as long as the settlement does not infringe public interest or the interest of consumers (Article 100d). From the decision concluding such proceedings an appeal may be made to the Court for the Protection of Competition and Consumers in Warsaw.

In cases involving unfair contractual clauses, a separate procedure has been introduced by the Act of 2 March 2000 *on the protection of certain consumer rights and liability for damage caused by an unsafe product* amending the Code of Civil Procedure of 1964. Cases may be brought by anyone who might conclude a contract containing such a clause, as well as a social organisation the statutory aims of which include consumer protection, the Representative of Consumers and the Head of the Office for the Protection of Competition and Consumers (Article 479.38 of the Code of Civil Procedure). The only court with the power to consider these claims is the Court for the Protection of Competition and Consumers in Warsaw. No settlement is possible during the proceedings (Article 479.41), and the decision contains the clause considered unfair and the prohibition of its use (Article 479.42). The decision is published in the Court and Economy Monitor (*Monitor Sądowy i Gospodarczy*),<sup>120</sup> and sent to the Head of the Office for the Protection of Competition and Consumers who inserts it into the Unfair Clauses Register (mentioned above). An appeal from the decision is possible (the Code does not specify which court should consider it!), and a cassation to the Supreme Court may be brought from the judgement of the court of second instance (Article 479.42 para 2).

In cases involving unfair commercial practices which are not covered by these three procedures, proceedings may be commenced in an ordinary court (using ordinary civil procedure based on the Code of Civil Procedure of 1964). Who is entitled to lodge such cases? It obviously depends upon the scope of a particular Act, but normally the consumers – victims of unfair conduct, as well as the Representative of Consumers (Article 63.3 of the Code of Civil Procedure),<sup>121</sup> social organisations the statutory aims of which include consumer protection (Article 61 and 63 of the Code of Civil Procedure), and the Head of the Office for the Protection of Competition and Consumers, may bring claims.

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118 As amended by the Act of 5 July 2002 *on the amendment of the Act on the Protection of Competition and Consumers, the Code of Civil Procedure and the Act on Combating Unfair Competition*, *Dziennik Ustaw* No. 129, poz. 1102.

119 The Representative of Consumers (*Rzecznik Konsumentów*) operates in every town (district) in Poland. His tasks are: free advice and information for consumers, taking part or bringing proceedings involving consumers.

120 An official journal established by the Act of 22 December 1995, *Dziennik Ustaw* (Journal of Laws) of 1996, No. 6, poz. 42, later amended.

121 The Representative of Consumers may bring claims in cases involving consumer interests, join the proceedings already commenced, or act as an accusing party in cases of criminal offences committed against consumers.

Some ADR mechanisms have also been established. The Settlement Consumer Courts (Polubowne Sądy Konsumenckie) have operated since 1991. Their activity is based upon the Act of 15 December 2000 *on the Trade Inspection*<sup>122</sup> and the provisions of the Code of Civil Procedure concerning Settlement Courts (Articles 695 – 715). The procedure before such Courts is shorter and cheaper than before ordinary courts, but its success depends upon whether the trader in question agrees to be a party in the proceedings. Cases may be brought by consumers (alone or represented by a lawyer), as well as (if consent of the consumer was obtained) the Trade Inspection, a consumer organisation or local authorities. The decisions of the Settlement Courts are final (however, there is a possibility of bringing the case to an ordinary court).

A District Inspector of the Trade Inspection may also act as a mediator in cases between traders and consumers (Article 36 of the Act on the Trade Inspection). This mediation procedure is possible even if the trader, or the consumer, do not initially agree to take part in them.

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122 Dziennik Ustaw (Journal of Laws) of 2001, No. 4, poz. 25.

## II. Possible obstacles to the Directive on Unfair Commercial Practices from the national law perspective

### a. What are the main obstacles from the point of view of your country, which might result, complicate transposition and implementation of the Directive?

It appears that the new Directive should fit well within the Polish consumer protection regime and the entire civil law system. Provisions resembling those contained in the draft, although more fragmented and at times less clearly articulated have already been present for some time in Poland. They have interacted with the provisions of contract and tort law, or the laws protecting intellectual property.<sup>123</sup> The fragmentation of the issues now covered by the Directive means, however, that the procedure and those entitled to bring cases involving issues of unfair commercial practices differ depending upon the particular Act of Parliament. These issues were explored above. Further problems which may occur are concerned with the practical application of the new provisions. It was signalled throughout the text of the Report that this is where the greatest challenges for Polish consumers lie at present.

The definition of ‘consumer’ inserted into the Civil Code (Article 22.1 - a very important definition as many consumer protection Acts refer to it – for instance the *Act on the Protection of Competition and Consumers*) is wider than the one which can be found in the Directive. Taking into account the maximum character of harmonisation prescribed by the Directive, this may constitute a problem. How much of a problem it will actually be depends upon the method which the Polish authorities decide to use in implementing the Directive: adopting a separate act or amending the existing legislation, but even more upon how comprehensive the legislative effort related to the implementation will be. The Directive regulates issues which so far have been ruled by a plethora of Polish legal provisions. Most of these provisions use the definition provided by the Civil Code or a similar definition. Introduction of a new act with its own definition of the notion, or implementation of the Directive by an amendment of the existing legal provisions, necessitates changes within these provisions. Although it seems a good option to introduce a common definition of ‘consumers’ (following the definition provided by the Directive) throughout the body of all consumer protection laws to avoid difficulties in the practical application and court adjudication concerning these provisions (it is easy to imagine confusion when the consumer protection provisions outside the scope of the new Directive are likely to continue use the wider definition), this is not likely to happen. Even within the European Community law the definition of ‘consumers’ is not uniform for all the consumer protection laws.

It is clear that practical application of the implemented Directives is as important for the existence and successful operation of Community policies as their proper transposition. Thus, I have decided to highlight the problem which in my view (supported by the views of Professor Ewa Łętowska<sup>124</sup> – former Ombudswoman of Poland and now the judge of the Constitutional Tribunal, presented in her numerous publications, for instance the book: *Prawo Umów Konsumenckich*, Second Edition, Wydawnictwo C.H. Beck (2002)) will present the main

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<sup>123</sup> The *Act on the Protection of Competition and Consumers* expressly states that its provisions remain without prejudice to the rules governing intellectual property and industrial property, protection of inventions, trademarks, geographic origin indication and other related rights (Article 2.1).

<sup>124</sup> Professor Łętowska is the most renowned consumer protection lawyer in Poland.

obstacle in the operation of the new Directive in Poland. The very specific legal culture which can still be clearly seen in Poland creates a very difficult situation for consumers.

As mentioned in the Introduction to this Report, after the demise of Socialism Polish consumers started facing similar challenges to those faced by the Western European consumers. However, the effects of the Socialist philosophy and policies still to some extent remained and the manner in which consumer protection has been understood and perceived in Poland was shaped accordingly. When Socialism ended, the legislators, the legal profession and courts welcomed the introduction of the liberal market, hoping that it will, on its own, solve the consumers' problems. It was believed that liberal markets, providing for free competition between traders, are able to protect the consumers' right to products and services of the adequate quality and safety. Unfair commercial practices which appeared were to some extent treated as the necessary evil – the side-product of the positive and beneficial market mechanisms. The laws aimed to protect consumers were insufficient, and those which existed were not interpreted by courts as to protect consumers. This situation has now began to change, with the introduction of the consumer protection laws from the European Communities; and the Western European approach to consumers started permeating the laws and practice in Poland. However, the consumers' position is still said to be unsatisfactory. Two main reasons for such a position can be singled out from the academic writings and the author's readings of the court decisions. First of all, as pointed out by Łętowska, the courts and the legal profession sometimes misunderstand the new legal provisions or apply them wrongly. Lack of experience, particularly of lower instance judges, in adjudicating in cases involving consumers, has been stressed. It seems to be a reasonable proposition, therefore, that the introduction of any general clause protecting consumer interests ought to be accompanied by an information campaign, promoting the purposes and features of the new law.

A further characteristic of the Polish justice system is its incapability of dealing with cases swiftly and cheaply. This crisis in the civil justice system is especially remarkable in consumer cases, which ought to be cheap to lodge and quick to solve. It is not a rare occasion when a case takes six years to be decided in Poland (cases taking 15 years have also been recorded). Further, high court fees and lawyers' fees make it very difficult for an ordinary consumer to lodge a case in court. Recently, an Act of Parliament was introduced which gives a citizen the right to be compensated for any losses caused by the lengthy court procedure. The Act started operating on 17 September 2004, and a growing number of cases are being brought on the basis of it. However, it must be contended that the Act itself is unlikely to cause any significant change in the operation of the civil justice system. Tackling the symptoms instead of the reasons of a problem is not an effective technique. It seems that for an improvement of the position of consumers in civil litigation, the proceedings before ordinary courts ought to be simplified and shortened, and the proceedings before the Settlement Consumer Courts made more accessible and not dependent upon the agreement of the traders.

**b. Do you see any incompatibilities within your national legal system?**

Apart from the fragmentation of the provisions regulating unfair commercial practices, and the wide definition of 'consumers', I did not notice any other incompatibilities within the legal system itself which may be an obstacle to the transposition of the Directive.

**c. How could the Directive be transposed into your national law?**

Poland does not have a comprehensive compilation of all consumer laws – such as a consumer protection act (acts of this kind exist in France, as well as some new Member States - the Czech Republic and Hungary). It would be advisable for the Polish authorities to consider the introduction of such a comprehensive act when transposing the Directive into the Polish legal system. This seems to be a great opportunity for Poland to bring an order into its consumer legislation: to finally confirm the universal definition of ‘consumers’ and ‘traders’, to list all the consumer rights and traders’ obligations, to list all the procedures available and all those entitled to bring them, to mention all the available remedies. Nevertheless, in a very likely case that such an opportunity should not be used, the Directive may be inserted into the Civil Code<sup>125</sup> or, more probable, into the *Act on Combating Unfair Competition*, the *Act on the Protection of Competition and Consumers*, or an entirely new Act.

**d. What would be - from the perspective of your national law - the appropriate sanctions in case of infringement of the general clause of the Directive? Is there a system to enforce the provisions on fair commercial practice? How is this organised?**

Polish law prescribes both civil and criminal sanctions for traders conducting unfair commercial practices and activities. They are imposed by ordinary courts or specially designated bodies described above in the part concerning procedures. The sanctions seem to be quite effective and sufficient, and may be taken over by the provisions implementing the new Directive. Again, it is important to notice their fragmentation and lack of consistent treatment of unfair commercial practices – some of which may be helped by the implementation of the Directive. Further, although the sanctions may well meet their preventive aim, they are limited as regards the weapons and types of compensation the consumer himself may use and obtain against the traders.

*Civil law sanctions:*

These range from invalidity or lack of effect of a contract (or a part of it) concluded with the use of unfair techniques or clauses (Civil Code provisions concerning unfair contractual clauses – Article 385.1 para 1, or Article 15 of the Act of 2 March 2000 *on the protection of certain consumer rights and liability for damage caused by an unsafe product* – in case of unsolicited goods or services), through requirements to stop any further practices and eliminate the results of those which already took place (Article 479.42 of the Code of Civil Procedure – procedure in cases involving unfair contractual clauses, also the clauses which have been inserted into the Unfair Clauses Register; decisions of the Head of the Office for the Protection of Competition and Consumers in cases involving practices infringing collective interests of consumers, together with an appropriate statement by the trader and a publication of the decision – Article 23c of the Act; decisions of ordinary courts in cases based on the *Act on Combating Unfair Competition* – Article 18.1), to paying compensation to other traders, in other way compensating their loss, or paying a sum of money for a designated purpose (Article 102 of the Act on the Protection of Competition and Consumers – fine of 500 to 10.000 EURO for each day the decision of the Head of the Office for Competition and Consumers is not followed;

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<sup>125</sup> The Polish Civil Law Codification Commission indeed adopted this, similar to the German, model of implementation of consumer Directives – whenever possible their provisions are inserted into the Civil Code in order to integrate consumer law with civil law as much as it is possible (E. Łętowska (2002) *Prawo Umów Konsumentkich 2* Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, at p. 81).

Article 18.1 of the Act on Combating Unfair Competition – damages for other traders imposed on the basis of the provisions of the Civil Code, and a sum of money for a designated charitable purpose). These sanctions appear adequate from the point of view of their preventive effect, but, as mentioned above, the consumers themselves cannot use the *Act on the Protection of Competition and Consumers* or the *Act on Combating Unfair Competition*. Their claims need to be based on other legal provisions. A number of provisions have been suggested in literature:

1. in case of misleading advertising – Article 84 of the Civil Code can be used (mistake as to the contents of the contract – the sanction is the possibility of avoiding the effects of such contract). This is not a particularly beneficial sanction from the point of view of a consumer – as it does not lead to satisfying his needs.<sup>126</sup>
2. if the advertisement gave rise to a conclusion of a contract (and it concerned some assurances of the characteristics or the quality of goods or services) – the consumer may have a claim under a legal guarantee, commercial guarantee, or the *Act on the particular conditions of consumer sales and on the amendment of the Civil Code* of 5 September 2002 implementing the Directive 99/44.<sup>127</sup>
3. if the advertisement or a practice is aggressive – the consumer may use the provisions of the Civil Code on the right to privacy and other personal rights (Articles 23 and 24). Article 23 specifies examples of such personal rights (the right to health, liberty, dignity, name, image, etc.). Article 24 stipulates that those whose personal rights have been endangered may require that the conduct be stopped, and in cases of infringements compensation may be claimed. Such an option was indeed used in a Judgement of the Court of Appeal of Gdańsk of 6 November 1996,<sup>128</sup> where the right to privacy and the right to image were explored with respect to an advertisement.

*Criminal law sanctions:*

Certain unfair commercial practices have also been declared to be criminal offences, punishable by a fine. The *Act on Combating Unfair Competition* introduces criminal liability for certain ‘acts of unfair competition’ – such as for instance snowball sales, counterfeiting products, misleading consumers as to the essential features of goods or services (Articles 23 – 27). Penalties include imprisonment or fines. The *Act on the protection of certain consumer rights and liability for damage caused by an unsafe product* of 2 March 2000 amended the Code of Criminal Offences of 1971, introducing as criminal offences punishable by a fine: failing to show the consumer the certificate of economic activity and an identity document by those concluding a contract away from business premises (Article 138a of the Code), or using clauses inserted into the Unfair Clauses Register (Article 138b of the Code).

**e. How would the Directive be delimited to the following fields of law?**

It was already mentioned above that the new Directive ought to fit well within the Polish legal system. The contemporary approach of the Polish legislators of attempting to incorporate consumer law into the area of civil law means that many of the provisions analysed above have already been existing in compliance with other areas of civil law – such as the law of contract and tort (and using the legal provisions regulating these areas of law, including the laws on legal and commercial guarantees, or product liability law). Further, provisions protecting consumer interests have already co-existed with the provisions protecting traders, public interest and

126 E. Łętowska (2002) *Prawo Umów Konsumentkich* 2 Wydanie (The Law of Consumer Contracts. Second Edition), Warszawa: Beck, at p. 208.

127 Ibid.

128 *Prawo Gospodarcze* (Economic Law) No. 6/1997, p. 38.

competition. There should be no problem in this regard. What's more, it was mentioned that the *Act on the Protection of Competition and Consumers* refers to the rules on protection of intellectual or industrial property. Criminal law also plays part in enforcing some consumer protection provisions already. The questions of decency are also not entirely foreign to consumer protection issues – for instance the provisions of the Civil Code on unfair contractual terms refer to the principle of good faith. Good faith is also mentioned by the *Act on Combating Unfair Competition*.

#### **i. Competition Law**

In fact, the *Act on Combating Unfair Competition* of 1993 regulates many examples of unfair commercial practices, and its aim is to protect the interests of the traders as well as consumers and the general public (Article 1). It contains provisions resembling elements of Articles of the EC Treaty concerning competition law. For instance, making it difficult for competitors to access the market through predatory pricing, tying distributors, discrimination in treatment (Article 15.1) is prohibited. Also, for the protection of small businesses, Article 15.3 prescribes that it is prohibited to sell goods or offer services on the premises exceeding 400m<sup>2</sup> without profit (unless it is done during an 'end-of-season' sale no longer than one month, an 'end of the use-by period' sale, or a liquidation sale). Article 17d specifies that it is prohibited for discount stores to be selling their own products in the quantity exceeding 20% of the total quantity of goods sold in these stores.

#### **ii. Intellectual Property Law (e.g. Imitation)**

The rules of unfair competition and intellectual property law are two separate legal areas, although the *Act on Combating Unfair Competition* of 1993 seems to additionally enforce some rules concerning intellectual property rights and trademarks by specifying that using a mark, an emblem or an abbreviation which is already used, according to the provisions of law, by another trader, is an act of unfair competition (Article 5). Also, Article 13 prohibits imitating an existing product (copying the outlook of the product which may mislead the customer).

#### **iii. Protection of Enterprises (esp. SME)**

The provisions of the Civil Code and other legislative acts regulating business activities apply to businesses in general. Similarly, the *Act on Combating Unfair Competition* normally regulates all types of business activities without distinguishing between small businesses and other businesses. However, Article 15.3 of the Act specifies that for the protection of small businesses and in order to enable them access to the market, other businesses are prohibited from selling goods or offering services without profit on the premises exceeding 400m<sup>2</sup>.

#### **iv. Product Safety and Product Liability**

There should be no problems as regards the relation between the Polish product safety law and the Directive on Unfair Commercial Practices. The first General Product Safety Directive was implemented by the Act of 22 January 2000 *on the general product safety* (published in Dziennik Ustaw (Journal of Laws) No 15, poz. 179), and the second General Product Safety

Directive 2001/95/EC was implemented by the Act of 12 December 2003 *on the general product safety* (came into force 31 January 2004, published in Dziennik Ustaw (Journal of Laws) No 229, poz. 2275).

#### v. Criminal Law

Certain unfair commercial practices have been declared to be criminal offences (analysed in another part of the Report). The Code of Criminal Offences of 1971 was amended by the Act *on the Protection of Certain Consumer Rights and Liability for Damage Caused by an Unsafe Product* of 2000, and new offences were introduced into Article 138a and b of the Code (failing to show the consumer the certificate of economic activity and an identity document by those concluding a contract away from business premises, or using clauses inserted into the Unfair Clauses Register). As far as more general provisions are concerned, the Code of Criminal Offences actually contains a chapter regulating offences against the interests of consumers (Chapter XV). Such offences include misleading the consumer regarding the quantity, weight, type, or price of the goods (Article 134), or intentional removal of the price or the indication of the use-by date from the product (Article 136). Even more generally, Article 107 of the Code provides an offence of viciously misleading or viciously disturbing someone's peace. The Criminal Code of 1997 established the crime of fraud in Article 286, where anyone who, for the purpose of gaining a material benefit, causes another by the use of fraud, by using a mistake, or by using the incapacity to understand the undertaken conduct, to transfer or in any other way dispose of his own or somebody else's property, is guilty of fraud.

#### vi. Public Policy (questions of decency)

Public policy and decency considerations play a very important role in a number of legal provisions relating to commercial practices. First of all, the Civil Code contains Article 5 regulating the abuse of rights (using the right in a manner which is contrary to the principles of social cooperation). Article 56 of the Civil Code specifies that the legal effects of any legal act depend upon this act and the law, but also upon the principles of social cooperation and established customs. Article 58 para 2 provides that a legal act contrary to the principles of social cooperation is void. A provision more directly related to unfair commercial practices is Article 16.1 of the Act *on Combating Unfair Competition*, which specifies that an advertisement contrary to good faith or violating someone's dignity is an 'act of unfair competition'.

#### f. **Is there any national unfair commercial practices' law, including case law, which may constitute a barrier to the Internal Market, for example case law which raises questions similar to *Estee Lauder*, *Clinique* and *De Agostini*?**

The Polish consumer protection laws and policies, as well as the laws governing business practice in general, are relatively young. The case law on the issues is negligible. Thus, it is very difficult to determine whether any particular rules or practices are capable of constituting a barrier to the Internal Market (free circulation of goods). In my own personal experience I have not encountered any such rules or practices, but it remains to be seen, as the development of this area of law progresses, whether they indeed do not exist. The problem may be still very rare references in judgements of the Polish courts to European Community law or the jurisprudence of the European Court of Justice. Lack of experience and knowledge of the relevant issues of



Internal Market may sometimes lead to interpretation of law which could be unfavourable for the free circulation of goods.



## **Slovak Republic**

JUDr. Mag. iur. Michal Malacka, Ph.D.

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**I. Existing national law<sup>129</sup>****a) General Provisions on Unfair Commercial Practices****i. Could you describe the general legal framework of the law on unfair commercial practices in your country (e.g. structures, main acts/statutes, leading cases, codes of conduct, self-regulation)?**

The most important instrument of legal regulation of unfair commercial practices is the fifth chapter of the Commercial Code<sup>130</sup> (hereinafter referred to as ComC), which deals with the economic competition in general.

The first part of this chapter (§§ 41 to 43) deals with the participation on economic competition. It contains general provisions, such as the definition of participants on economic competition (competitors, § 41), ban of abusing of participation on the competition (§ 42), which it divides on unfair competition (which is regulated by the second part of the fifth chapter of ComC in §§ 44 to 52) and unlawful limitation of economic competition, which is governed by a specialized Law on protection of the economic competition (hereinafter referred to as PEC)<sup>131</sup>. Personal and territorial scope of the mentioned measures is determined in the first branch as well (§ 43).

The second part of the fifth chapter of the ComC (§§ 44 to 52) deals with unfair competition. The introductory “Basic provision” provides for the general clause (§ 44), i.e. the general criteria of unfair competition, and the demonstrative listing of different categories of unfair competition (§ 44 sub 2). The following provisions of this branch specify more precisely the listed possible manners of unfair competition. In this respect it is important to mention that the listing stipulated in the § 44 sub 2 ComC is solely demonstrative so that other unforeseen conduct may be also considered unfair competition, in case it fulfils the conditions set in the general clause (rules for application of the general clause to unforeseen conducts are mostly set by the courts’ practice).

The third part of this chapter (§§ 53 to 55) stipulates the legal means of protection against unfair competition, particularly the active and passive eligibility, the scope of claims deriving from the unfair competition (§ 53) and procedural specialities of such claims (§§ 54 and 55). Specific unfair conducts provided for in §§ 45 to 52 ComC can be classified into four categories with one exception. These categories are causing possibility of confusion of goods or services with goods or services of other competitor (misleading advertising (§ 45) and causing possibility of confusion (§ 47)), stating misleading information about the qualities of goods or services (misleading labelling of goods or services (§ 46) and sponging on the reputation (§ 48), stating incorrect information about business which could cause a harm to it (discrediting (§ 50) and comparative advertising<sup>132</sup>), conducts close to criminal activities (bribery (§ 49) and breach of business secrets (§ 51), with the exception being the unfair competitive conduct causing health or environmental hazard (§ 52), which is rather new and still needs to be developed by the

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129 My deepest thanks for invaluable cooperation in completing the study goes to: Mgr. Maxim Tomoszek, Mgr. Miluše Gonsorčíková and Mgr. Růženka Sklenářová.

130 Nr. 513/1991 of the Collection of Laws, as amended by later acts, §§ 41 to 55.

131 Nr. 136/2001 of the Collection of Laws, as amended by later acts.

132 Comparative advertising is only mentioned in § 50 ComC, detailed regulation is contained in § 4 AdL.

practice. Special category is constituted by so-called innominate unfair competitive conducts, which will be mentioned in connection with the general clause.

Though the phenomenon of unfair competition is closely related to economic competition, which is regulated by the PEC, legal means protecting economic competition and unfair competition are strictly separated. § 42(2) ComC is expressly not applicable to economic competition and the PEC expressly excludes unfair competition from its scope.

Another relevant legal instrument of protection against unfair commercial practices is the Civil Code (hereinafter referred to as CC).<sup>133</sup> On one hand it is applied as a *lex generalis* towards the ComC (§ 1(2) CC), on the other hand it contains the regulation of the consumer contracts (§§ 52-60) and general provisions on the liability for damage (§ 415 ff).

CP and CPDM represent no less important part of law against unfair competition, because they deal with some unfair competitive conducts in detail and allow their administrative sanctions. However, they are primarily designed to protect consumers, while other abovementioned laws are mostly dedicated to protect the competitive environment and the competition as such, although it under certain circumstances means to protect customers as well. Concerning the relation to other mentioned laws, the CP is absolutely independent and it constitutes its own mechanism of sanctioning the conducts harming consumers. Both § 2(1a) CP and § 1 CPDM contain definitions of consumer.

The ComC, as was said above, prohibits unfair competitive conduct and its foremost objective is to protect competition. All conducts described in §§ 44 to 52 of ComC are considered unfair competition only if they fulfil the conditions of general clause (i.e. it has to be a **competitive** conduct, contrary to bonos mores of **competition** and capable of harming other **competitors** or consumers). These provisions are not designed for protecting consumers and therefore it is hard for consumers to use them.

On the other hand, CP contains clear obligations set to protect the consumer (e.g. information that must be provided to consumer, ban of misleading the consumer etc.). It is not related to economic competition at all. Moreover, the protection under CP is realized by public authority (Czech Business Inspection), which acts on its own initiative, while protection under ComC has to be realized by the harmed subject itself at the court. This is also reflected in prohibited kinds of commercial practices. § 44(2) ComC bans:

- (a) misleading advertising;
- (b) misleading labelling of goods and services;
- (c) causing possibility of confusion;
- (d) sponging on reputation of another competitor's enterprise, products or services;
- (e) bribery;
- (f) discrediting;
- (g) breach of business secrets;
- (h) endangering the health of consumers and the environment,

the CP bans

- (a) discriminating of consumer
- (b) misleading the consumer
- (c) producing, exporting, importing, selling, giving or offering of goods dangerous due to possibility of their confusion with food products

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<sup>133</sup> Nr. 40/1964 of the Collection of Laws, as amended by later acts.

(d) exporting, offering or selling humanitarian material and sets numerous obligations regarding providing information about goods. Specific kind of protection against unfair competition is the regulation of advertising, which is contained in AdL.

Although the case law – with regard to Slovak law system belonging to the continental family of law system – cannot be considered generally binding source of law, courts interpret, concretise and develop the existing law by creating a special kind of case law, the so-called stable practice of the courts. Its significance consists especially in defining the innominate unfair competitive conducts based on the general clause, interpreting the general clause itself and the concept of *bonos mores* as well. However, the case law in Slovak Republic is far less relevant than in Anglo-American law system, which is based on precedent, and definitely no leading cases exist, because the legal regulation must always be based on law.

Self-regulation and codes of conduct have some importance in Slovak Republic in area of regulation of advertising. There is an autonomous organisation overseeing the quality of advertisements based on the Ethical Codes, the Advertising Standards Council. However, it is only a voluntary association and therefore it does not possess any coercive authority enabling it to enforce its decisions, so that it only depends on the will of the subject whether it respects the decision or not, which greatly diminishes Council's significance.

## ii. Does a general clause on unfair commercial practices exist?

The general clause of the unfair competitive conduct is provided for in the § 44(1) ComC stating “the unfair competition is a conduct in an economic competition, which is contrary to *bonos mores* of the competition and is capable of harming other competitors or consumers.”

The essential features of the general clause are that such conduct has to be committed in an economic competition (which expresses the competitive nature of the conduct and relations), that it has to violate the *bonos mores* of the competition (which expresses its lack of morality) and that it is capable of harming other competitors or consumers (which defines the subjects protected against the unfair competition). In order to fall within the scope of the general clause the conduct has to fulfil all the abovementioned conditions cumulatively.

The general clause is subsidiary to foreseen unfair competitive conducts listed demonstratively in § 44(2) ComC, i.e. it can be employed only in case that the conduct in question cannot be subsumed under any of these instances. On the other hand, every unfair competitive conduct including the ones explicitly described in §§ 45 to 52 ComC must fulfil all conditions of the general clause, because it defines the general characteristics of the unfair competition.

Contrary to the law of neighbouring countries, the Slovak ComC (as well as Czech ComC) does not demand the violation of *bonos mores* in general but of the *bonos mores* of the competition. This is a way to express that there are different ethics in economic competition compared to ordinary situations (e.g. the concept of *bonos mores* according to CC), which requires especially the courts to adjust the understanding of this concept within the scope of economic competition.

This is one of the reasons of the importance of the case law connected to general clause, while other reason is that it defines the innominate unfair competitive conducts, such as snow-ball effect, boycott and economic discrimination, price advantages and other consumer-catching

methods or enticing of employees etc. This listing is naturally not exhaustive and will be continuously adjusted to changing spectrum of practices employed by the competitors.

The Directive's aim is to implement maximum harmonization on business-to-consumer protection. However, consumer protection on unfair practices in Slovakia is inserted in a general framework of competition protection (a business-to-business). The problem is that under this general framework the requirements for establishing unfair competition are different from requirements to prove unfair commercial practices under a business-to-consumer perspective. For instance, the feature of conduct that has to be committed in an economic competition might be present in most of the cases, but the focus is different and the burden of proof seems to be higher in that situation. Unfair commercial practices cannot be treated as unfair competition therefore, since the focal point is consumers, and not competitors.

**iii. Who or what is protected by these provisions (e.g. consumers, customers in general, competitors, functioning of markets)?**

In general it is possible to say that all of the mentioned subjects and interests are protected (i.e. consumers, customers in general, competitors, functioning of markets) and all of them primarily by special legal framework (e.g. the competition is protected by PEC, consumers are protected by CP etc.).

The main groups of subjects protected among others against unfair competition by the provisions of the fifth chapter of ComC are competitors and consumers (§ 44(1)). However, their interests are frequently opposite (e.g. the cases when the competitor gives an advantage of discounts or bonuses to consumers in order to gain advantage over other competitors) and therefore are their protection provided differently.

Generally speaking the protection of consumers is governed by CP, with the exception of consumer contracts, which are regulated by CC, whilst the ComC provides for the regulation of relations between competitors, who are its main recipients. It is also necessary to distinguish between PEC, which protects the economic competition as such, and the protection against unfair competition under ComC, which protects the mentioned subjects against harm.

Concerning the very protection against unfair competition, its focus depends on type of unfair competitive conduct. Some conducts foreseen in the ComC are meant to protect other competitors (e.g. sponging on the reputation, discrediting or comparative advertising) and others protect consumers (misleading labelling of goods and services or causing danger of confusion), and the same is true for innominate unfair competitive conducts.

**iv. Are there definitions of consumers, specific groups of customers, such as “vulnerable consumers”; are there definitions of “business”, “trader” or similar terms?**

Although the ComC regulates the unfair competition, it contains only the definition of competitor (§ 41 ComC) and not the definition of consumer. This concept is defined in three different sources – in § 2(1a) CP, § 1 CPDM and § 52(3) CC (in the chapter dealing with consumer contracts).

Concerning the competitor, its essential features are participation on economic competition (which depends on existence of plurality of marketable supply subjects on relevant market) while it is irrelevant if the competitor is an individual or corporation or if he is an entrepreneur. There are no definitions of special groups of competitors although the juridical persons entitled to protect the interests of competitors (namely associations or unions) foreseen by the § 54(1) ComC may be deemed an exception.

Besides the term competitor the ComC defines both concepts of trader and business<sup>134</sup>, but these are of no practical importance in area of unfair competition, because e.g. the concept of competitor does not depend on the person being trader or businessman.

As was already said, there are three definitions of consumer according to Slovak law. One of them is contained in § 2(1a) CP, the second in § 1 CPDM and the third in § 52(3) CC. These definitions slightly differ in details, however their substantive parts are identical – the consumers may be both individuals and **corporations**, who buy goods or exploit services (CP and CPDM) or who conclude or fulfil a contract (CC), and do not perform these activities within or towards business.

Although there is no general legal definition of any specific group of consumers, for certain reasons specific groups of consumers are distinguished (such as children, young people, seniors etc.), especially by courts when measuring the *bonos mores* of competition.

Absolutely specific area is the regulation of advertising, because its impact significantly differs depending on its subject. This is usually influencing the advertising strategies, which are often targeted at a specific group of potential consumers. Therefore the legal regulation of advertising grants special protection to such more vulnerable groups of consumers, especially children (i.e. people under fifteen years). For example, § 3(4n) AdL bans advertising designed for persons younger than fifteen years or advertisements performed by such people, which could promote behaviour endangering their health or their psychic or moral development. Furthermore §§ 5 and 6 AdL, which regulate advertising of tobacco products and alcohol, ban such advertising focused on persons younger than fifteen years or performed by them.

**v. How are rules on fair commercial practices interpreted (e.g. by public authority, case law, codes of conduct)?**

The law protecting against unfair competition is interpreted by courts with the leading authority being the Supreme Court. It mainly unifies the practice of the courts to form a consistent interpretation of controversial or unclear issues (see above). The protection of economic competition is performed by the Antimonopoly Office of the Slovak Republic, whose decisions develop and concretise the legal framework. However, its relevance in area of unfair competition is minimal.

The Advertising Standards Council should be also mentioned in this connection, although its voluntary character and its inability to enforce its decisions are a limiting factor.

The Slovak Commercial Inspection (Consumer Protection Department) is a public authority under the Ministry of Economy and its activity is governed by the law on state control of

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134 § 2(1) and § 2(2) ComC



internal market regarding consumer protection. The Commercial inspection is an administrative body and therefore its competence is only to apply the law and not to interpret it.

Concerning the role of courts, there is no special branch of judiciary dealing with administration in Slovakia, but the measure of administrative action against the decision of an administrative body exists. These actions are dealt with by general courts (see § 244 and following of the civil procedure code, law nr. 99/1963 Coll.)

The procedure within Commercial Inspection consists of two instances – regional and central. This means that in addition to the possibility of appeal against the decision of Commercial Inspection within the code of administrative procedure (this appeal is subject to decision of the Director of Slovak Commercial Inspection), the decision of the director can be challenged at the court by the administrative action.

There are three judicial instances in Slovakia – district courts, regional courts and Supreme Court. According to § 10 of AdL the authorities responsible for control over its fulfilment are Slovak Commercial Inspection, State veterinary and food agency, State agency for control of pharmaceuticals and State agency for control of veterinary pharmaceuticals.

## **b) Provisions on specific issues**

### **i. Are there any other provisions and case law prohibiting misleading advertising?**

Misleading advertising is generally regulated by two laws – ComC and AdL. The ComC provides for the definition of misleading advertising (§ 45), stating that it is a spreading of information about one's own or other's enterprises, products or services, which is capable of invoking a misleading image and thus giving advantage to one enterprise at the expense of other competitors or consumers. This provision can be applied only to conduct, which at the same time fulfils the conditions of the general clause (§ 44(1)), i.e. it has to be contrary to *bonos mores* of competition and capable of harming other competitors or consumers. One of the features contained in the general clause is that the conduct must be committed in economic competition. Therefore it is impossible to apply the ComC e.g. to misleading advertising during electoral campaign. Another condition set by the general clause is the contradiction with the *bonos mores* of the competition, which can be fulfilled e.g. by unfair persuading techniques, commercial techniques based on compassion or immoral techniques. The third condition is that the conduct must be capable of causing harm to other competitors or consumers. Conducts, which do not fulfil these conditions, cannot be considered misleading advertising.

It is important to mention that the actual harm does not necessarily have to happen; it is enough for the general clause to be applied if a threat of causing such harm exists.

§ 3(2) AdL also bans misleading advertising using the definition set by the ComC. The AdL is applied by appropriate public authority, which above all considers the characteristics of goods or services, their price, or the way, in which the price is set, conditions, under which the goods or services are supplied, and the advertisement's submitter.

There is only one definition of misleading advertising in Slovak law, which is contained in ComC. Therefore only conducts fulfilling conditions of general clause can be considered misleading advertising. The term misleading advertising is the same for ComC and the Law on

advertising. Misleading advertising is a different concept from misleading of consumer, which is regulated by CP and is broader, because it includes not only misleading advertising, but other practices capable of misleading of consumer. Another difference is that it can be committed not only by entrepreneur, but other persons such as employees as well.

The reason why the misleading advertising is regulated by different laws is the different character of these laws, which demonstrates itself at the moment of breach of the ban of misleading advertising. In such case the consumer is entitled to bring a civil action to the court to claim that the violator stops the conduct and renews the rightful state. He can ask for adequate compensation or compensation for damages as well. (procedure based on ComC) hand in a suggestion to a competent public authority, which then starts the procedure and if it finds out the law has been breached, it can impose a fine on the violator and order him to stop the misconduct. This procedure does not give the consumer the possibility to claim damage compensation, because this is possible only by bringing a civil action before the court according to a). (procedure based on CP and Law on advertising).

Hence, there are two different procedures: (a) The ComC takes into account competitive elements and can be claimed directly by consumers but under certain requirements, one of them a competitive framework; (b) the CP does not require the competitive element and is enforced by a Public Agency, damage remedies being not provided under such framework. In summary, there a claim brought by the consumer for misleading advertising (to stop conduct and damage repair) dissociated of the economic competition requirement is hardly conceivable. In general, every advertisement affecting a consumer is part of the economic competition, and therefore both procedures may be applied simultaneously. If the advertising is not done in the economic competition and is solely under regime of CP (which we think is impossible), the damage repair can still be sought using general provisions on damage liability of Civil Code.

It is important to mention that the procedure described under b) is not dependent on the suggestion of the consumer, because the public authorities are obliged to take action *ex offio*. The public authority can then impose a fine up to 5 million Slovak Crowns (approximately € 150,000) on submitter, creator or distributor of such advertisement.

In this respect it should be also mentioned, that CP generally bans misleading the consumer (§ 8 CP), namely stating false, unattested, incomplete, inaccurate, unclear, ambiguous or exaggerated information or keeping the true information secret. The responsibility for misleading the consumer cannot be denied even if the relevant information was not provided by the producer, importer or supplier. For breach of this ban the public authority can impose a fine up to 2 million Slovak Crowns (approximately € 60,000) and in case of repeated breach even up to 5 million Slovak Crowns (€ 150.000) (§ 11 AdL). Similar ban is also contained in ComC, which prohibits misleading labelling of goods and services (§ 46 ComC). Concerning the non-precedental nature of decisions of Slovak courts the case law in general is not significantly relevant and therefore will not be mentioned.

## **ii. Are there any other provisions and case law regulating comparative advertising?**

In the first place it is necessary to mention that Slovak law (§ 4 AdL) makes the comparative advertising possible, but only under certain conditions. The comparative advertising is defined in § 4(1) AdL as any advertising, which expressly or even indirectly defines other competitor or goods or services offered by other competitor. To be acceptable, the comparative advertising

must not be misleading, discrediting, must not be intended to allow sponging on reputation, it has to compare only similar and comparable goods or services, and only their representative and relevant features etc. (for details see § 4(2) AdL). Sanctions for unlawful comparative advertising are set in § 11 AdL as well. The AdL also regulates in detail the advertising of specific kinds of products, which it allows only under certain conditions (§§ 5 to 9 AdL).

**iii. Are there other provisions and case law regulating aggressive practices?**

Special provisions regulating aggressive practices do not exist in Slovak law, protection against such practices is possible only by applying the general clause in the Commercial Code (§ 44(1)) or the general provisions of the Civil Code setting the essential requirements for contracts (§ 37(1) CC) or conflict with *bonos mores* (§ 39 CC).

**iv. Are there provisions and case law regulating special marketing techniques?**

**1. Distance marketing**

Contract concluded at a distance is a contract concluded by seller and consumer within mail-order supplying of goods or providing services at a distance exclusively using communication devices such as supply catalogue, telephone, fax, radio, television or e-mail. Seller can use communication devices enabling individual negotiation only if consumer did not preclude it.

Automatic calling devices (without human operator) and faxes can be used only after previous approval of consumer. In case the offer of goods or services is made using telephone, the seller is obliged to declare his identity and the purpose of the call immediately in the beginning of the conversation. DPMC also provides for special obligations concerning the provision of information, e.g. the obligation to deliver to consumer at latest with the supply of goods or services the written version of the information, which were provided via communication devices at the time of negotiation (§ 10(3) CPDM), or the obligation to inform the consumer about the product liability or avoiding the contract etc. (§ 10(4) CPDM). When supplying the ordered goods or services the seller shall not supply goods or services that were not ordered (§ 11 CPDM).

If the seller complies with the abovementioned obligation to provide required information, the consumer may avoid the contract only within 7 days after goods or services were supplied. However, if the seller does not comply with that obligation, consumer may avoid the contract in term of 3 months after goods or services were supplied, which renders the contract invalid from the beginning.

For breach of mentioned obligations the public authority can impose a fine up to 100 000 Slovak Crowns (approximately € 3,000).

**2. Face to face marketing**

The face to face marketing is defined as supporting goods or performing services based on a contract concluded between seller and consumer, if such contract was negotiated away from business premises or during visit of consumer (unless consumer asked for that visit) (§ 5

CPDM). In case the consumer asked for visit of the seller, the contract can still be considered face to face marketing if seller offers to consumer a product or service, which consumer did not mention at the time of asking for a visit of the seller. If consumer in abovementioned situations proposes the seller to conclude a contract and the seller agrees within 30 days, it is also considered face to face marketing.

Provisions of the CPDM are not applied to contracts on construction of buildings, insurance contracts, stocks contracts, selling food and drinks, and to contracts concluded on a basis of a catalogue, if consumer had a possibility to familiarize with the catalogue without presence of a seller, seller and consumer are going to be in a long-term commercial relation and the catalogue states the right of the consumer to avoid the contract in term of 7 days.

In case the seller cannot fulfil the contract concluded using distance or face to face marketing, because ordered goods or services cannot be supplied, he is obliged to inform the consumer about such facts without delay and to repay the price already paid unless substitutive performance was negotiated.

The CPDM also provides for special obligations of the seller, e.g. providing information about exercising product liability etc. In case the consumer avoids the contract within 7 days after the conclusion (even without reason), the contract is invalid from the outset (§ 8 CPDM). Face to face marketing can be practiced on working days only between 8am and 7pm and on non-working days only between 10am and 3pm (§ 3 CPDM). It is prohibited to supply through face to face marketing goods or services, whose supplying requires a license (§ 6 CPDM).

Some of the mentioned practices of face-to-face marketing (e.g. snowball system or Multi-Level-Marketing) are not expressly regulated by Slovak law, although both legal theory and practice are familiar with them. However, express regulation of snowball system (together with plentiful case law) existed in Czechoslovak law before World War II and it was qualified as unfair competition. At present its unfair character has to be deduced based on the general clause.

### **3. Price reduction techniques**

No legal regulation of such practices exists in Slovak law (nor they can be qualified unfair competition), although with regard to the frequency of their use by numerous subjects it would be quite reasonable to set detailed rules for them. The PEC could be invoked to protect against such commercial practices provided they affect economic competition.

#### **v. Are there specific provisions and case law regarding information requirements (e.g. rules that impose on traders a duty to disclose to consumer all “material information”)?**

All products introduced to the market must be equipped with documents necessary for handling and using of these products. Further, if such products comply with all safety requirements, but using them in a specific way can be dangerous for the consumer, he must be warned about such danger (for details see LDP).

Most important regulation (and most detailed as well) is contained in CP. This law provides for general obligation of seller to inform the consumer about features of the sold goods, about

means of their utilization and maintaining, about dangers that can result from improper use or maintaining, or about character of provided services as well as about possible risks connected with them. The seller is responsible for breach of such regulation regardless of the producer, importer or supporter did not provide such information to him (§ 9 CP).

Concerning food products, the seller also has to provide information to consumer about composition and means of utilization of product as well as the date of minimal serviceability (§ 10 CP). The information about composition of dry goods must also be provided (§ 14a CP).<sup>135</sup> The seller is further obliged to inform the consumer about the price of offered goods or services by transparent labelling of goods by the price or by making the price information conveniently accessible (§ 12 CP). Detailed rules for informing consumers about prices are set in the Law on Prices<sup>136</sup>.

Seller must also provide the consumer with the information regarding scope and conditions of product liability including determination of the manner of its exercise (§ 13 CP). All mentioned information must be provided in Slovak language and the measures used must be the measures commonly used in Slovak Republic (§ 11 CP). In case of breach of these obligations the public authority can impose a fine up to 2 million Slovak Crowns (approximately 60 000 €).

General provisions concerning information about special means of utilization of the products (especially when they are governed by technical standards or instructions) are contained in § 617 CC, establishing liability for eventual damage. The seller is also obliged to inform the purchaser about defects of the subject of contract (§ 596 and § 618 CC).

Providing misleading information about goods or services is prohibited by § 46 ComC and is qualified as unfair competitive conduct. This provision can be also applied in case of breach of obligation to provide information; provided this non-performance can invoke misleading assumption some goods or services possess some qualities, which would not be true. The Commercial Code does not specify the kinds of undesirable conduct; it only specifies the undesirable effects. This means that also omissions are protected by § 46 ComC.

**vi. Are there specific provisions and case law concerning specific sectors (e.g. final consumers)?**

The only special regulation concerning specific group of consumers in Slovak law is the abovementioned regulation of advertising concerning children. Concerning specific product sectors, CP, AdL and other consumer protecting laws modify general obligations of seller according to the special nature of some kinds of goods (e.g. tobacco products, dry goods, food products etc.).

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<sup>135</sup> See also regulation of Ministry of Economy of Slovak Republic Nr. 18/1999 of Collection of laws, as amended by later acts.

<sup>136</sup> Nr. 18/1996 of Collection of laws, as amended by later acts, namely its §§ 13 ff.

**vii. What are the national laws of post-contractual and after-sale commercial practices?**

Slovak law does not specifically regulate commercial practices performed after conclusion of the contract. Such conduct, provided it would be qualified unfair competitive conduct, could be sanctioned employing the general clause of unfair competition.

The stage after conclusion of the contract, i.e. post-contractual relations between trader and consumer, is generally governed by the regulation of product liability and avoidance of contract<sup>137</sup> (see above).

**viii. Are there provisions and case law on handling complaints?**

There are different ways of demanding remedy or satisfaction for infringement of consumers' rights. Firstly, if consumers' rights were violated by conduct breaching protection of economic competition, the harmed consumer may bring legal action before the court demanding the subject to stop unlawful conduct and relieve the unlawful state. Further the consumer may demand reasonable compensation (which can be of financial nature as well), compensation for damages and repaying of unjust enrichment. The claim for stopping the unfair competitive conduct and relieving the unlawful state can be filed also by a juristic person entitled to protection of competitors' interests, although in fact it is not the subject harmed by unfair competitive conduct. ComC also provides for the reversion of burden of evidence in favour of consumer by laying an obligation on the defendant to prove that the conduct in question was not unfair (§ 53 ComC). This reversion applies to all cases concerning a breach of the appropriate provisions of §§ 44 to 52 ComC.

Disputes concerning product liability can be mediated by consumer associations or other organizations established to protect consumers (§ 14(6) CPDM). The observation of regulation of consumer protection is inspected by various public authorities, in general namely by Slovak Commercial Inspection and concerning special kinds of products by specialized public authorities. These institutions are entitled and as well obliged to perform supervision of observation of appropriate laws and under certain circumstances they can issue binding instructions regarding elimination of ascertained deficiencies, in case of health hazard they can stop selling of the dangerous product or they can disrupt operation of a place of business. Furthermore they have to inform the public by all possible means (including mass media) about dangerous products, which can be confused with food products (§ 21 ff. CP). If these institutions find out breach of obligations set by CP, they can impose fines up to extent determined by the law (§ 24 CP). Paying the fine does not influence the liability for damages (§ 24(10) CP). Mentioned public authorities can act on their own initiative or on basis of suggestion handed in by consumer or organization protecting consumers' rights.

A very specific part of responsibility for unfair commercial practices is the criminal law, which for example defines a crime of causing harm to consumer (§ 121 Criminal Code). Any consumer who is harmed by the specified criminal conduct can hand in a complaint and subsequently join the criminal proceeding with the claim for damages as the sufferer (§ 43 Code of Criminal Procedure).

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<sup>137</sup> For details see Part Three of ComC and §§ 52 to 60 and Part Eight of CC.

## II. Possible obstacles to the Directive on Unfair Commercial Practices from the national law perspective

### a. What are the main obstacles from the point of view of your country, which might result, complicate transposition and implementation of the Directive?

Upon implementation of the prepared directive, the main problem is the numerousness of norms in the conception of legal regulation for unfair competition or possible absence of certain institutions or standards to regulate them.

As stated above, the core of the legal regulation of unfair competition is Chapter five of the Commercial Code, which deals with economic competition in general. Illegal limitation of competition is regulated by a special law – Act on the protection of competition (PEC).

Unfair competition is closely connected to the protection of competition which is regulated by the PEC, but the legal means for the protection of economic competition and the protection against unfair competition are strictly separated: the ComC expressly delegates legal regulation of the protection of economic competition to a special act (PEC), which then excludes the protection against unfair competition entirely from its force.

Another important legal element of the protection from unfair competition is the Civil Code (CC)<sup>138</sup>. Equally important part of the law against unfair competition is the Consumer protection act (CP)<sup>139</sup>, whose substantial contribution is a detailed regulation of some unfair competition conducts and their administrative recourse. A special kind of protection from unfair competition is the regulation of advertising. Here it is necessary to mention the Act on regulation of advertising (RA)<sup>140</sup>, and the Act on radio and television broadcasting operation (RTB).<sup>141</sup> Specific kind of protection in Slovakia against unfair competition is the regulation of advertising, which is contained in AdL<sup>142</sup> and CPDM.<sup>143</sup>

The body of these laws contains legal regulation oriented to the protection of economic competition as well as to the consumer protection, protection of companies and entrepreneurs, protection of competitors and the market they operate on.

Therefore, upon implementation of the new directive it will be necessary to consider mutual relationships between the abovementioned standards, the scope of matters they regulate and to maintain their mutual interactions. Additionally, it will also be desirable to legislatively fill the gaps presented by the absence of certain institutions as e.g. aggressive business practices, to consider their systematizations in the body of the abovementioned regulations.

Despite these observations, in all branches of the Slovak legal order there does not seem to be any aspect to disable implementation of the new Directive.

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138 Act No. 40/1964 Coll., Civil Code as amended.

139 Act No. 634/1992 Coll., on consumer protection as amended.

140 Act No. 40/1995 Coll., on the regulation of advertising as amended.

141 Act No. 231/2001 Coll., on radio and television broadcasting operation as amended.

142 Nr. 147/2001 of the Collection of Laws, as amended by later acts, effective on 5th April 2001.

143 Nr. 108/2000 of the Collection of Laws, as amended by later acts, effective on 16th March 2000.

**b. Do you see any incompatibilities within your national legal system?**

In general, the proposed directive does not seem to contain any elements incompatible with the context of the Slovak system of legal regulation. As stated before, the new directive will rather bring a necessary adaptation or implementation of terms and institutes that have not yet been included in the body of laws in this field. It is unlikely that a new norm will be produced, for the issue is tied to many laws and branches of the legal order. The question will be a solution to the problem of introduction of new provisions within existing standards to regulate the new in the legal order rather than the issue of compatibility, since the issue of the new directive is not foreign to the Slovak Laws.

**c. How could the Directive be transposed into your national law?**

While the “old” member states agreed when forming competition and consumer laws proceeded rather in the way of creation of autonomous national laws, into which the particular EC directives were later transposed, the Slovak competition and consumer law is rather a result of implementation of the European law or inspiration by foreign legal regulations when we eventually reach the same source. In recent years the Slovak Republic has been coping with harmonization of Slovak norms, though frequently elaborated during the so-called “legislation rushes” agreed related to meeting deadlines bound to the accession to the EU. In compliance with current legislation practice, the directive would be transposed into particular norms presented hereinabove. Probably no new act to cover the entire issue of the prepared directive will be enacted, for such an act would find itself beyond the existing system of norms that pursue unfair competition practices which would result in further shattering of the system. The transposition would have its basis in harmonization of existing norms together with complementation of missing institutes, namely in ComC, PEC, CP and others.

Additionally, the institutional framework should also be considered, to the extent that legislation providing competences to the mentioned authorities would have to be changed, as well as internal statutes. It is most likely that there will be a group of amendments of existing laws for parts which contradict the content of the Directive. It is not usual to use legislative of higher rank for the harmonization of “lower” laws.

**d. What would be – from the perspective of your national law – the appropriate sanctions in case of infringement of the general clause of the Directive? Is there a system to enforce the provisions on fair commercial practice? How is this organized?**

The system of norms covering the discussed issue in the current Slovak legislation contains also a system of sanctions for infringement of the rules of fair commercial practices. This system is possible to preserve (see part I.). The discussion should be lead within the context of financial recourses and ability to pay in home and foreign subjects in order to prevent disproportions and/or any form of discrimination within the market and competition. Considered could also be so far less used sorts of sanctions connected with the infringement of the general clauses, registration of those infringements in the Commercial Register or other public means. A common element should also be a discussion over adequate sanctions not only from a national point of view as it is emphasized in art.13 of the prepared directive and their harmonization in the Union environment. (For example, there are some differences between Czech and Slovak



law too – compare chapter *b. Provisions on specific issues. i. Are there any other provisions and case law prohibiting misleading advertising? - in Czech and Slovak Report* )

In the case when the provisions regulating economic competition have been infringed, the claimant may file an action against the given subject with a state court to request the given subject cease such a conduct and remove the faulty state. Further, he may claim appropriate satisfaction which can be a financial one, compensation for damages or rendering the unjustified enrichment. An application to court to restrain from unfair conduct and remove defective state can be filed even by a legal person authorized to protect the interests of consumers, even though it is actually not the person whose rights were prejudiced or infringed by that unfair competition. The Commercial Code further provides that in certain cases the burden of proof is transferred in favour of the consumer, when it is the seller to prove that he has not conducted unfairly<sup>144</sup>.

It is not possible to open a court procedure by which the consumer or another person would claim refraining from unfair conduct if a proceeding in the case has already been opened<sup>145</sup>. Upon request, the court may adjudicate the claimant, whose action for consumer rights protection has been admitted, the right to make the judgment public at the cost of the unsuccessful party; the court shall define the volume, form and the way of announcing according the circumstances of the case<sup>146</sup>.

In the Slovak republic the inspection over application of legislation regarding consumer protection is executed by controlling and inspection organs established according to law on competences of organs of consumer protection<sup>147</sup>, namely Slovak Commercial Inspection, departments protecting consumer and environment of district and regional authorities municipalities.

The Slovak Commercial Inspection is a public authority falling under the Slovak Ministry of Economy and its activity is governed by the law on state control of internal market regarding consumer protection.<sup>148</sup> The main competences of Slovak Commercial Inspection are:

- to order the elimination of deficiencies ascertained during inspection,
- to request the necessary information and documents from controlled subjects,
- to require the dangerous products to be labelled and to control such labelling,
- to ban import and distribution of certain kind of goods or services,
- to withdraw certain product from the market and to dismantle such product,
- to publish risks and dangers resulting from nature of products.

According to Law 147/2001- Advertising Law (AdL) the public authority may agreed impose a fine up to 2 million Slovak Crowns (euro 60.000) and in case of repeated breach even up to 5 million Slovak Crowns (euro 150.000). Similar ban is also contained in the Commercial Code, which prohibits misleading labelling of goods and services.

The Slovak Commercial Inspection cooperates with customs authorities, which provide it with necessary information. Except the abovementioned organs the following institutions are involved in consumer protecting activities:

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144 ObZ, provisions of § 53

145 Act No. 99/1963 Coll., Civil Procedure Code (CpC), as amended, § 83 odst. 2

146 OSŘ, provisions of § § 155 par. 4

147 Nr. 274/1993 of the Collection of Laws, as amended by later acts

148 Nr. 128/2002 of the Collection of Laws, as amended by later acts

- State veterinary and food authority,
- district and regional hygienic officer and medical institutions established by Ministry of Health,
- price controlling organs and custom authorities within Ministry of Finance,
- labour inspection organs within Ministry of Labour, Family and Social Matters.

**e. How would the Directive be delimited to the following fields of law?**

**i. Contract and Tort Law**

The legal regulation of consumer contracts is applied for contractual relationships, parties to which are always the consumer (§ 52(3)) and the supplier (§ 52(2)). The consumer law within the Slovak Civil Code reaches a better protection of the consumer mainly by:

- prohibition of certain contractual covenants regarded as most frequent unfair terms in consumer contracts
- enables the consumer to withdraw from a concluded contract under a priori settled conditions, and sets forth other provision which the supplier shall obey.

§ 52 Civil Code defines the consumer contracts sales contracts, contracts for work done, or other sorts of contracts, defined in part eight of the Act, provided that the parties to the contract are:

- a) consumer (a person not conducting upon concluding and performing of the contract within the framework of its business or another entrepreneurial activity)
- b) supplier (a person conducting upon concluding and performing of the contract within the framework of its business or another entrepreneurial activity).

Consumer contracts must not include clauses that in contradiction to the requirement of good faith mean, to the detriment of the consumer, a considerable unbalance between rights and duties of the parties. The act further sets for a demonstrative list of inadmissible contractual covenants (§ 56).

Upon comparison of the context of the directive and the existing Slovak legal regulation, we can state a harmony with fundamental principles and basic wording of the directive, with minor legislative alterations.

**ii. Competition law (aiming at the protection of the consumer)**

Legal protection of consumers as an element of consumer-oriented policy of the state is in the Slovak legislation oriented primarily to the establishment of effective legal guarantees for actual protection of the consumer and in wider circumstances to ensuring the development of equal conditions in economic competition. Of most importance is Act No. 634/1992 Coll. on the protection of consumers. This act regulates sales of goods and providing of services when the performance takes place in the territory of the Slovak Republic; other cases can be considered under this act only if the performance is related to business activities operated in the Slovak territory.

The main groups of subjects protected among others from unfair competition by provisions of chapter 5 of the ComC are competitors and consumers.<sup>149</sup> Their interests are though often controversial (see e.g. the cases when a competitor grants the consumer bonuses or reductions in order to reach an advantage before other competitors), therefore their protection is solved in different ways and the prepared directive may affect both the fields.

In general, it has to be mentioned that the consumer protection is primarily regulated by the Slovak CPDM, while the issue of consumer contracts are governed by CC. The ComC rather regulates relations between the competitors who are its primary addressees. However, it is necessary to make distinction between the operation of PEC, which, as reads from its title, protects mainly the competition as such, and the protection from unfair competition under ComC, which protects the respective subjects from prejudice.

As to the protection from unfair competition as such, its orientation differs by the kinds of unfair competition conducts. In some merits of case, it is obvious from their nature which subjects are primarily protected (e.g. depreciation, sponging on other's reputation or comparative advertising are oriented to other competitors, while deceptive designation of goods and services or endangering health and environment protect mainly the consumers), while the same applies to unlisted unfair competition delicts (see part I.).

### **iii. Intellectual property law (e.g. Imitation)**

The Slovak copyright law will not be in its substance affected by the directive, as a legal discipline or a body of laws it is only marginally connected with the questioned set of norms - in contractual relationships of sellers and buyers, provided that the subject of purchase is a product protected by copyright. Copyright and consumer law relationships must nonetheless be in this case classified as existing independently to each other; possible defects from the viewpoint of consumer protection would thus belong to the sphere of defects on product and liability for damage, or to the protection of competition.

### **iv. Protection of Enterprises (esp. SME)**

The legal order of the Slovak Republic does not directly regulate the protection of small and medium-size businesses – SME. Regulated is the issue of misuse of dominant position, concretely in PEC in both systems, where the general clause determines the misuse of dominant position and the position of SME.

Alike in the covenants that injure competition, in this issue has been chosen the form which at first defines by the general clause the misuse of dominant position and then provides a demonstrative list of merits of case of the misuse of dominant position.

The general clause defines in § 8(6) PEC: “A misuse of dominant position to the detriment of other competitors or consumers is prohibited”. This provision is considered a general clause for the reason that it prohibits any form of misuse of dominant position to the detriment of any other competitors or consumers.

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<sup>149</sup> § 44 odst. 1 zák. č. 531/1991 Sb., obchodního zákoníku, ve znění pCCdějších předpisů

The later mentioned cases have then only a demonstrative character, which means that even when the entrepreneur's conduct is not in a collision expressly with those on the list, he may be sanctioned under the general clause.

#### **v. Product Safety and Product Liability**

In Slovak rep. there is a specific regulation of civil law nature that agreed covers damages on health, life and property of the injured person.

Until enactment of the act, the only way to claim liability for damages caused by defective product was the proceeding under the Civil Code (provisions on liability for defects and liability for damages). The act on liability for damages caused by defective product recognizes the term defective product and introduces the institute of objective legal liability. The injured person then has to prove only the defect on product, the occurred damage and the causal relation between the defect on product and the damages.

The Act on liability for damages caused by defective product also regulates the relation of this act to the Civil Code. If not stated otherwise by the act, provisions of the Civil Code shall be applied. In a general context, there is no threat from collision of this issue with the Directive.

#### **vi. Criminal law**

Causing damage to the consumer is, in the Slovak criminal law, agreed defined as a conduct when there is a significant agreed damage to another's property through agreed cheating on quality, quantity or weight of the goods, or introduces on the market a large volume of products, labour agreed or services and conceives their material defects. More severe sanctions for such a conduct can be imposed on members of organized groups, or in the case when they through such conduct gain a significant profit<sup>150</sup>. From the viewpoint of criminal law there is no collision with the text or objective of the proposed directive.

#### **vii. Public policy (questions of decency)**

It is important that unlike neighbouring countries the Slovak unfair competition law does not require for unfair conduct to be controversial to good manners in general, but rather a controversy to good manners in competition. This way is the term understood also by judicature.

Self-regulation and moral codes have their importance in the Slovak Republic mainly in the field of regulation of advertising. There exists the Council for Advertising, which is a self-governing organization monitoring the quality of advertising, based on the Advertising code. The Council is though a voluntary organization, therefore their activities must not be overestimated mainly for the reason that it lacks power means to enforce its resolutions and it is solely up to the subjects whether they conform or not.

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150 § 121 Czech and Slovak Criminal Code

**f. Is there any national unfair commercial practices' law, including case law, which may constitute a barrier to the Internal market, for example case law which raises questions similar to Estee Lauder, Clinique and De Agostini.**

Unfair competition law is in principle interpreted by courts, where the highest authority is the Supreme Court. It mainly unifies the judiciary in order to establish a unified interpretation of questionable or unclear issues and its activities will not influence the internal market. A decision-making body in the field of the protection of competition is also the Office for the protection of competition, whose decisions are important for the development of legal regulations in this field. However, its influence on unfair competition is only marginal.

Since the Slovak legal culture belongs to the continental legal systems, court decisions cannot be considered as generally binding sources of law. However, there is the so-called established judiciary, through which the courts develop, precise and concretize the current legal regulations. As stated above, its importance can be seen mainly in undefined torts of unfair competition under the general clause, the definition of which is the task of courts, as well as a general interpretation of the general clause or the interpretation of the term "good manners". However, the importance of the decision-making activity of courts is impossible to compare to the role of precedents in the Anglo-American legal system, nor we can talk about leading cases, because the bases of every legal regulation must always stem from law.

**Final comments:**

*Framework identified:*

Legislation	Protection over	Authority
ComC	<ul style="list-style-type: none"> <li>- protects unfair commercial practices (misleading information - no clear protection to misleading omissions and aggressive practices).</li> <li>- possible claim for damage</li> <li>- reversion of burden of proof</li> </ul>	General Courts – appeal to Supreme Court.
CC	Regulation of the consumer contracts - general provisions on the liability for damage	General Courts – appeal to Supreme Court.
CP	Set up the requirements for information provision: (ban on misleading to consumers,	Slovak Commercial Inspector – administrative authority – judicial appeal to Supreme

	discriminating consumers ect) - misleading to consumers has a broader concept compared to the Comc. (it seems to include misleading omissions) - no possibility of damage claim	Court.
Adl	Regulation of misleading advertisement (same definition of the Comc) - sanction established	
PEC	Protects economic competition	Antimonopoly Office

#### Main problems identified:

- 1) The general framework identified as regards unfair competition practices instead of unfair commercial practices. Therefore, there is a conflict of goals foreseen that suggests competition and consumer protection although ultimately related, should be treated separately.
- 2) Misleading Advertisement: the concept brought by the ComC and Adl is narrower than the concept brought by the CP due to the different perspective they have. While the first regards economic competition the second focus on consumer protection. There is already a conflict of concepts and enforcement that shall be separate (competition/consumer protection) and harmonized with the Directive.
- 3) There are no provisions dealing with aggressive practices – for purposes of maximum harmonization they should be introduced. With respect to misleading omissions, it seems that although they are not expressly mentioned, they could be assumed (jurisprudence is relevant on this sense). In the case of the CP they are cleared than in the case of ComC and Adl.
- 4) Concept of consumer includes corporations – incompatible with Directive.
- 5) Criminal Sanctions are established for consumer protection, providing for a stricter protection. However, it shall be relevant the discussion on whether the criminal nature provisions are included/excluded the scope of the Directive.

**Annex: translation of Slovak statutory provisions***Commercial Code***§ 44 Basic Provision**

(1) Unfair competition means conduct in economic competition which conflicts with the accepted practices of competition and which may be detrimental to other competitors or customers. Unfair competition is prohibited.

(2) Unfair competition under subsection (1) means in particular the following:

- (a) misleading advertising;
- (b) misleading labelling of goods and services;
- (c) causing possibility of confusion;
- (d) sponging on reputation of another competitor's enterprise, products or services;
- (e) bribery;
- (f) discrediting;
- (g) breach of business secrets;
- (h) endangering the health of consumers and the environment.

**§ 45 Misleading Advertising – some differences between Czech and Slovak Law**

(1) *Misleading advertising is the advertising of products, services, real property, business name, trademark, mark of the origin of the product and other rights and obligations related to business, which misleads or may mislead persons, at which it is aimed or which are affected by it, and which in consequence of its misleading character may influence the economic conduct of such persons or which harms or may harm other competitor of consumer.*

(2) *When judging the misleading character of an advertisement, all its features must be taken into account, especially the information it contains concerning*

- (a) *products and services, their accessibility, design, composition, manner and date of production or supply, suitability and way of use, quantity, geographic or business origin or effects, that should be expected when using them, or about the outcome of their tests or controls,*
- (b) *price or the way it is calculated and the conditions, under which the products or services are supplied or performed,*
- (c) *characteristic features of the competitor of the advertisement, especially his identity, qualification, his law protected rights, intellectual property, evaluations or distinctions.*

**§ 46 Misleading Labelling of Goods and Services**

(1) Misleading labelling of goods and services means the marking of goods and services in such a way as to create an erroneous impression in the market place about the country, region or location where the goods or services so marked originated or are made by a certain manufacturer (producer), or the special characteristics or quality of such goods or services. It is irrelevant whether such markings appear on the goods, the packaging, or in commercial documentation, etc. It is also irrelevant whether the misleading marking was provided directly or indirectly, or by what means. § 45(2) applies as appropriate (*mutatis mutandis*).

(2) Misleading labelling also means incorrect marking of goods or services with expressions such as "(of) the kind", "(of) the type", or "(using) the method" in order to distinguish such goods or services from an authentic original, if such marking is capable of creating an erroneous impression with regard to the origin or nature of the goods or services involved.

(3) The marking of goods and services which is commonly used in business to describe a particular kind or a particular quality is not considered misleading, unless accompanied by additional words which might be misleading, e.g. "genuine", "original", etc.

(4) The above provisions do not affect rights and duties ensuing from the registered designation (marking) of products, trademarks, protected plant varieties and livestock (animal) breeds, as stipulated by particular Acts.

#### **§ 47 Causing Possibility of Confusion**

Causing possibility of confusion means:

(a) using a commercial name or designation or the special designation of an enterprise which is already legitimately being used by another competitor;

(b) using the special designation of an enterprise, a special marking or a specific design related to products, services, or commercial materials which customers associate with a particular enterprise, or a particular branch of an enterprise (e.g. packaging, printed matter, catalogues, advertising materials, etc.);

(c) imitating a competitor's products, packaging or performance, unless this imitation involves elements which are predetermined functionally, technically or aesthetically, and the imitator has taken every possible measure which could be required of him to avoid the danger of mistaken identity, or at least has substantially restricted such danger;

if such conduct is capable of creating the danger of mistaken identity or a misleading notion about a particular enterprise, its commercial name or special designation, by using such designation or by imitating the products or services of another competitor.

#### **§ 48 Sponging on Reputation**

Sponging on reputation means the use by a competitor of the reputation of another competitor's enterprise, products or services to gain extra benefits for its own or a third party's business activity which would not otherwise have been achieved by such person.

#### **§ 49 Bribery**

Under this Code, bribery means conduct whereby:

(a) a competitor offers, promises or renders benefits, directly or indirectly, to an individual who is a member of another competitor's statutory or similar organ or employee (or an individual of similar status) to gain an advantage by means of unfair conduct for himself or a third party (another competitor) to the detriment of other competitors, or an illegal competitive advantage; or

(b) an individual under letter (a) directly or indirectly demands or solicits or accepts any kind of benefit for the same purpose.

#### **§ 50 Discrediting**

(1) Discrediting means conduct whereby one competitor states or disseminates false information about the circumstances, products or services of another competitor, such false information being likely to be detrimental.

(2) Disparagement also involves stating and disseminating truthful information about the circumstances, products or services of another competitor, if such information is capable of causing detriment to that competitor. However, it is not considered unfair competition if a competitor is forced by circumstances to such conduct (e.g. in justified defence).



**§ 51 Breach of Business Secret**

Breach of business secret means conduct whereby an individual illegally informs another person about a business secret (§ 17 ComC), or provides him with access to it, or exploits it for his own or another person's benefit, using it in competition, and of which the individual learned of:

- (a) as a result of having been entrusted with that secret, or by having gained access to it through technical documentation, instructions, drawings, models or patterns on the basis of an employment or other relationship with the competitor, or while performing a function to which the individual was appointed by a court or other authority; or
- (b) through his own or another person's illicit conduct.

**§ 52 Endangering the Health of Others and the Environment**

Endangering the health of others and the environment is conduct whereby a competitor distorts the conditions of economic competition by manufacturing and marketing products, or by carrying on activities, which endanger health or the environment as protected by law, in order to acquire benefits for himself or for another person at the expense of other competitors or consumers.

**Provisions of Slovak Consumer Protection Law (CP):****§ 3 Honesty in Sale of Products and Provision of Services**

(1) Sellers are obliged:

to sell products with the proper weight, measure, or quantity and to enable the consumer to check the correctness of the same;

to sell products and to provide services of the prescribed or approved quality, if such quality is determined in a binding manner or ensues from special regulations, or of the quality described by the seller; if the quality is not prescribed, approved or stated, products and services are to be of the usual quality. The usual quality is a quality not prescribed by special regulations and the product or service does not have obvious defects, about which the consumer must be informed, to sell products and to provide services for prices agreed in compliance with pricing regulations, to charge correct prices when selling products or providing services.

(2) Sellers must not vex consumers.

(3) The obligations pursuant § 3(1b) and the ban pursuant § 3(2) apply to exporters, importers and suppliers of the products or services as well, unless a special regulation determines different.

**§ 4 Hygienic Conditions of Sale of Products and Provision of Services**

(1) When selling products or providing services, the seller is obliged to ensure hygienic conditions determined by special regulations including measures imposed by public authorities.

(2) When selling products or providing services, the seller is obliged to observe the storage conditions specified by producer or by special regulation, so that the products and services do not degrade.

**§ 5 Safeguarding of Sale of Products and Provision of Services**

The seller is obliged to safeguard the sale of products and provision of services in the way that enables their proper and safe utilization.

**§ 6 Prohibition of Discrimination against Consumers**

(1) The seller is obliged in relation to a consumer to observe the principle of equal treatment in supplying products and services provided by a special law. The seller especially must not refuse

to sell the consumer the products, which are displayed or otherwise ready for sale, or refuse to provide service, which his operation conditions allow to provide; the sale of products or providing of services must not be bound to sale of other products or provision of other services, unless such limitation applies in the same way to all cases and is usual in business. This does not apply to cases, where the consumer does not satisfy the conditions demanded by special regulations.

(2) The seller is obliged to mark the reserved products through the whole time of their reservation and state till when they are reserved. That applies also to already sold products, which are present at the place of business until the consumer takes them over or until they are supplied.

(3) The seller must not act in contradiction with bonos mores. To act in contradiction with bonos mores means in particular a behaviour that

(a) is contrary to established traditions and shows obvious signs of discrimination or breach of ethic rules of sale of products or provision of services,

(b) can cause harm to participant of a business relation by not observing good faith, honesty, customs and practices,

and that usually employs error, trick, threat, significant inequality of contracting parties and breach of liberty of contract.

(4) If the consumer suspects that his rights or by law protected interests were harmed as a consequence of breach of the principle of equal treatment, he may sue for the legal protection pursuant to special law.

#### **§ 6a Safe Product and Obligations when Emitting the Product**

(1) Safe product is a product, which under normal or rationally foreseeable conditions of use during the time specified by the producer or during the time of usual usability is not dangerous or with regard to health protection represents only a minimal danger. For determining if the product is safe namely these features are judged:

the characteristics of the product, its composition, usability, packing, instructions for assembling and using of the product, accessibility, recommended way of use including the environment of use, marking of warnings, maintaining and disposal, conditions of storage, conditions of transport a other information provided by producer; all mentioned information must be stated in way understandable to consumer and in state language,

the influence of the product on other products, if it foreseeable that they will be used together, the way of demonstration of the product,

the groups of consumers, which may be at risk when using the product, especially children and elderly people.

(2) Safe product is also a product, which complies with requirements of a special regulation for product safety or reduction of risk connected with use of product. If such regulation deals only with some aspects of safety, the other aspects are judged according to this law.

(3) If there is no EC or EU regulation of product safety or reduction of risk connected with use of product, safe product is a product fulfilling requirements of regulation of the member state of EU, in which it is emitted, if such regulation provides for protection equivalent to requirements according para 1.

(4) If the safety of product cannot be judged according para. 2 or 3, it is judged according to Slovak technical norm adopting a European norm, to which refers the Commission of EC in the Official Journal of EC, and such reference is published in Journal of the Office for normalization, metrology and testing of the Slovak Republic, Slovak technical norm, which adopts a European norm other than stated in a., technical norm of the member state of EU, in which the product was emitted, recommendation of the Commission of EC, which contains rules for assessment of product safety, rules of right practice of the product safety valid in

particular branch, current state of scientific and technical development, reasonable expectation of the consumer concerning safety.

(5) The possibility of achieving higher level of product safety or availability of other less dangerous products is not a reason to consider a product not to be safe.

(6) Any product, which does not comply with requirements set in para. 1 to 4, is considered dangerous.

(7) Dangerous products are also products, that due to their shape, smell, color, look, packing, labelling, volume or size may cause the consumers, especially children, to confuse them for food product and thus endanger their health or life.

(8) If the producer produces or the importer imports the product from the state, which is not a member state of EU, the public authorities for control of emitting of products act as provided by a special regulation.

(9) Details on requirements for safety of fibers, textile and leather products and clothes made of textile or leather intended to be in direct contact with skin are set by a generally binding legal regulation issued by Ministry of economy of Slovak Republic.

### **§ 7 Prohibition of Offering and Selling of Dangerous Products**

(1) No one may emit, offer or sell dangerous products.

(2) Products, which due to their character have a date of usability, must not be emitted or sold after such date has expired.

(3) The seller may excuse from responsibility for prohibition pursuant to para. 1 if he proves, that at the time of offer or sale of the products he could not know that the products are dangerous.

(4) If the seller gets any knowledge indicating that he sold products dangerous to consumer he must immediately inform the consumer about it. If it is impossible to inform all individual consumers, he is obliged to inform in an effective way the consumers' public and public authorities, which inspect the observation of this Act.

(5) The obligation provided for by the para. 4 applies similarly to producer, importer and supplier.

(6) The provision of para. 1 to 5 apply adequately for provision of services.

### **§ 8 Prohibition to Deceive Consumers**

(1) No one may deceive consumers, particularly by providing untruthful, unsubstantiated, incomplete, inaccurate, unclear, ambiguous or exaggerated information, or by concealing information about the real properties of products or services or the quality of purchasing conditions.

(2) The terms "guarantee" or "guaranteed" as well as other terms with a similar meaning may be used only when the content and conditions of the guarantee are specified at the same time.

(3) The provisions of the preceding paragraphs shall have no affect on the general provisions on unfair competition.

(4) Advertisement must comply with requirements set in a special regulation.

(5) An offer or sale of products or provision of services breaching the intellectual property law, as well as storage of such products in order to offer or sell them is also considered deceiving of consumer.

(6) An offer or sale of products or provision of services breaching the mark of origin rights or geographic marking of products, as well as storage of such products in order to offer or sell them is also considered deceiving of consumer.

### **§ 9 Information Duty**

(1) Producer and importer, who emit the product, are obliged to intelligibly, visibly and appropriately label the product by the information, which enable the consumer to assess the risks connected with use of the product or by other information connected with the safety of the product. The product must also be labelled with an indication of the identity and details of the producer or importer or, where applicable, the batch of products to which it belongs. The supplementary documents must be also provided; supplementary documents are documents which are needed for taking over and using the product.

(2) If the product complies with the requirements for product safety, but certain kind of its use may endanger the consumer and such danger is not obvious, producer and importer are obliged to inform about such danger in the supplementary documentation. Producer and importer are obliged to specify the parts of the product which may be dangerous and describe the safe way of their use. Warning on danger does not release producer and importer from the obligation to ensure other safety requirements.

(3) Producer and importer are obliged to inform the seller truly and completely about the characteristics of supplied products. If the producer or importer are not in a direct relation with the seller, they have to inform truly and completely about the characteristics of supplied products the supplier of the product. Supplier of the product is then obliged to inform truly and completely about the characteristics of supplied products the seller of the product. Information, that must be provided, are

complete description of the risk represented by the product, including the risk caused by products used for provision of services,

all information important for performing the control of the product,

measures which must be employed in order to prevent the risk for consumer using the product.

(4) The seller is obliged to properly inform the consumer about the characteristics of sold products or about character of provided services, about the way of using and maintaining the product and about danger resulting from its misuse or wrong maintaining, and about risk connected with provided service. If it is needed with regard to the nature of the product, way and time of its use, the seller is obliged to ensure that such information is included in enclosed written instructions, which must be intelligible.

(5) A seller may not be released from the duties set forth in para. 4 on the grounds that the required or correct information was not provided to him by the manufacturer, importer or supplier. However, such duty does not apply in cases of obvious or generally known facts.

### **§ 10**

(1) Sellers must ensure that products to be sold by them are visibly and intelligibly marked with the designation of the manufacturer, importer or supplier, and quantity. Seller must ensure that products are labelled with the information about quality, date of production, date of usability and way of use, maintaining and storage of product. Information concerning the way of use, maintaining or storage may be included in enclosed written instructions. When it is not possible or expedient to mark products to be sold due their nature, sellers shall provide such information truthfully, on request, to any consumer or authorities monitoring compliance with the provisions of this Act, and if necessary sellers must substantiate such information.

(2) No seller may remove or change product markings and other information provided by the producer, importer or supplier.

(3) In the case of sale of used or modified products, products with a defect, or products whose usefulness is otherwise limited, sellers must advise consumers clearly of these facts in advance. Such products must be sold separately from other products.

(4) The provisions of para. 1 shall apply to the sale of used goods only where applicable.

(5) The duties set under para. 1 shall also apply commensurately to producers, importers and suppliers, unless otherwise stipulated in a special law.

(6) A special regulation issued by Ministry of economy shall stipulate details concerning marking material composition of particular kinds of products, methods of testing material composition of products and ways of packing and handling products designated for consumers.

### **§ 11**

If the information referred to in §§ 9 and 10 is provided in writing, it must be in the state language. Possibility of parallel using of markings, especially graphic symbols and pictograms as well as other languages, remains intact. Physical quantities must be expressed in measuring units stipulated by a special act.

### **§ 12**

(1) In accordance with price regulations, sellers shall clearly inform consumers about the actual price of products to be sold or services to be provided by clearly marking the price on every product or providing information about the price of products or services in another suitable manner.

(2) Information about the price, or the fact that information about the price is incomplete or missing, may not make it appear that:

the price is lower than the actual price,

the setting of the price depends on circumstances on which it in fact does not depend,

the price includes delivery, performance, work, or services, that in fact is to be paid for separately,

the price has been or will be increased or reduced or will remain unchanged, if this is not the case,

the price and usefulness of an offered product or service is comparable to the price and usefulness of a similar product or service if this is not the case.

(3) The provisions of para. 2 shall apply commensurately to information about methods of setting prices.

### **§ 13**

Sellers shall duly inform consumers about the extent, conditions, and manner of making claims concerning defects in products and services (hereafter "claims") and advise them as to where they can claim a defect and obtain warranty service.

### **§ 14**

(1) Sellers shall visibly mark their place of business by the information according special regulation, eventually also by a symbol or by stating the main group of sold products or provided services.

(2) On a convenient and permanently visible place in the place of business the following information shall be displayed

business name and seat

name and surname of the person responsible for operation of the place of business

hours of business

category, group and class of hotel and hospitality services.

(3) When a place of business is to be closed temporarily for a period of time longer than one day, the seller is obliged to inform about the time of beginning and ending of closure at the place, where hours of business are displayed, no later than 24 hours before closing the place of business. When a place of business is to be closed down permanently, no later than 7 days

before closing it the seller shall inform the appropriate public authority about where claims can be settled and who will do so.

(4) The provisions of para. 1 and 2 letters a) and b) shall apply also to selling of products or provision of services out of place of business.

#### **§ 14a**

Details concerning marking the composition and handling of textiles shall be provided by a special regulation of the Ministry of Economy.

### **Other Duties Related to Sale of Products and Provision of Services**

#### **§ 15**

(1) If the nature of a product so permits, the seller shall demonstrate the product to consumers upon request.

(2) In cases stipulated by law, the seller shall duly issue a warranty certificate.

#### **§ 16**

(1) A seller is obliged to issue a receipt confirming purchase of a product or provision of a service, stating the business name and seat of the seller, address of the place of business, date of sale of the product or provision of the service, the name and type of product or service, as stipulated in a Statistic classification of production, and the price for which such product was sold or service provided.

(2) Receipts of purchase for products that are to be delivered at a later date must state the place and date of delivery.

(3) Receipt of purchase for used or modified products, products with a defect, or products whose usefulness is otherwise limited must clearly indicate this fact.

#### **§ 17**

If the nature of products so requires, particularly in respect of the hygienic conditions in which they are sold and the manner in which they are used, the seller shall sell products in hygienic packaging or wrap them in such packaging materials at the time of sale; in the case of self-service sale, the seller at his expense shall provide the consumer with a suitable packaging material.

#### **§ 18**

(1) In case it is necessary for reduction of risk, producers, importers and suppliers of products are obliged to take samples of products and perform tests of their safety according to a special regulation. They are also obliged to keep a written record containing outcomes of these tests.

(2) Producers, importers and suppliers of the products are obliged to gather information about the safety of the produced or supplied product also after it is supplied to the seller or sold to a consumer. Shall the producers, importers or suppliers get the information that the product is dangerous, they are obliged to pass such information to consumers and to appropriate public control authority and withdraw such product from market immediately; withdrawing a product from market means performing measures preventing presentation, offering and selling of the dangerous product.

(3) Shall the producers, importers or suppliers get the information that the product they produced, imported or supplied is dangerous, they are obliged to immediately on their expense publish information that the product is dangerous in mass media.

(4) Producers, importers, suppliers and sellers of the dangerous product are obliged to afford the consumers the opportunity to return the dangerous product and the consumer has the right to choose to which subject he will return it. If the consumer sets up such claim, producers, importers, suppliers or sellers are obliged to take over the dangerous product and within to refund the price paid for the product including rational expenses within three days. If the consumer does not have the receipt documenting the purchase of the product, these obligations apply to producer or importer.

(5) If producers, importers, suppliers or sellers do not satisfy the obligation stipulated by the para. 4, in case that life, health or property of consumer are at risk, appropriate public control authority is besides imposing a fine entitled to order the destruction of the product on expense of the subject, which did not observe the obligation to withdraw the product from market.

### § 19

(1) Except when another person is designated to perform repairs, a seller must accept a claim in respect of a product that he sold in any of his places of business, if this is possible taking into account the assortment of goods sold or services provided, at his registered office.

(2) An employee authorized to handle claims concerning sold products must be present at a place of business during the entire course of hours of business.

(3) A seller of a group tours must ensure permanent presence of an employee authorized to handle claims during whole time of the tour.

(4) A seller, or an employee authorized by him, shall decide about a claim immediately, in complicated cases within three business days. This period shall not include an adequate time required for expert assessment of a defect in a product or service. A claim concerning a defect in a product sold or service provided must be settled and the defect rectified without delay, at the latest within 30 days of the making of the claim. After the elapsing of such a period, the consumer shall have the same rights as if the defect were non-rectifiable.

(5) The seller shall issue a document about the claim made and about way of its settlement even if the claim was not immediately completely accepted.

(6) The seller shall keep a record about claims made and present it on request of appropriate authorities entitled to control the observation of this Act.





## **Slovenia**

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**I. Existing National Law****a) General Provisions on Unfair Commercial Practices****i. Could you describe the general legal framework of the law on unfair commercial practices in your country (e.g. structures, main acts/statutes, leading cases, codes of conduct, self-regulation)?**

At present, there is no specific legislation in Slovenia governing fairness of commercial practices. Instead, the issue of unfair commercial practices is addressed in a piecemeal manner by a number of laws regulating various aspects of fairness in commercial transactions. In addition, there are specific laws which regulate fairness in commercial transactions in certain sectors of the economy.

The Protection of Competition Act (the “Competition Act”)<sup>151</sup> is the most general in its scope. However, it should be noted that the primary purpose of this law is not the protection of consumers in business transactions. Rather, the main aim of the Act is to ensure fairness between competitors by safeguarding against distortions in the market caused by competitive advantages gained by businesses using unfair commercial practices. Accordingly, the economic interests of consumers are only indirectly protected from unfair business-to-consumer commercial practices; their interest is only protected if unfair competition as between businesses can be shown to have occurred. Pursuant to Article 2(1) of the Competition Act the law is binding on legal and natural persons who undertake commercial activity regardless of their legal or organisational structure or ownership.

As discussed in detail in Part (ii) below, the Consumer Protection Act<sup>152</sup> accords consumers specific protection in respect of certain unfair commercial practices, such as misleading or false advertising. Other relevant laws include the Act on Prevention of Restrictions on Competition,<sup>153</sup> the Law on Trade,<sup>154</sup> the Slovenian Code of Obligations (in particular, Article 12),<sup>155</sup> the Penal Code (in particular Article 237) and the Personal Data Protection Act (in particular, Articles 72 and 73).<sup>156</sup> Article 12 of the Code of Obligations provides that when determining the standard of behaviour and actions which businesses are required to comply with in their commercial dealings, business customs and practices shall be taken into account.

In addition, certain laws contain provisions granting consumers protection in specific sectors of the economy or in respect of specific methods of communication which businesses may use in their dealings with consumers. For example, the Energy Act<sup>157</sup> provides specific consumer protection in the energy sector. The Consumer Credit Act<sup>158</sup> accords consumers additional

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151 Zakon o varstvu konkurence, Official Gazette of the Republic of Slovenia No. 18/93, as amended by the Prevention of Restriction of Competition Act, Official Gazette of the Republic of Slovenia No. 56/99 and Law on the Amendments and Additions to the Consumer Protection Act, Official Gazette No. 110/2002, dated 18 December 2002.

152 Zakon o varstvu potrošnikov, Official Gazette of the Republic of Slovenia, No. 98/04.

153 Zakon o preprečevanju omejevanja konkurence, Official Gazette of the Republic of Slovenia, Nos. 56/1999 and 37/2004.

154 Zakon o trgovini, Official Gazette of the Republic of Slovenia No. 96/04.

155 Obligacijski zakonik, Official Gazette of the Republic of Slovenia No. 83/2001.

156 Zakon o zaščiti osebnih podatkov, Official Gazette in the Republic of Slovenia No. 95/2004.

157 Energetski zakon, Official Gazette of Republic of Slovenia No. 26/2005.

158 Zakon o potrošniških kreditih, Official Gazette of Republic of Slovenia No. 77/2004.

protection in the finance sector in respect of borrowing. The Real Estate Agencies Act<sup>159</sup> and the Protection of Buyers of Apartments and Single Occupancy Buildings Act<sup>160</sup> grant consumers protection in respect of the transfer of immovable and movable goods and regulate the activities of real estate agents by setting out rules concerning advertising of property. The Electronic Communications Act<sup>161</sup> sets out rules governing the use of electronic communication in business – consumer transactions.

Finally, a number of business associations have adopted codes of conduct, which set out rules concerning good business practices such as: (i) the Statute of the Slovenian Chamber of Commerce,<sup>162</sup> (ii) the Slovenian Advertising Code<sup>163</sup> of the Slovene Advertising Chamber; (iii) the Banking Code of the Association of Banks;<sup>164</sup> (iv) Code of Legal Ethics of the Bar Association,<sup>165</sup> and (v) the Doctors' Code<sup>166</sup> adopted by the Medical Council of Slovenia.

However, such Codes, apart from those set out by the Chamber of Commerce, the Medical Council and Bar Association, are of limited effectiveness. Adherence is strictly voluntary, and there are few sanctions for breach. That said, the rules set out in these codes provide evidence as to what amounts to good business practices in a specific sector. The courts may then use these as a basis for determining whether certain actions by a business amount to an unfair commercial practice once the Directive is transposed.

## ii. Does a general clause on unfair commercial practices exist?

No general clause on unfair commercial practices exists in Slovenian law. Instead of a general clause on unfair commercial practices certain commercial practices regarded as unfair under the Directive are prohibited under Article 13 of the Competition Act as amounting to unfair competition. Article 13 defines unfair competition as “an act which is contrary to good business practices and causes or is likely to cause damage to other participants in the market”. Article 13(3) sets out a non-exhaustive list of commercial practices which in all circumstances are regarded as constituting unfair competition, including (i) “advertising or offer of goods and products which is misleading”; (ii) “advertising or offering of goods and services which denigrates another company on an ethnic, racial, political or religious basis”; (iii) “provision of information which damages or could cause damage to the reputation or business of another company”. It should be, however, reiterated that the aim of the Competition Act is to ensure fairness amongst competitors and, thus, only indirectly to protect the economic interests of consumers from unfair business-to-consumer practices.

More generally, Article 25 of the Consumer Protection Act imposes a general requirement on a business that sells goods or provides services to consumers to do so “in a manner which is not contrary to good business practices”. However, the Act does not contain a definition of the term “good business practices”.

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159 Zakon o nepremičninskem posredovanju, Official Gazette of the Republic of Slovenia No. 42/2003.

160 Zakon o varstvu kupcev stanovanj in hiš, Official Gazette of the Republic of Slovenia No. 18/2004.

161 Zakon o elektronskih komunikacijah, Official Gazette of the Republic of Slovenia No. 43/04.

162 See in particular, Article 81. For details of the Statute see <http://www.gzs.si/Nivo3.asp?ID=74>.

163 See [http://www.soz.si/ogljasevalsko\\_razsodisce/slovenski\\_ogljasevalski\\_kodeks/](http://www.soz.si/ogljasevalsko_razsodisce/slovenski_ogljasevalski_kodeks/) for details of the Advertising Code of the Slovenian Advertising Chamber.

164 For details of the Banking Code see a: [http://www.zbs-giz.si/slo/akti/bancni\\_kodeks/bancni\\_kodeks.htm](http://www.zbs-giz.si/slo/akti/bancni_kodeks/bancni_kodeks.htm).

165 For details of the Code of Legal Ethics see <http://www.odv-zb.si/default.aspx?cid=2&aid=11>

166 For details of the Doctor's Code see <http://www.zzs-mcs.si/kodeks#E3184>.

**iii. Who or what is protected by these provisions (e.g. consumers, customers in general, competitors, functioning of markets?)**

The Competition Act accords protection to all participants in the market from unfair competition rather than protecting consumers specifically. As discussed above, Article 13(2) of Competition Act defines unfair competition as an act contrary to good business practices which causes or is likely to cause damage to another market participant. The term “market participant” is not defined in the Act but most commentators are of the view that consumers fall within the ambit of this provision and are, therefore, afforded protection.

Articles 26 and 27 of the Competition Act accord a market participant, including a consumer, the right to commence legal proceedings to obtain, *inter alia*, damages or a declaration for the cessation of unfair competition. The authors are not aware of any case to date brought by a consumer against a company for a breach of the Competition Act. It should also be noted that Article 28 of the same Act gives the Market Inspectorate the power to ensure compliance with the provisions of the Act and to impose sanctions in case of a breach of the Act.

**iv. Are there definitions of consumers, specific groups of customers, such as “vulnerable consumers” or “children”, and are there definitions of “business”, “trader” or similar terms?**

Only a few of the above-listed terms are defined under Slovenian law. These will be briefly examined below.

*(a) Definitions of the Terms “Consumers” and “Business”*

Article 2 (1) of the Competition Act defines, for the purposes of the Act, a business as “any legal and natural persons who undertake commercial activities regardless of their legal ownership or organisational structure”. Article 2(2) of the same Act defines a “business activity” as “any activity that is performed in the market including the buying or selling of goods or transport, tourist, building or any other services, and banking, financial, insurance and similar services.

Article 1(2) of the Consumer Protection Act defines a “consumer” as “a natural person who is purchasing or using goods or services for purposes that are outside his professional or business activity”. Article 1(3) of the same law defines a “business” as “any legal or natural person who carries-on commercial activities, regardless of such person’s legal or organisational form or ownership structure”. Article 1(4) goes on to clarify that the obligations imposed on a business under the Consumer Protection Act extend to public institutions and other organisations and natural persons providing goods and services to consumers. This Act also defines the terms “producer”, “exporter” and “services of an information company”.

*(b) Definition of the Term “Children”*

The term “children” is not defined under Slovenian law. However, Article 117 of the Marriage and Family Relations Act<sup>167</sup> provides that a child becomes an adult at the age of 18, when parental rights cease.

Children are granted special protection under Slovenian law. In particular, Article 15 of the Consumer Protection Act protects children against advertising “which causes or is likely to

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<sup>167</sup> Zakon o zakonski zvezi in družinskih razmerjih, Official Gazette of the Republic of Slovenia No. 69/2004.

cause them physical, mental or other harm ... [or] exploits or is likely to exploit their trust or lack of experience". However, the Act contains no definition of "children". Similarly, Article 49 of the Public Media Act prohibits advertising to children and advertising depicting children that morally or psychologically affects children, without defining the concept of "children".

*(c) Definitions of the Terms "Young Consumer" and "Vulnerable Consumer"*

There is no general definition of "young consumers" or "vulnerable consumer" under Slovenian law. Although not referring to "vulnerable consumers", the Energy Act provides in Article 76 that energy suppliers "cannot cease to provide energy below the quantity that in view of the circumstances (time of the year, place of residence and financial situation ...) is necessary to ensure the life and health of ...consumers". As such, in the case of energy provision, specific protection is accorded to a certain category of consumers.

**v. How are rules on fair commercial practices interpreted (e.g. by public authority, case law, or codes of conduct)?**

The authors are aware of only one reported case of the Administrative Court which concerned the meaning of good business practices. In its decision U 1622/2000 the Court held in a case concerning a breach of Article 13 of the Competition Act that a business breached good commercial practices by failing to print, in the same-sized print, that participation in its prize competition did not require the purchase of its products. It held that in doing so, the business had misled consumers.

**b) Provisions on Specific Issues**

**i. Are there other provisions and case law prohibiting misleading advertising?**

It should be noted that Slovenia harmonised its laws in respect of consumer protection with the *acquis communautaire* upon entry into the EU in May 2004. Consequently, it has transposed the relevant EU Directives concerning consumer protection such as, for example, on misleading advertising and distance contracts.

Please note that Articles 6 and 7 of the Directive relate to misleading actions and omissions rather than misleading advertising. Misleading advertising is dealt with below.

Article 12(b) of the Consumer Protection Act defines misleading advertising as "advertising... which misleads or is likely to mislead a consumer targeted or exposed to such advertising and which in view of its misleading nature is likely to influence the commercial behaviour of such consumer or which, for the same reasons, is likely to cause harm to a competitor". In particular, paragraph (b) of the same Article provides that "misleading advertising" is advertising which takes advantage or could take advantage of a consumer's inexperience, is unclear, contains exaggerations or content which could or is likely to mislead a consumer. Furthermore, this Article provides that advertising of goods and services must not be contrary to the law and must not be indecent or misleading. Indecent advertising is also prohibited under Article 12(a) of the Act. This Article defines "indecent advertising of goods and services" as "advertising whose content either insults consumers, readers, listeners or viewers, or is *contra bonos mores*". Article 12 (b) was inserted in 2002 in order to harmonise Slovenian law with the EU Directive on misleading advertising.

Misleading advertising is also caught under the provisions of the Competition Act if it causes confusion in the market or takes advantage of the inexperience of consumers as per Article 13(3) of the Act.

It should be noted that an omission of material information by a business is not *per se* misleading under Slovenian law. However, under Article 13(3) of the Competition Act "hiding faults of the goods and services" is deemed to be an act of unfair competition and is, therefore, prohibited. Moreover, to the extent that a business omits material information when advertising a service or product, such misleading omission would fall within the ambit of "misleading advertising" under Article 12(b) of the Consumer Protection Act.

Finally, Article 47 of the Public Media Act<sup>168</sup> prohibits subliminal advertising and provides that advertising must not (i) affect human dignity; (ii) incite racial, sex or ethnic discrimination or religious or political intolerance; (iii) encourage actions which damage health and safety of people or the cultural heritage; or (iv) damage the interests of consumers. Moreover, as discussed in sub-sections (b) and (c) of Section (I) (a) (iv) above, particular laws govern advertising to children.

## **ii. Are there other provisions and case law regulating comparative advertising?**

Comparative advertising is defined in Article 12(c) of the Consumer Protection Act. This Article was inserted into the Consumer Protection Act in order to harmonise Slovenian law on consumer protection with the *acquis communautaire*. It is defined as "advertising which directly or indirectly identifies a competitor or the goods and services offered by such a competitor. Comparative advertising is permitted under the said Article if: (i) it is not misleading; (ii) it compares verifiable data concerning goods and services, which satisfy the same demand or have the same purpose; (iii) it objectively compares one or more objective, relevant or representative features of such goods, including price; (iv) it does not cause confusion in the market between the advertiser and its competitors or between the advertiser's trade and service marks, trade names or other distinguishing marks of its goods and services and those of its competitors". There are no reported cases concerning comparative advertising in Slovenia.

It should be noted that at present lawyers are prohibited from advertising their services pursuant to the Statute of the Bar Association.<sup>169</sup> Advertising in breach of the Statute can result in the lawyer being warned, fined or barred from practising as a lawyer.

## **iii. Are there other provisions and case law regulating aggressive practices?**

There is no law or case law regulating aggressive practices as defined in the Directive. A consumer can bring an action under tort and contract law for actions undertaken by a trader that fall within the definition of aggressive practices as defined under the Directive. However, there is no specific law which defines such actions as aggressive practices. Under contract law, a consumer can set aside a contract if he/she can show undue influence. Alternatively, a consumer

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168 Zakon o medijih, Official Gazette of the Republic of Slovenia nos 35/2001, 54/2002, Skl.US: U-I-177/02-5, 62/2003, 73/2003 Odl.US: U-I-177/02-15, 113/2003 Odl.US: U-I-181/01-12, 16/2004 Odl.US: U-I-106/01-27, 123/2004 Odl.US: U-I-207/01-20).

169 Slovenian Bar Association, <http://www.odv-zb.si/default.aspx?cid=2&aid=11>

can bring a tort action in case fraud was committed by a business. In addition, criminal proceedings can be brought in case of aggressive practices.

#### **iv. Are there provisions and case law regulating special marketing techniques?**

##### **1. Distance marketing**

In this area, Slovenian law has been harmonised with the following EU Directives: (i) Directive 2000/31/EC on electronic commerce, Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, Directive 97/7/EC on the protection of consumers in respect of distance contracts, Council Directive 85/577/EEC on the protection of consumers in respect of contracts negotiated away from business premises.

In particular, Article 45 of the Consumer Protection Act provides that unsolicited goods sent by a company to a consumer with the purpose of concluding a contract of sale are deemed as “promotional gifts”.

Article 45(a) of the same Act provides that a company may only use automatic calling devices, faxes and e-mail if it obtains prior consent of the consumer to whom such information is directed. The Article also requires the person making a telephone call to “reveal at the beginning of each call the name and seat of the company on whose behalf he is calling and clearly state that the call is a business related call”. Finally, the Article enables the consumer to inform a company if he no longer wishes to receive information from such company and requires such company to desist from sending him any information which relates to the purchase of any product or provision of any service. If a business is found by the Market Inspectorate to be in breach of the above-mentioned provisions it will be liable to pay a fine ranging between SIT 1 million to 10 million.

Similarly, Article 109 of the Electronic Communications Act, which harmonised Slovenian law with the EU Directive on electronic commerce, prohibits automatic calling systems, fax machines and e-mails for the purposes of direct marketing, except where prior consent has been given by the consumer to whom such information is directed.

##### **2. Face to face marketing**

Rules on door-to-door selling are set out in Articles 46, 46(a), 46(b), and 46(c) of the Consumer Protection Act and are harmonised with the *acquis communautaire*. In addition, Article 51 of the Regulation on minimal technical and other requirements concerning premises for the sale of goods and the sale of goods outside shops<sup>170</sup>, which was adopted under the Trade Act, prescribes the types of goods which can be sold door-to-door. The following goods can *inter alia* be sold door-to-door: books, periodicals, art reproductions, small household appliances and goods, ceramic and porcelain household goods and cosmetics. A business found to be in breach of this Article is liable to pay a fine of at least SIT 1 million.

There is no law in Slovenia concerning multi-level-marketing or the ‘snowball’ system.

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170 Official Gazette of the Republic of Slovenia No. 28/1993, 57/1993, 110/2002.

### 3. Price reduction techniques

#### (a) General Rules

Article 15(a)(2) of the Consumer Protection Act requires communications regarding special offers (sales, premiums, gifts or similar) to be “clearly identifiable, the conditions concerning such offers easily available and clearly and unambiguously listed”.

Advertising a fictitious price reduction or sale that misleads consumers regarding the price of the goods in question falls within the scope of unfair competition as per Article 13 of the Competition Act and is, therefore, prohibited.

The specific rules governing price reductions, seasonal sales, free gifts, liquidation sales and loyalty cards are set out in turn below.

#### (b) Rules Governing Price Reductions

The general rules governing price reductions are set out in Article 28 of the Consumer Protection Act. Article 28(1) of the Article provides that a business must announce a sale in the manner which is typical for the region in which it operates. What is regarded as a typical announcement of a sale in a region is not defined in the Act. Paragraph (2) of the Article provides that a business offering goods on sale must clearly specify the discount offered on the goods being sold, as well as the duration of the sale. This Article provides that goods offered on sale must be labelled with the pre-sale and sale price. Paragraph 3 of this Article provides that if a price reduction is advertised as a percentage discount from the original price, then at least a quarter of all goods being offered on sale must be offered at the advertised rate of discount.

More specifically, Article 29 of the Consumer Protection Act provides that if a product is being offered for sale because of its impending expiry date, the expiry date must be clearly visible on the product. In addition, Article 30 provides that faulty goods must be (i) clearly labelled as such, (ii) displayed separately from the other goods on sale, and (iii) individually labelled.

The Consumer Protection Act provides in Article 78 that a sole proprietor or a company who fails to comply with Articles 28(1), 28(2) and 30 is liable to pay a fine of SIT 200,000 and SIT 300,000 respectively. Article 79 imposes a fine of between SIT 1,000,000 and 5,000,000 and SIT 3,000,000 and 10,000,000 respectively on a sole proprietor and a company for breaching Article 28(3).

#### (c) Seasonal Sales

The Consumer Protection Act does not contain any rules concerning seasonal sales. The Slovene Chamber of Commerce adopted Rules Concerning Seasonal Sales of Textile Goods and Shoes<sup>171</sup> on 8 December 2004. Article 6 of these Rules provides that summer and winter sales cannot commence before 15 July and 6 January respectively. Article 5 provides that seasonal sales cannot last longer than 3 weeks. Moreover, the Rules prohibit a company from offering any discounts 5 days before the beginning of either the winter or the summer sales in respect of goods which will be offered at the sales.

Since membership of the Slovenian Chamber of Commerce is compulsory by law for all Slovenian companies, the above-mentioned rules are binding on them. Article 7 provides that

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171 Pravila Pri Sezonskih Razprodajah Tekstilnega Bлага in Obutve, Official Gazette of the Republic of Slovenia No. 135/2004.



the court of the Slovenian Chamber of Commerce has the power to fine a company in breach of these Rules and/or to issue a warning.

*(d) Rules Governing Offers of Free Gifts*

Article 13 of the Competition Act provides that an offer or promise of a prize or any other benefit or advantage the value of which significantly exceeds the value of the goods and services being offered will be considered as unfair competition and, consequently, will be prohibited. The Supreme Court held in its decision U1388/94 in 1994 that an offer of a gift or prize which exceeded by 30 fold the value of the good or service being sold amounted to unfair competition as per Article 13 of the Competition Act. Pursuant to Article 28 the Market Inspectorate is empowered to prohibit such actions by businesses where it determines that there has been a breach of Article 13.

**v. Are there specific provisions and case law regarding information requirements (e.g. rules that impose on traders a duty to disclose to the consumer all “material information”)?**

Article 32 of the Consumer Protection Act provides that a business must familiarise consumers with the characteristics of the product being offered for sale. Article 32(2) of the same Article provides that a business must show how a selected product is to be used or operated showing that it is free of fault. If this is not possible, then detailed instructions and information must be given to the consumer concerning the product being sold. Article 33 goes on to provide that easily understandable and clear instructions concerning the use of a product must be provided with it at the time of sale. Finally, Article 34 provides that at the time of the sale of a product a company must provide certificates, warranties, instructions for the assembly and use of the product, lists of authorised service providers and other accompanying documents as prescribed by law. at the time of the sale. The Act prescribes high fines and authorises the Market Inspectorate to issue decisions prohibiting the sale of products sold in breach of these provisions. In addition, specific and more detailed provisions regarding the information which needs to be provided at the time of the sale of certain products have been promulgated under Slovene law.

**vi. Are there specific provisions and case law concerning specific sectors (e.g. final consumers)?**

As mentioned above, laws have been enacted prescribing the scope of the information that must be provided in specific sectors of the economy. For example, in line with the EU Directive on consumer credit, Articles 5 to 7 and 9 of the Consumer Credit Act<sup>172</sup> set out information requirements for consumer loans. In addition, Article 888 of the Code of Obligations sets out the information that needs to be provided to consumers by package tour operators.

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<sup>172</sup> Zakon o potrošniških kreditih, Official Gazette of the Republic of Slovenia no. 77/2004.

**vii. What are the national laws of post-contractual and after-sale commercial practices?**

A number of provisions of the Consumer Protection Act regulate post-contractual and after-sale commercial practices. Discussed below are the obligations of a business concerning repairs and defective products.

Article 16(2) of the Consumer Protection Act provides that the producer or the trader who does not himself offer repair services in respect of a good for which a warranty is prescribed by law must ensure that an authorised service for the repair of such good is available to the consumer. Paragraph (5) of the same Article requires that the producer of a good for which a guarantee is prescribed by law must ensure the maintenance, spare parts and additional attachments for a period of at least three years after the expiry of the warranty period.

The rights of consumers in respect of a “fault” are set out in Article 37 of the Consumer Protection Act. In particular, under Article 37(c), a consumer has a right, in case of a fault to request that the trader: “(i) rectify the fault, (ii) reimburse such proportionate part of the purchase price so as to compensate the purchaser for the fault, (iii) replace the faulty product with a fault free product, or (iv) reimburse the consumer for the full amount paid for the product”. Article 37(b) provides that the trader is not responsible for faults which become apparent two years after the good was purchased. In case of a used good the trader’s liability ceases a year after its purchase. Article 37(a) requires the consumer to inform the trader within two months of his/her discovery of the defect, set out in details the nature of the defect and enable the trader to examine the good in question. Article 37 states that there is a “fault” if (i) the product “does not have the characteristics necessary for its ordinary use, (ii) the product “does not have the characteristics necessary for the particular use for which the consumer has purchased it and which was known or ought to have been known by the retailer at the time of sale”, (iii) the “product does not have the characteristics which were expressly or implicitly agreed or are prescribed”, and (iv) “if the trader delivers a good which is not the same as the sample or model previously offered, except where the sample or model was exhibited only for information purposes”. Finally, Article 37 provides that the obligations of a trader concerning “faults” under this Act cannot be limited or excluded pursuant to a contract.

Similar rights are granted to consumers in respect of a service incorrectly provided under Article 38.

In addition, after-sale practices are commonly set out in contracts for the supply of goods and services and the consumer is able to invoke contract law remedies in case of a breach of the after-sale terms set out in such contracts.

**viii. Are there provisions and case law on handling complaints?**

No general provision on handling complaints exists under Slovene law. However, in the case of a complaint regarding a faulty product, Article 39 of the Consumer Protection Act requires a company to either (i) reply to a consumer within 8 days of receipt of the product if it does not believe the product is faulty or (ii) comply with the request of the consumer where the product is faulty. Article 78 provides that a sole proprietor or a company who fails to comply with this Article is liable to pay a fine of SIT 200,000 and SIT 300,000 respectively.

As the decisions of the Market Inspectorate are not publicly available it is not possible to review its decisions concerning breaches of this Article 39. The authors have not found any published case law in respect of this issue.

## **II. Possible obstacles to the Directive on Unfair Commercial Practices from the national law perspective**

### **a. What are the main obstacles from the point of view of your country, which might result, complicate transposition and implementation of the Directive?**

There is currently no comprehensive law on unfair business-to-consumer commercial practices in Slovenia. In the authors' view the simplest way to transpose it, and minimise any overlap and inconsistency in the law, would be to amend the Consumer Protection Act so as to incorporate the provisions of the Directive.

The main obstacle in the process of transposition will be the complexity of the process of harmonising the provisions of the numerous laws, regulations and decrees which address business-to-consumer practices with the terms of the Directive. This legislation will have to be amended or revoked. Laws covering different aspects of business to consumer practices include the Consumer Protection Act, the Competition Act, the Energy Act, the Banking Act, the Electronic Communications Act and the Real Estate Agencies Act. Consequently, the transposition of the Directive will not be an easy or straightforward task. Nevertheless, it represents an opportunity to develop a more coherent body of law in the field of unfair commercial practices in Slovenia.

In addition, the professional organisations, particularly those whose membership is mandatory under law, such as the Slovene Chamber of Commerce, will need to amend their codes of conduct.

Another difficulty in the process of transposing the Directive into Slovenian law will be to ensure that a coherent system of sanctions in case of an infringement is established. If the government decides to transpose the Directive in a piecemeal way rather than by adopting a single new law, this will further complicate the adoption of a coherent sanctions system. Given that at present the Market Inspectorate is empowered to sanction breaches of the Consumer Protection Act, there will also be a need to make its decisions publicly available. The slowness of the Slovenian court system will also be another key obstacle in the implementation of the Directive.

Although the Directive aims to ensure that the laws of Member States are harmonised in the field of the protection of a consumer's economic interest from unfair business-to-consumer commercial practices and is without prejudice to the laws Member States might otherwise adopt concerning health and safety, public morality and competition law, drawing a line between these will not be straightforward. The Directive provides that only the information required in Community law is considered as material and that laws of Member States must be harmonised so as to ensure that a failure to provide extra information does not constitute a misleading omission. Given that Slovenian law prescribes more stringent information requirements in respect of certain goods (for example, electrical goods) and in relation to certain sectors of the economy, it would seem that certain laws will also have to be amended even though they were introduced specifically to protect the health and safety of consumers.

**b. Do you see any incompatibilities within your national legal system?**

As a general rule, the adoption of 1 rules prohibiting unfair commercial practices would be in accordance with the Slovene legal system. The key to ensuring that Slovenian law is not incompatible with the provisions of the Directive is to undertake a careful review of all the laws which address aspects of unfair commercial practices to eliminate any inconsistency and overlap. If the Directive is transposed by adopting a new law or amending the Consumer Protection Act, then, for example, the Competition Act will need to be amended to remove the right it creates for consumers to instigate actions in the case of unfair competition. This would be necessary to avoid overlap and inconsistency with the more general provisions which would now exist under Slovenian law.

The fact that under Slovenian law a consumer has the right to commence proceedings under contract or tort law in respect of unfair commercial practices would not render Slovenian law incompatible with the provisions of the Directive. These sanctions would apply in addition to those prescribed by the law transposing the Directive and would in no way affect the primary purpose of the Directive of setting EU-wide rules regarding circumstances under which business practices are considered unfair.

**c. How could the Directive be transposed into your national law?**

There are two ways in which the Directive could be transposed into Slovene national law: (i) the adoption of new law or (ii) the amendment of the Consumer Protection Act. We believe that the best approach would be to amend the Consumer Protection Act to bring it in line with the provisions of the Directive. This would avoid the situation in which two laws would cover the same subject matter. It would also mean that key consumer rights would be set out in a single document which would make it easier for consumers to be aware of their rights.

**d. What would be – from the perspective of your national law – the appropriate sanctions in case of infringement of the general clause of the Directive? Is there a system to enforce the provisions on fair commercial practice? How is this organised?**

It is the authors' view that the system of sanctions prescribed under the Consumer Protection Act should be extended to cover also cases of infringement of the Directive's general provision. The present system of sanctions is described in some detail below. We would also propose that the rights granted to consumers to initiate proceedings to recover damages under Article 27 of the Competition Act be duplicated in respect of unfair commercial practices by inserting such a provision into the Consumer Protection Act if the proposed method of transposing the Directive by way of an amendment of this Act is adopted.

Set out below is a brief description of the current legal framework for enforcing the provisions concerning unfair commercial practices.

*(a) Breach of the provisions of the Consumer Protection Act*

The Market Inspectorate is given extensive powers under the Consumer Protection Act to enforce the rights accorded to consumers under this Act. In particular, Article 72 grants the Market Inspectorate the right to issue decisions to prevent the sale of goods or services in the

case of breaches of the Act concerning price reductions. In addition, Article 73 of the Consumer Protection Act accords the Market Inspectorate power to (a) temporarily prohibit advertising of goods and services, or (b) prevent the publication of advertising if such advertising is pending publication, should it determine that "(i) a business is advertising its goods and services in a manner contrary to this Act, indecently or misleadingly or if it does not advertise in the Slovenian language; (ii) a business comparatively advertises goods and services in a manner contrary to the provisions of this law; or (iii) advertising contains elements which cause or are likely to cause physical, mental or other damage".

The procedure which Market Inspectorate needs to follow in issuing decisions and sanctions is regulated by law. Given that the decisions of the Market Inspectorate are not publicly available, its role in interpreting the rules from the point of view of precedential value is limited. The decisions of the Market Inspectorate are appealable.

Pursuant to Article 74(1) of the Consumer Protection Act consumer organisations and professional associations of which a business is a member can commence proceedings against it should it adopt commercial practices contrary to the provisions of the Act. In respect of misleading and comparative advertising the courts have the power to issue a temporary injunction prohibiting the publication of advertisement not yet published or demand the cessation of such advertising. The courts are able to fine a sole proprietor or business which (i) advertises goods and services in a manner contrary to the Consumer Protection Act, whether incidentally or misleadingly; (ii) does not advertise the goods and services in the Slovene language; or (iii) comparatively advertises goods and services contrary to the provisions of the Consumer Protection Act. The minimum fines imposed on a sole proprietor and businesses are set out in Articles 77 and 78 of the Act. Finally, pursuant to Article 74(2) of the Consumer Protection Act the courts can, at the request of the consumer, require that its decision be published.

Moreover, Article 75(3) grants consumer organisations and independent public bodies, such as an ombudsman from another EU Member States, the right to initiate proceedings if the rights of consumers in such country are affected by misleading and comparative advertising by a business in Slovenia.

*(b) Breach of the Competition Act*

Consumers can also initiate claims for damages under Articles 26 and 27 of the Competition Act in case of an unfair commercial practice that falls within the scope of unfair competition as per Article 13 of the Competition Act. However, the authors are not aware of any such claim having being brought to date by a consumer.

*(c) Breach of Rules of a Professional Association*

A breach by an individual of the rules of a professional association, such as those of lawyers, accountants and doctors, carries certain sanctions. As discussed in Section I above, certain of these associations prescribe rules on comparative advertising and other commercial practices. A breach of such rules may result in the debarment from the profession. However, the authors are not aware of any instance of debarment to date on the grounds of unfair commercial practices.

*(d) General Rights of Consumers under Contract and Tort Law*

Most typically, consumers enforce their rights concerning unfair commercial practices under contract law by initiating proceedings for breach of contract or by seeking injunctive relief. In certain instances, actions for breach of tort law can be brought as well.

As discussed above, the most significant obstacle to the effective enforcement of the Directive is the ineffectiveness and slowness of the Slovenian court system. Reducing delay and making the judicial system more effective and efficient, including training judges in consumer protection and the introduction of Court case management, will be crucial to the effective enforcement of rules concerning unfair commercial practices in Slovenia.

**e. How would the Directive be delimited to the following fields of law?**

**i. Contract and Tort Law**

Articles 1 and 23 of the Consumer Protection Act provide that contract terms which contravene or exclude the application of the provisions of the Consumer Protection Act are void and unenforceable under Slovene law. Should the provisions of the Directive be inserted into the Consumer Protection Act, the same would apply to contracts seeking to contravene its provisions.

Unless otherwise expressly provided, the transposition of the Directive into Slovene law would not affect the rights granted to consumers in respect of unfair commercial practices under contract or tort law.

**ii. Competition Law (aiming at the protection of the consumer)**

As discussed above, the Competition Act would need to be amended to remove the right of a consumer under Articles 26 and 27 to initiate proceedings to obtain damages for breach of unfair commercial practices in order to ensure that there is no overlap or inconsistency. The right granted to a consumer to obtain damages for a breach of the Competition Act should be inserted into the Consumer Protection Act.

The right of a competitor to initiate proceedings in respect of unfair commercial practices of a business which impacts unfairly on competition would be preserved in accordance with Article 11 of the Directive. This provides that national laws must enable a competitor to take legal action in case of unfair commercial practices.

**iii. Intellectual Property Law (e.g. Imitation)**

The activities permitted pursuant to intellectual property law would not be regarded as unfair commercial practices. At the same time unfair business-to-consumer commercial practices which breach intellectual property rights of another business would be considered by the courts as breaching good business practice requirements set out in Article 25 of the Consumer Protection Act. Imitation which does not breach intellectual property rights would remain permitted under Slovenian law upon the transposition of the Directive, except if the similarity of products would result in the consumer being confused as to the origin of the product and causing him/her to be misled.

**iv. Protection of Enterprises (esp. SMEs)**

The authors are not aware of any laws concerning enterprises which would be affected by the transposition of the Directive, or whose operation would affect the implementation of the Directive.

**v. Product Safety and Product Liability**

The authors see no particular need to delimit the scope of the Directive in respect of product safety and product liability. A business which produces or sells a product that breaches product safety laws would be, in addition to being liable under tort and contract law, held to have infringed the general clauses of the Directive.

**vi. Criminal Law**

The Slovenian Penal Code provides in Article 237 that deceiving consumers is a criminal act and provides that a person committing such an act is either liable to pay a fine or [X?] two year jail term. Since the Directive does not prescribe the sanctions for the infringement of the provisions of the Directive, the Penal Code would not need to be amended.

**vii. Public Policy (Questions of Decency)**

It is clear from paragraph 7 of the preamble of the Directive that it does not seek to address the legal requirements relating to the taste and decency or health and safety. Thus, the right of a Member State to ban or regulate commercial practices in its territory in conformity with Community law on these grounds is preserved even where such practices do not limit consumers' freedom of choice. At present, the Consumer Protection Act, the Media Act and certain other laws set out legal requirements concerning taste and decency, particularly in the area of advertising. If the Directive is transposed into Slovene law by amending the Consumer Protection Act, then either the provisions concerning these public policy issues will need to be preserved or legislated for by enacting another act.

**f. Is there any national unfair commercial practices law, including case law, which may constitute a barrier to the internal market, for example case law which raises questions similar to *Estée Lauder*, *Clinique* and *De Agostini*?**

Our research has not revealed any law which would constitute a barrier to the internal market concerning questions raised in the above-listed EU case law. The only possible barrier to the internal market may be the restrictive rules on comparative advertising imposed by professional associations with mandatory membership, in particular, the association of lawyers - since it is difficult to enter a market if one is prohibited from advertising.



## Questionnaire to national experts

### I. Existing national law

- a. *General Provisions on Unfair Commercial Practices*
  - i. Could you describe the general legal framework of the law on unfair commercial practices in your country (e.g. structures, main acts/statutes, leading cases, codes of conduct, self-regulation)?
  - ii. Does a general clause on unfair commercial practices exist?
  - iii. Who or what is protected by these provisions (e.g. consumers, customers in general, competitors, functioning of markets)?
  - iv. Are there definitions of consumers, specific groups of customers, such as “vulnerable consumers” or “children”, are there definitions of “business”, “trader” or similar terms?
  - v. How are rules on fair commercial practices interpreted (e.g. by public authority, case law, codes of conduct)?
- b. *Provisions on specific issues*
  - i. Are there other provisions and case law prohibiting misleading advertising?
  - ii. Are there other provisions and case law regulating comparative advertising?
  - iii. Are there other provisions and case law regulating aggressive practices?
  - iv. Are there provisions and case law regulating special marketing techniques (esp. pressure selling techniques) like
    1. distance marketing (e.g. cold calling, automatic calling devices, e-commerce, unsolicited goods etc);
    2. face to face marketing (e.g. door-to-door selling, touting for consumers in public places, snowball systems, Multi-Level-Marketing etc);
    3. price reduction techniques (e.g. rebates, free gifts, end of season sales, liquidation sales, sale at a loss, loyalty cards etc).
  - v. Are there specific provisions and case law regarding information requirements (e.g. rules that impose on traders a duty to disclose to the consumer all “material information”)?
  - vi. Are there specific provisions and case law concerning specific sectors (e.g. final consumers)?
  - vii. What are the national laws of post-contractual and after-sale commercial practices?
  - viii. Are there provisions and case law on handling complaints?

### II. Possible obstacles to the Directive from the perspective of your national law

- a. *What are the main obstacles from the point of view of your country which might complicate transposition and implementation of the Directive?*
- b. *Do you see any incompatibilities within your national legal system?*
- c. *How could the Directive be transposed into your national law?*
- d. *What would be – from the perspective of your national law – the appropriate sanctions in case of infringement of the general clauses of a possible*

*Directive? Is there a system to enforce the provisions on fair commercial practice? How is this organised?*

- e. *How would such a Directive be delimited to the following fields of law?*
- i. Contract and Tort Law
  - ii. Competition law (aiming at the protection of the consumer)
  - iii. Intellectual Property Law (e.g. Imitation)
  - iv. Protection of Enterprises (esp. SME)
  - v. Product Safety and Product Liability
  - vi. Criminal law
  - vii. Public policy (questions of decency)
- f. *Is there any national unfair commercial practices' law, including case law, which may constitute a barrier to the Internal market, for example case law which raises questions similar to cases like Estee Lauder, Clinique and De Agostini?*

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