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UNFAIR COMMERCIAL PRACTICES

Recent developments, online marketing, and kids ads

edited by
Tihamér Tóth PhD

PÁZMÁNY PRESS

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A PÁZMÁNY PÉTER KATOLIKUS EGYETEM
JOG- ÉS ÁLLAMTUDOMÁNYI KARÁNAK
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PREFACE

The Pázmány Péter Catholic University's Competition Law Research Center organized its first international conference back in 2013. The initiative has grown into an annual event aiming at to bring together law enforcers, judges, private practitioners, academics and students to discuss practical problems relating to misleading advertising and other unfair trade practices covered by the EU Directive prohibiting unfair commercial practices. The cross-border nature of the coverage of marketing campaigns makes harmonized enforcement a necessity. We hope that in the long term not only officials of enforcement authorities and judges but also business will benefit from this dialogue. Law enforcers in different EU Member States are tackling similar issues, the annual conference intends to provide a forum for exchanging their experience and listen to comments from the business, thereby contributing to a more unified approach in interpreting the provisions of the UCP Directive.

Our second book builds on the presentations of the third and fourth UCP conferences covering recent legal and policy development at EU level and in Member States like Poland, the Netherlands, Italy and Hungary. Other papers focus on the concept of the average consumer, unfair commercial practices occurring in the online market place, in social media, and advertisements targeting children.

We are grateful to the supporters of the event Fundamenta Lakáskassza, Telenor, the Advertising Self-regulatory Board and the Hungarian Brands Association.

Tihamér Tóth
head of the organization board
of UCP Pázmány Conferences

ALL ROADS LEAD TO ROME

Protection Against Unfair Advertising on Social Media

Monika Namysłowska*

1. Introduction

When did you last check your account on Facebook or LinkedIn? When did you use Twitter, Instagram or YouTube? Last week? Yesterday? Most probably today. Our everyday life is becoming more and more taken up with and influenced by the phenomenon of social media, that is, the use of web-based and mobile technologies for platforms of user-generated content. Social media consists of online communication channels dedicated to interaction, such as social networking sites, blogs, chat rooms, micro-blogging sites and discussion forums.[1]

The users of social media post, tweet and share their likes, which quickly spread and multiply. As a result, social media provides traders with the network effect in online advertising and at the same time it delivers essential information on consumer behaviour and preferences.[2] Traders use social media

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1 See e.g. Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, SWD(2016) 163 final, point 5.2.9.; https://en.wikipedia.org/wiki/Social_media; F. Lichtnecker: Die Werbung in sozialen Netzwerken und mögliche hierbei auftretende Probleme. *Gewerblicher Rechtsschutz und Urheberrecht,* 2013/2. 135.; T. Schwenke: *Social Media Marketing und Recht*. Köln, 2014. 4.

2 First Report on the application 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 ('Unfair Commercial Practices Directive'), COM(2013) 139 final, point 3.4.2.

to promote and advertise products because the specific characteristics of these communication channels allow for targeted and therefore effective advertising.[3] This enormous marketing potential of social media has led to its development from a tool used mainly for private purposes to a space of intense activities on the part of traders.

Social media raises a variety of legal questions[4] concerning data protection, employment issues, contract terms etc. Online commercial practices, among them advertising, may also be unfair. Owing to its scale, the issue of unfair advertising on social media cannot be underestimated. In September 2016 Facebook enjoyed 1.71 billion monthly active accounts, WhatsApp – 1 billion, Twitter – 313 million, Instagram – 500 million and LinkedIn – 106 million.[5] YouTube has over one billion active monthly users,[6] while the number of blog users may not be calculated reliably. These overwhelming numbers, which are increasing with each passing day, are actually understated since many users of social media visit these websites several times a day. Additionally, the viral nature of social media leads to an incalculable and unpredictable dissemination of user-generated content, even if the companies involved intend to cease the commercial practice in question or not wish to advertise at all on social media.[7] Consequently, the unfairness of advertising on social media can become of an alarming scale. In order to maintain the fairness of social media, the combination of appropriate rules governing new advertising models as well as their effective enforcement have a central role to play.

2. Forms of Unfair Advertising on Social Media

Online advertising appears to be a modern commercial practice although it is worth noting that the European Commission distinguishes between its "more

[3] See Y. Draheim – Ph. Lehmann: Facebook & Co.: Aktuelle rechtliche Entwicklungen im Bereich Social Media – Marken- und Lauterkeitsrecht. *GRUR-Prax*, 2014/18. 402.

[4] See e.g. Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank "A Digital Single Market Strategy for Europe", COM(2015) 192 final, Strategia jednolitego rynku cyfrowego dla Europy, point 3.3.1.

[5] https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/.

[6] https://www.youtube.com/yt/press/en-GB/statistics.html.

[7] C. Lexa – N. Hammer: Social Media Guidelines – Sichere Kommunikation in den sozialen Medien. *Corporate Compliance Zeitschrift*, 2014/1. 46.

traditional" forms such as companies' websites and the "new advertising models" including, *inter alia*, advertising on social media.[8] Online advertising, including on social media, often takes a traditional form transferring characteristic features of offline advertising into the online world. For example, it may be the case that an advertisement on a website does not differ from an advertisement in a print magazine. However, some of the new advertising models are characteristic only for this online communication platform.

The most popular form of unfair advertisements on social media is hidden advertising,[9] which is the promotion of the supply of goods or services in the form of a supposedly neutral statement that conceals the commercial character of the practice.[10] Hidden advertising on social media may take different forms. The hidden commercial content may be inseparable from the user-generated content. Positive opinions on one's own products and negative comments concerning a competitor's offer may both result in increasing sales. The comments may be given by the traders themselves or by e.g. advertising agencies.[11] The characteristics of social media facilitate this type of unfair commercial practice. The users look for reviews on products driven by their trust in the personal judgment of other social media users believing in their neutral character.[12] Comments on virtual pinboards called "pinwall" are also popular. Fake-Accounts and fake-profiles are created for the sole purpose of publishing allegedly neutral reviews on products.[13] Astroturfing[14] and guerilla-marketing[15] may also contain hidden advertising. It is also possible to use a website similar to a blog but with a hidden commercial character.[16] A new category of native advertising is also worth mentioning, which encompasses different advertising strategies, including hidden ones, focusing on integrating

8 First Report on the application of Directive 2005/29/EC, point 3.4.2.

9 Guidance on the Implementation/Application of Directive 2005/29/EC, point 1.2.; First Report on the application of Directive 2005/29/EC, point 5.2.9.

10 See M. Namysłowska – K. Sztobryn: Zwalczanie nieuczciwej reklamy ukrytej w prawie polskim i niemieckim. In: M. Namysłowska (ed.): *Reklama. Aspekty prawne*. Warszawa, 2011. 217 et seq.

11 Lichtnecker (2013) op. cit. 139.

12 See Federal Trade Commission's Enforcement Policy Statement on Deceptively Formatted Advertisements https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf.

13 See e.g. Lichtnecker (2013) op. cit. 137 and 139.

14 F. Lichtnecker: Ausgewählte Werbeformen im Internet unter Berücksichtigung der neueren Rechtsprechung. *GRUR*, 2014/6. 527.; Schwenke(2014) op. cit. 297.

15 https://en.wikipedia.org/wiki/Guerrilla_marketing; Schwenke (2014) op. cit. 300–301.

16 Lichtnecker (2014) op. cit. 526.

advertisements with the website. Due to the matching of an advertisement's content and form to a website, native advertising does not bother consumers, entailing an easy absorption of the commercial content.[17]

Additionally, the users of social media often defer to price comparison websites. According to the European Commission, four out of five EU online consumers used a price comparison website in 2010.[18] While websites that compare prices generally do not give rise to concerns, they may however be misused in an unfair manner. An online price comparison service may belong to or be linked to a trader and be used to advertise its products. Even when websites with price comparisons are independent, a trader's activity, which consists of sourcing prices from retailers and passing this information on to consumers, must also be fair. Comparison tools may also e.g. omit their criteria for 'best deals' or display prices are not actually available.[19]

Social media also allows the use of so-called (online) behavioural advertising, which is based on the observation of the online behaviour of individuals over time, including repeated site visits, interactions, keywords and the production of online content compiled in order to develop a user profile and allow companies to present the user with advertisements which match his interests.[20] Behavioural advertising may be unfair when users are not provided with transparent and exhaustive information on receiving cookies. Behavioural advertising may also be aggressive in the form of remarketing (retargeting), which consists of the repeated engagement of a user who visited a website without buying anything. Advertisements regarding products that had once interested this user are published on other visited websites.[21]

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17 A. Wiebe – O. Kreutz: Native Advertising – Alter Wein in neuen Schläuchen? (Teil 1) *Wettbewerb in Recht und Praxis,* 2015/9. 1055–1060.

18 First Report on the application of Directive 2005/29/EC, point 3.4.2.

19 Guidance on the Implementation/Application of Directive 2005/29/EC, point 5.2.7. See also 'Key Principles for comparison tools' of 2016, http://ec.europa.eu/consumers/consumer_rights/unfair-trade/docs/key_principles_for_comparison_tools_en.pdf.

20 See e.g. Article 29 Data Protection Working Party, Opinion 2/2010 on online behavioural advertising, pp. 4 et seq; O. Tene – J. Polonetsky: To Track or „Do Not Track": Advancing Transparency and Individual Control in Online Behavioral Advertising. *Minnesota Journal of Law, Science & Technology*, 2012/1. 288 et seq.

21 See M. Namysłowska, Internetowa reklama behawioralna – między regulacją prawną a samoregulacją. In: J. Kępiński – K. Klafkowska-Waśniowska – R. Sikorski (eds.): *Własność intelektualna w obrocie elektronicznym*. Warszawa ,2015. 143 et seq.

A further example is advertising with the amount of likes, friends or followers, which may be unfair not only when the numbers are fake,[22] but also when they were bought – something agencies nowadays offer to the traders. The unfairness of this commercial practice lies in creating a false image of a company as being successful and having a throng of dedicated buyers.[23] The use of advertising links without their proper disclosure, e.g. on blogs may also have a misleading character.[24] Advertisements on social media sent individually to a user (direct messages) may be aggressive.[25] Additionally, misleading marketing concerning advertising on social networks may be based on abusive pricing, e.g. very expensive pay-per-click, while actually this service is offered by the social networks themselves at much lower rates.[26]

While the abovementioned forms of unfair advertising are the most common, more and more forms of unfair advertisements on social media are emerging, and contemporary legal systems must be prepared to deal with them effectively.

3. The basic framework of the UCPD and the MCAD

The fundamental EU legislative instrument having as its purpose to combat unfair commercial practices in the Members States is the Unfair Commercial Practices Directive (the UCPD),[27] which is applicable to the commercial practices of businesses to consumers (B2C). When a commercial practice has

[22] See Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, point 5.2.9.

[23] See Lichtnecker (2014) op. cit. 525.

[24] Schwenke (2014) op. cit. 304–306.

[25] See Ch. Solmecke: Social Media. In: Th. Hoeren – U. Sieber (eds.): *Handbuch Multimedia-Recht.* München, 2015. nb. 32–33.

[26] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions. Protecting businesses against misleading marketing practices and ensuring effective enforcement. Review of Directive 2006/114/EC concerning misleading and comparative advertising, COM(2012) 702, point 3.1.

[27] 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 ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22–39.

a business-to-business (B2B) nature, Directive 2006/114/EC on misleading and comparative advertising (the MCAD)[28] applies.

It comes as no surprise that the proposal for the Directive on misleading advertising of 1977[29] did not mention the issue of new technologies. The proposal for the UCPD only contained one reference to the Internet.[30] Moreover, in neither of the Directives can one find the notions "Internet" and "online", not to mention the term "social media". Nonetheless, the question whether these Directives are also applicable to unfair advertising on social media has to be answered in the positive. The digital single market is part of the single market, consequently the legal acts regulating the single market must be applied to digital forms. Even the European Commission has expressly stated that the UCPD covers the totality of B2C transactions be they offline or online.[31] The European Commission also provides examples of unfair online B2B commercial practices[32] and the Court of Justice of the European Union has already ruled on the unfairness of online commercial practices such as metatags.[33]

Although it is unquestionable that advertising on social media may be assessed in light of the existing EU legal framework, the appropriate act has to be carefully and correctly chosen. The EU Directives, and the national legislation implementing these Directives, cover the B2C relations (the UCPD) and B2B relations on misleading and comparative advertising (the MCAD). However, it is solely the national law that regulates other B2B commercial practices as well as commercial practices in C2B (consumer-to-business) and C2C (consumer/customer-to-consumer/customer) relations. With respect to advertising on social media it is not always easy to select the appropriate provisions to apply to a

28 Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376, 27.12.2006, p. 21–27.

29 Proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading and unfair advertising, COM(77) 724 final.

30 Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), COM(2003) 356 final, p. 12.

31 First Report on the application of Directive 2005/29/EC, point 1.

32 Review of Directive 2006/114/EC concerning misleading and comparative advertising, point 3.1.

33 Judgment of the Court of 11 July 2013 in Case C-657/11 Belgian Electronic Sorting Technology, ECLI:EU:C:2013:516.

given commercial practice,[34] for example, when the companies pay bloggers to promote and advertise their products on a blog, unbeknownst to other users,[35] or when employees make a promotional statement regarding the employer without disclosing their employment relationship.[36] And in case of price comparison tools, some individuals provide price comparison information purely on a non-professional basis and as such they are not considered as engaging in commercial practices.[37] For the UCPD or MCAD to apply, a trader has to be party to one side of the practice. It is not always obvious whether in a particular case a natural person may be qualified as a trader. In this context it is obviously essential to refer in the first instance to the definition of a trader. Under Article 2b of the UCPD, 'trader' means 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 acting in the name of or on behalf of a trader.[38] This broad definition allows for the application of the UCPD to e.g. advertising agencies[39] and employees even when the employer did not know about the employee's advertising activity on social media.[40] Next, national enforcement authorities should make an assessment on a case-by-case basis taking into consideration whether the seller has a profit-seeking motive; the number, amount and frequency of transactions; the seller's sales turnover; and whether the seller purchases products in order to resell them. Persons whose main activity consists of selling products from their homes on the internet, using auction websites on a very frequent basis, seeking profit and/or purchasing products with the aim of reselling at a higher price, could for example fall within the definition of trader.[41]

To reiterate, the unfairness of advertising on social media is to be assessed on the basis of the UCPD (in case of B2C advertising) or the MCAD (in case of B2B misleading or comparative advertising). In particular, hidden advertising may be considered to be in breach of Article 7 (2) of the UCPD according to which a misleading omission takes place when a trader hides or provides in an unclear,

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34 See also H.-W. Micklitz – M. Namysłowska: § 5 UWG. In: G. Spindler – F. Schuster (eds.): *Recht der elektronischen Medien. Kommentar.* München, 2015,. 2606–2607.

35 See Guidance on the Implementation/Application of Directive 2005/29/EC, point 5.2.9.

36 Draheim–Lehmann (2014) op. cit. 403.

37 Guidance on the Implementation/Application of Directive 2005/29/EC, point 5.2.7.

38 See H.-W. Micklitz: Das Unionsrecht und die UGP-Richtlinie. In: P. W. Heermann – J. Schlingloff (eds.): *Münchener Kommentar zum Lauterkeitsrecht.* München, 2014,. 547.

39 A. Michalak: *Przeciwdziałanie nieuczciwym praktykom rynkowym. Komentarz.* Warszawa, 2008. 53.

40 For more see Draheim–Lehmann (2014) op. cit. 403.

41 See Guidance on the Implementation/Application of Directive 2005/29/EC, point 2.1.

unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. Furthermore, Annex I of the UCPD contains specific prohibitions of two commercial practices that have the characteristics of hidden advertising. Firstly, under No 22 it is forbidden in all circumstances to falsely claim or create the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer. Secondly, No 11 of Annex I prevents traders from using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content, or through images or sounds clearly identifiable to the consumer (advertorial) since the Internet may be regarded as an type of media.[42] In case of hidden advertising aimed at other traders, Article 3 of the MCAD is applicable since hidden advertising is a form of misleading advertising.

Price comparison tools may be assessed against the prohibition of misleading commercial practices (Article 6 of the UCPD), in the event that they, e.g., omit material information about, *inter alia*, the price (Article 7(2) of the UCPD). No 18 of Annex I prohibits *per se* the practice of passing on materially inaccurate information regarding market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions. In case price comparison websites are directed to businesses, it is possible to apply the governing misleading (Article 3 of the MCAD) and comparative advertising (Article 4 of the MCAD). The ban of describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other that the unavoidable cost of responding to the commercial practice (No 20 of the UCPD) may be of importance in case of presenting social media services as 'free' when they require personal data in exchange for access.[43] If a social media platform does not inform consumers of processing their personal data for economic purposes, it may be assessed as omitting material information that the consumer needs to take an informed transactional decision (Article 7 of the UCPD).

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42 See e.g. judgment of WSA in Warsaw of 4 December 2013, III SA/Wa 616/13.

43 Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, point 5.2.9.

When deeming online behavioural advertising to be unfair, either the prohibition against misleading commercial practices (Article 6 and 7 of the UCPD) or that against aggressive commercial practices (Article 8 and 9 of the UCPD), or both may be applied.[44]

Because many users of social media are children, Article 5(3) of the UCPD can be relevant for the protection of 'a clearly identifiable group of consumers who are particularly vulnerable'. As far as advertisements on social media targeting children are concerned, one must also consider the application of No 28 of Annex I which prohibits commercial practices including in an advertisement a direct exhortation to children to buy advertised products or to persuade their parents or other adults to buy advertised products for them.

In case this legal framework is not applicable under given circumstances, it is possible to assess advertising practices on social media against the backdrop of the general clause enshrined in Article 5 of the UCPD. The general clause prohibits unfair commercial practices which include commercial practices that are contrary to the requirements of professional diligence, and which materially distort or are likely to materially distort with regard to the product the economic behaviour of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group of consumers to which a commercial practice is directed.

It is worth noting that apart from the prohibitions contained in Annex I of the UCPD, that are applicable to every consumer, in case of other commercial B2C practices the benchmark is the average consumer who, as interpreted by the Court of Justice, is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.[45] As regards e-consumers, the Federal Court of Justice in Germany repeatedly stated that the same rules apply in both the offline and online world. A consumer on the Internet may be not expected to be familiar with technical details and when using price comparison websites, an e-consumer may expect them to be accurate and does not have to take into account that the latest price occurs only hours after its transmission.[46] Moreover, advertisements which are directed to a specific target group, e.g. regular young users or the elderly, shall be assessed

44 M. Namysłowska: (2015) op. cit. 147–150.

45 Recital 18 of the UCPD.

46 See judgments of the Federal Court of Justice in Germany (*Bundesgerichtshof)* O. Sosnitza: Das Internet als Rahmenbedingung und neue Handlungsform im Marken- und Lauterkeitsrecht. *GRUR-Beilage,* 2014/1. 97–98.

from the perspective of the average member of that group.[47] In the case of B2B advertisements on social media, the average trader test should be applied.

Some specific EU Directives also help provide fairness in marketing. Their application is dependent on the media or product in a given case.[48] One may consider, *inter alia*, the E-Commerce Directive[49] and the Audio-visual Media Services Directive[50], as well as the rules governing the advertising of medicinal products[51] and foodstuffs.[52] In case of a conflict between the provisions of the UCPD and other EU rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.[53]

4. The Comfort of Self-Regulation

Complementarily to the legal framework, the fairness of advertising on social media is also safeguarded by means of self-regulation which is specifically welcomed under the UCPD.[54] Self-regulation avoids the complexities and delays of a judicial process and offers a quick, uncomplicated and often cost-free handling of complaints.[55]

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47 Also Sosnitza (2014) op. cit. 98.

48 See J. Trzaskowski: User-generated marketing – legal implications when word-of-mouth goes viral. *International Journal of Law and Information Technology*, 2011/4. 354–355.

49 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, p. 1–16.

50 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1–24.

51 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311, 28.11.2001, p. 67–128.

52 Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, OJ L 304, 22.11.2011, p. 18–63.

53 Article 3(4) of the UCPD.

54 See recital 20 of the UCPD.

55 http://www.easa-alliance.org/page.aspx/166.

High ethical standards in commercial communications are protected at the European level by the European Advertising Standards Alliance (EASA) which brings together self-regulatory bodies from both European and non-European countries.[56] The "EASA Digital Marketing Communications Best Practice Recommendation," updated in 2015, contains guidelines concerning advertising on social media, in particular on hidden advertising. As noted therein, the type of a marketing communication depends on its context and can be identified through several means, e.g. design, arrangement, content, position/placing within a site or through an identifier".[57]

The Polish self-regulatory body and a member of EASA is the Advertising Council.[58] The Code of Ethics in Advertising of 2014 is also applicable to advertising on social media. Some of the decisions of this self-regulatory body in the advertising sector have already addressed advertisements on social media such as e.g. Facebook,[59] Twitter,[60] Instagram[61] and YouTube[62].

5. Additional means: Internal regulations of social media

Social media itself also regulates the use of advertising. For example, the Statement of Rights and Responsibilities of Facebook contains, *inter alia*, a prohibition against posting unauthorized commercial communications and prohibits the use of Facebook for unlawful, misleading, malicious or discriminatory activities.[63] Facebook advertising policies aim to prevent deceptive, false, or misleading

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56 http://www.easa-alliance.org. See also e.g. the International Chamber of Commerce (ICC) and the Consolidated ICC Code of Advertising and Marketing Communication Practice, http://www.iccwbo.org.

57 EASA Digital Marketing Communications Best Practice Recommendation, http://www.easa-alliance.org/binarydata.aspx?type=doc&sessionId=jiehkou3hkis2t55bnrwqfbs/2015_-_EASA_Digital_Marketing_Communications_Best_Practice_Recommendation.pdf, point 2.2.6.

58 https://www.radareklamy.pl.

59 E.g. adjudication Nr ZO 124/15 of 9 September 2015, adjudication Nr ZO 100/15 of 23 July 2015, adjudication Nr ZO 29/15 of 10 March 2015.

60 Adjudication Nr ZO 10/10 of 24 February 2010.

61 Adjudication Nr ZO 16/15 of 25 February 2015.

62 Adjudication Nr ZO 113/15 of 5 August 2015.

63 https://www.facebook.com/legal/terms, point 3.1 and 3.9.

content, including deceptive claims, offers, or business practices.[64] Other forms of social media have similar terms of service.[65]

In the event of a violation of these rules, access to a given Facebook account may be restricted or the account may even be deleted.[66] For a company this may be a graver sanction from the financial and public image point of view, than legal steps taken by consumers or competitors.[67]

Nevertheless it should be stressed that Facebook also states that it may not always be able to identify paid services and communications as such,[68] which diminishes its role as a tool protecting fairness in advertising.

6. The End Justifies the Means?

By serving as a new platform for unfair advertising, social media creates new threats for both consumers and traders. At the same time social media offers possibilities to combat unfairness with the use of new, powerful means. As social media makes it possible to comment on products or on traders' activities that may constitute an unfair commercial practice by a trader, the users may publish on social media highly negative, emotionally-charged comments in spiteful forms, not only against a disliked company but also against a company that is acting unfairly. In this way social media facilitates drawing attention to unfair advertising and may even, as a result of collective actions, lead to the ceasing such a commercial practice. The Polish association "Twoja sprawa" [69] ("It is up to you") illustrates this point. In 2014 the association brought about the cessation of a commercial spot broadcast on Polish television by posting negative comments about its unfairness on the Facebook account of the company.[70] Another example of such a successful action was the withdrawal of an online advertisement on a company's Facebook account following 1200

64 https://www.facebook.com/policies/ads/#prohibited_content.

65 See e.g. https://twitter.com/tos; https://www.linkedin.com/legal/user-agreement?trk=hb_ft_userag; https://help.instagram.com/478745558852511.

66 https://www.facebook.com/legal/terms, point 14.

67 Lichtnecker (2013) op. cit. 139.

68 Statement of Rights and Responsibilities, point 9.3.

69 See http://twojasprawa.org.pl.

70 http://twojasprawa.org.pl/zakonczone-akcje/klip-reklamowy-napoju-sprite/#.Vh-p7LxLKL4.

consumer complaints addressed to the Advertising Council and 2000 emails sent in February 2013 to the CEO of the company.[71]

The use of social media to launch a counterattack against unfair traders is inevitable and may be quite effective. However, one has to draw attention to the fact that posted comments should not be aggressive, offensive or constitute a criminal act.

7. Conclusions

The rapidly evolving social, technological and economic developments give rise to new legal challenges. This is certainly true in the case of social media marketing, which involves an increased risk of non-compliance with basic fairness rules. Statements made on social media, whether fair or not, may spread rapidly, in an uncontrolled and even uncontrollable way.

While the majority of unfairness problems on social media are not new from the legal point of view, nevertheless such commercial practices appear in a new technological context that must be taken into consideration. Cases in question may be solved through the use of the traditional legal framework, in particular the UCPD and the MCAD, making use of the judicial process. The provisions originally enacted to combat unfairness in the offline world may be equally applied to online practices. Therefore, social media does not appear to need its own distinct legal provisions, at least for now. That being said, the fact that the European Commission drew attention to social media in its Guidance on the UCPD of 2009[72] and broader picked up on this topic in new Guidance of 2016, must be welcomed owing to the intensive development of the internet which encompasses new practices and new legal challenges.

Further rules are complemented by self-regulating bodies, and are additionally supervised by social media itself. Consumers may use social media to prevent traders from unfair advertising, however many pitfalls stem from insufficient awareness about the risks inherent in the use of or reliance on social media. Educational actions are needed to increase knowledge and awareness among the members of society. At the same time it should be recognized that traders are also put at risk by the existence of social media. Therefore, although the

[71] http://twojasprawa.org.pl/zakonczone-akcje/spot-reklamowy-promujacy-wafle-grzeski/#.Vh-q9rxLKL4.

[72] Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, SEC(2009) 1666.

European Union's main goal is to restore consumers' confidence in order to create a digital single market,[73] traders also should have the appropriate level of legal protection. The European Commission should continue its review of the MCAD[74] as well as its work in regulating unfair trading practices in the supply chain.[75]

Advertising on social media is efficient and widespread, but often unfair. Various methods may help achieve the compliance of social media advertising with fairness rules. The substantive provisions are satisfactory, but they should be further evaluated in the future. Currently, however, it is effective enforcement that is of crucial importance.

[73] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank "Annual Growth Survey 2015", COM(2014) 902 final, point 3.

[74] Review of Directive 2006/114/EC concerning misleading and comparative advertising.

[75] Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe, COM(2013) 37 final.

THE NORMATIVE CONCEPT OF CONSUMER IN THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE[1]

Katalin J. Cseres*

Introduction

This paper will examine the normative concept of 'consumer' in the Unfair Commercial Practices Directive (UCPD). By focussing on unfair commercial practices the paper analyses the normative concept of consumer from the broader perspective of market regulation, since unfair commercial practices involve a wide range of transactions in various markets. The normative concept of consumer functions as a point of reference indicating the level of State intervention, and as such, the level of protection consumers are afforded under a given legal system. The normative concept of consumer establishes the balance between default and mandatory (consumer) rules, defining thereby the types of rights and legal instruments that give meaning to these rights. The interpretation of the normative concept of average consumer in the UCPD is laconic. Therefore, this paper will fill in this gap by first looking at the normative standard as developed in the ECJ's jurisprudence on free movement rules and contrasts that standard with the UCPD and the case-law of the CJEU on consumer law legislation. It further assesses various other areas such as trade mark law, sector regulation and US law, offering an external perspective for this analysis.

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[1] This contribution is a revised and shorter version of the article: K. J. Cseres: The Regulatory Consumer in EU and National Law? Case Study of the Normative Concept of the Consumer in Hungary and Poland. *Yearbook of Antitrust and Regulatory Studies,* Vol. 9, 13. (2016) 9–41.

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1. The relevance of the normative concept of the consumer

The normative concept of consumer plays a fundamental role in all legal systems – it establishes the type of consumer the law protects. It outlines what the presumed expectations of an average consumer can be in a given transaction and accordingly whether and what kind of State intervention is necessary to assist or protect consumers. Accordingly, this concept defines the rights and obligations between parties in B2C contracts. By establishing the balance between default and mandatory rules, it designates the regulatory and/or legal means the envisaged consumer needs in order to enter into effective and efficient transactions in a specific situation. The fundamental dilemma for law and policy-making is to strike the 'right' balance between default and mandatory rules. That decision may depend on what the legislator considers to be the goal of consumer law. For some, it is about justice and dealing with inequalities, whilst for others, particularly according to the law and economics approach, law should be concerned with promoting efficient solutions within market transactions, for example, by improving the flow of information on the basis of which consumers make their market decisions.[2]

Legislators of consumer rules have to decide which trade practice or business behaviour harms consumers and should thus trigger state intervention, and whether such intervention should consist of introducing mere disclosure rules, mandatory standards or strict mandatory rules. The different models of consumer protection are thus determined by this fundamental relationship between State intervention and free market forces. The specific distribution of responsibilities, that is, rights and obligations between the State, individual consumers, consumer organizations, as well as suppliers and their organizations, illustrate the different models of regulatory policies. The adopted normative concept of consumer is thus characteristic of a given legal system and illustrative of its underlying economic model. These models represent different degrees of intervention and, accordingly, contain different combinations of market-conformity, market-complementary, and market-corrective tools.[3]

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[2] While the pursuit of these objectives is sometimes harmonious, it is often revealing of tensions between opposing positions as to the very purposes of consumer law. C. Scott: Enforcing Consumer Protection Laws (July 30, 2009). *UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper*, 2009. 15.

[3] L. A. Reisch: Principles and visions of a new consumer policy. *Journal of Consumer Policy*, 27(1), (2004) 1–42. http://dx.doi.org/10.1023/b:copo.0000014103.38175.df

2. The normative concept of consumer in the UCPD

The EU Directive on Unfair Commercial practices 2005/29 (UCPD) is the relevant legislative source for defining the normative concept of both the average and the vulnerable consumer. The Directive is a broad legislation covering all kinds of commercial parties in B2C relationships and it specifically lays down the normative concept of the above in its provisions. [4] While the notion of average consumer has not made it into the final text of the Directive,[5] Recital 18 of the Directive does define the benchmark of the average consumer as someone "who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors". This concept has almost completely been transposed into the national legislation of the Member States. Only four Member States (Czech Republic, Denmark, Hungary, Sweden) failed to implement a reference to the "average" consumer.[6] The transpositions, however, largely differ ranging from broader through narrower concepts to a word for word transposition of the Directive's normative concept.[7]

The function of the concept in the Directive may be understood by looking at Article 5 of the UCPD, which is the general clause on unfair commercial practices. Article 5 (and 9) cover unfair, misleading and aggressive commercial practices which are capable of distorting consumers' economic behaviour. According to Article 5(2) UCPD, a commercial practice is unfair if it is contrary to the requirements of professional diligence and 'materially distorts or is likely to materially distort' the economic behaviour of the *average* consumer.

The interpretation of the notion of average consumer is meagre. In cases concerning the Directive's interpretation, the concept of average consumer has not been an important element of the decisions, neither is it addressed in depth.[8]

Concerning the UCPD the CJEU has also acknowledged the existence of linguistic, cultural and social differences between EU Member States. This justifies a different interpretation of the message communicated in the

4 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 (OJ L 149/22), recital 18 and Art. 5.

5 B. Duivenvoorde: *The consumer benchmarks in the unfair commercial practices directive*. Springer, 2015. 20–21.

6 Vulnerability study, p.141.

7 Vulnerability study, p.143–145.

8 Vulnerability study, p.141.

commercial practice by the competent enforcement authority or court.[9] As a part of the UCPD, almost every Member State implemented the concept and term of the 'average' consumer. However, there seems to be limited experience, and thus little interpretational practice, of the term in domestic case law.[10] Moreover, national interpretations differ considerably.

Accordingly, the next sections will try to fill in this gap in interpretation by analysing EU case law concerning legislation other than the UCPD where the notion of average consumer has been developed and interpreted. More specifically, cases of free movement law will be analyzed as foundation for the concept of average consumer and more recent cases concerning various consumer contract related issues where the CJEU has extenisvely interpreted the notion of consumer. The analysis will also include external perspectives from US law and EU sector specific legislation.

3. The normative concept in EU and US law

In EU law, the normative concept of consumer has evolved as the interpretation of the average consumer emerged – and more recently, the second category of the 'vulnerable' consumer was also introduced. Since the judgment in *Cassis de Dijon*[11], EU consumer protection has been characterized by the normative concept of a well-informed and confident consumer and was based on the

[9] In the *Estée Lauder* case (C-220/98 *Estée Lauder Cosmetics GmbH & Co OHG v. Lancaster Group GmbH*, ECLI:EU:C:2000:8), the emphasis was on the role of social, cultural and linguistic factors in advertising. Could the usage of the term 'lifting' mislead an average consumer when this term was used to promote cosmetics? In case C-313/*94 F.lli Graffione SNC v Ditta Fransa,* para. 22, the Court argued that 'In a prohibition of marketing on account of the misleading nature of the trade mark is not, in principle, precluded by the fact that the same trade mark is not considered to be misleading in other Member States. […] it is possible that because of linguistic, cultural and social differences between the Member States a trade mark which is not liable to mislead a consumer in one Member State may be liable to do so in another'.

[10] Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08). Available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm p.141–142.

[11] Case 120/78 *Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42. The ECJ acknowledged consumer protection as a *rule of reason* exception to the free movement rules. In this and similar cases, the ECJ found national consumer protection rules to be overprotective which (ab)use consumer protection as a justification for distorting market competition and holding back information relevant for consumers.

adoption of information provisions[12]. The ECJ developed a neo-liberal concept of the consumer, emphasizing the consumer's own responsibilities in the market and the beneficial workings of market forces, such as the freedom of contract and competition. This model is based on the idea that the consumer should be able to make informed choices, rather than his/her choice being defined by governmental regulations. Mandatory information disclosure creates a well-informed bargaining environment through improving transparency.

By way of comparison, in the US, the normative concept of the consumer was developed in the framework of deceptive trade practices as set forth under the Federal Trade Commission Act,[13] amended by the Wheeler-Lea Act in 1938[14], and enforced by the US Federal Trade Commission (FTC). The consumer concept evolved in three stages – evolving from the cognitively limited member of the general public[15] to the 'reasonable consumer' based on standard economic rationality, a concept notably influenced by the Chicago school[16]. Finally, following the financial crisis, the concept of bounded rationality emerged. The normative concept of bounded rational consumer is promoted by new regulatory agencies such as the Consumer Financial Protection Bureau (CFPB) recently created under the Dodd-Frank Act or the 'US Behavioral Insights Team' at

12 Case C-362/88 *GB-INNO-BM,* ECLI:EU:C:1990:102; C-238/89 *Pall,* ECLI:EU:C:1990:473; C-126/91 *Yves Rocher,* ECLI:EU:C:1993:191; C-315/92 *Verband Sozialer Wettbewerb,* ECLI:EU:C:1994:34; C-456/93 *Langguth,* ECLI:EU:C:1995:206; C-470/93 *Mars,* ECLI:EU:C:1995:224.

13 15 U.S.C. §§ 41–58 (2000).

14 Wheeler-Lea Act of 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a) (2000)).

15 Hacker argued that from the 1940s onwards, it was sufficient for the FTC to show that a trade practice reveals a tendency or capacity to deceive *any* substantial portion of the general public. This reference group comprised 'that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyse but too often are governed by appearances and general impressions'. The standard was geared not towards a rational machine but towards a cognitively limited creature. The test therefore boiled down to whether a substantial number of consumers, regardless of their cognitive endowments and attention deficits, were deceived. *quoted in FTC v. Sterling Drug, In.*, 317 F.2d 669, 674 (2d. Cir. 1963); see also *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944); P. Hacker: The Behavioral Divide. A Critique of the Differential Implementation of Behavioral Law and Economics in the US and the EU. *European Review of Contract Law,* 11. (2015) 308.

16 FTC Policy Statement on Deception, Letter from James C. Miller III, Chairman of the FTC, to Rep. John D. Dingell, Chairman of the Commission on Energy & Commerce of the House of Representatives (Oct. 14, 1983); Cliffdale Associates, Inc., 106 F.T.C. 110, 161 (1984) in this case most of the FTC adopted the new standard of the reasonable consumer and both the federal and state courts have widely adopted the standard afterwards [Hacker (2015) op. cit. 309].

the White House.[17] While behavioural economics clearly shapes the US policy agenda, the revision of the reasonable consumer standard as employed by US courts has not yet taken place.[18]

This short overview and reflection on the EU and US approach shows that the point where State intervention and thus the application of consumer protection rules begins, crucially depends on the normative concept of consumer chosen, and may considerably differ both in terms of legal provisions applied and their enforcement.[19]

4. The normative concept of consumer in EU law

In EU law the normative concept of the consumer is directly linked to the notion of the internal market and as such it has been described as being both instrumental and protective.[20] Instrumental, since its primary goal is to complete the internal market and to facilitate the functioning of free movement and competition rules. This goal has significantly influenced its protective function, shifting the European normative concept closer to free market mechanisms than social policy concepts.

It has been argued that the European normative concept is closer to free market mechanisms than social policy concepts, with its primary goal centred on the completion of the internal market. Consumer protection has been considered to be a 'market-promoting objective' [21] of the EU and the consumer has primarily been considered in his/her capacity as an active market participant, as the 'marketized consumer'.[22]

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17 E. Zamir – D. Teichman – Y. Feldman: Behavioral Ethics Meets Behavioral Law and Economics. In: E. Zamir – D. Teichman (ed.): *The Oxford Handbook of Behavioral Economics and the Law*. Oxford, Oxford University Press, 2014. http://dx.doi.org/10.1093/oxfordhb/9780199945474.013.0009

18 Hacker (2015) op. cit. 310.

19 For a detailed comparison and overview of the various normative concepts see: (Hacker, 2015). Hacker shows how behavioural insights may be integrated into the concept of consumer. He proposes three distinct ways: strictly empirical, strictly normative or a mix of the two.

20 H.-W. Micklitz: The Consumer; Marketised, Fragmentized, Constitiutionlised. In: D. Leczykiewicz – S. Weatherill (ed.): *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law.* Oxford, Hart Publishing, 2016. 23., http://dx.doi.org/10.5040/9781474202510.ch-002

21 I. Benöhr: *EU Consumer Law and Human Rights*. Oxford, Oxford University Press, 2013. http://dx.doi.org/10.1093/acprof:oso/9780199651979.001.0001 36.

22 Micklitz (2016) op. cit. 23.

5. Normative concept as developed under the free movement case law

The normative concept of consumer in EU law has been developed by the CJEU through its free movement jurisprudence. Accordingly, EU law relies on the benchmark of the 'average' consumer who is a well-informed, reasonable and circumspect market actor. In cases such as C-238/89 *Pall Corp,* C-315/92 *Clinique*[23]*,* C-470/93 *Mars* and C-373/90 *Procureur de la Republique v. X.*[24] the ECJ condemned national rules allegedly promoting consumer protection as being over-regulatory and relied on the 'reasonably circumspect consumer' who is capable of processing information and making informed choices.[25] In these cases, the Court, in fact, defined the limits of national legislation seeking to provide a higher degree of protection than that offered under EU consumer protection. Mak showed how the concept functions as an analytical tool that mediates between the different levels of regulation in the EU, that is, between the different normative standards employed by EU and national laws.[26]

More importantly, this concept puts the emphasis on the ability of consumers to process and use information. Thus, instead of market intervention, it gives preference to rules that require information disclosure.[27] The current definition of the normative concept is based on *Gut Springheide* where the Court explained that '[…] in order to determine whether a particular description, trade mark, promotional description or statement is misleading, it is necessary to take into

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23 In *Clinique,* a German law prohibited the use of the name 'Clinique' on the grounds that it can mislead and confuse consumers so as to believe that it is a medical product and not a cosmetic one. The Court again found that the alleged consumer confusion did not justify the effects of the rule, namely the impediment on trade and the restriction of market communication.

24 Case C-373/90 *Procureur de la Republique v. X*., ECLI:EU:C:1992:17.

25 In *Yves Rocher,* the Court affirmed the relevance of market or product-related information and condemned a provision of the German law on unfair competition prohibiting individual price comparisons. The Court stated that '[…] the prohibition in question goes beyond the requirements of the objectives pursued, in that it affects advertising which is not at all misleading and contains prices actually charged, which can be of considerable use in that it enables the consumer to make his choice in full knowledge of the facts' (C-126/91 *Yves Rocher*, para. 17).

26 V. Mak: The 'Average Consumer' of EU Law in Domestic Litigation: Examples from Consumer Credit and Investment Cases (November 16, 2011). *Tilburg Law School Research Paper* No. 004/2012.

27 S. Weatherill: Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection. In: S. Grundman – W. Kerber – S. Weatherill (ed.): *Party Autonomy and the Role of Information in the Internal Market*. Berlin, de Gruyter, 2001. http://dx.doi.org/10.1515/9783110873030.173 174.

account the presumed expectations of an average consumer, who is reasonably well informed and reasonably observant and circumspect'[28].

According to this jurisprudence, the consumer is a well-informed and confident market actor that, with the help of information provisions can effectively participate in markets without the need for corrective legal measures. This concept draws the borderline in EU law between the rights and duties of private parties in B2C transactions.[29] The average consumer is granted mandatory rights[30] in order to participate in markets and to realise the EU goal of market integration. The ECJ developed a neo-liberal concept of the consumer by emphasizing the responsibilities of the latter in the market and stressing the importance of information as the main regulatory tool in this new regulatory architecture. This model is premised on the idea that consumers should be able to use information and participate actively in the market by making informed choices rather than their choices being defined by governmental regulation.

Moreover, these rules also compound public and private law aims. On the one hand, they pursue public policy goals of competition, market regulation and EU integration, and thus mainly consist of regulatory law to complete the internal market and strengthen competition building a new 'horizontal' regime of consumer contract law. They transcend, in fact, the internal relationship between producers or service providers and consumers to the external dimension of the well-functioning of markets.[31] On the other hand, they regulate the internal relationship of B2C transactions, protecting weak and vulnerable consumers.

The following section will analyse how positive integration Directives, and their interpretation by the ECJ as well as the enforcement of trade mark law deviate from the above examined 'average' consumer concept.

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28 C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung*, ECLI:EU:C:1998:369, para. 31, 32. See also C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, ECLI:EU:C:2010:660, para. 103.

29 V. Mak: The Consumer in European Regulatory Private Law. In: Leczykiewicz–Weatherill (ed.) op. cit.

30 H.-W. Micklitz: An Expanded and Systemized Community Consumer Law as Alternative or Complement? *European Business Law Review*, *13*(6), (2002) 588.

31 N. Reich: Harmonisation of European Contract Law: With Special Emphasis on Consumer Law. *China-EU Law Journal*, 1(1–2), (2011) 55–94. http://dx.doi.org/10.1007/s12689-011-0006-5 71.

6. Normative concept of 'average' consumer in cases of positive harmonization

It has been demonstrated above that the positive and negative measures of harmonization take significantly different stances regarding the image of the consumer and the level of intervention required at EU level.[32]

Positive measures of harmonization (legislation in the form of Directives) follow a more protective approach perceiving consumers as weak parties that need mandatory rules for their protection. The interpretation of these Directives by the ECJ has, after an initial period of relying on the notion of an assertive consumer, taken a more consumer friendly approach. This more protective approach can be captured through the interpretation of Directive 93/13 on unfair contract terms. Already in *Océano Grupo*[33], and in a number of more recent cases such as *Pénzügyi Lízing*, the Court of Justice stressed that the system introduced by the Directive is based on the idea that the consumer is in a weak position *vis-à-vis* the seller or supplier as regards both its bargaining power and his level of knowledge. As a result, the consumer may agree to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms[34]. It is because of this weaker position of the consumer that Article 6(1) of the Directive provides that unfair terms are not binding upon the consumer. This is a mandatory rule which aims to re-establish equality between the contracting parties[35].

Similarly, ECJ jurisprudence on consumer sales and distance contracts reflects the same concern for the 'weak' consumers. With reference to consumer sales, national courts must grant *ex officio* a price reduction when the consumer only invoked a rescission of the contract as illustrated in *Soledad Duarte Hueros v. Autociba*[36] and, more recently, concerning the notification

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[32] H. Unberath – A. Johnston: The Double-Headed Approach of the ECJ Concerning Consumer Protection. *Common Market Law Review,* 44(5), (2007) 1237–1284.; Mak (2016) op. cit. 382.

[33] Joined Cases C-240/98 and C-244/98 *Océano Grupo*, ECLI:EU:C:2000:346.

[34] Joined Cases C-240/98 and C-244/98 *Océano Grupo*, para. 25; see also C-168/05 *Mostaza Claro,* ECLI:EU:C:2006:675; C-40/08 *Asturcom Telecommunication,* ECLI:EU:C:2009:615, para. 29; C-243/08 *Pannon GSM,* ECLI:EU:C:2009:350, para. 25; C-137/08 *VB Pénzügyi Lizing v. Ferenc Schneider,* ECLI:EU:C:2010:659, para. 46.

[35] C-137/08 *VB Pénzügyi Lizing v. Ferenc Schneider,* para. 46–48.

[36] C-32/12 *Soledad Duarte Hueros v. Autociba*, ECLI:EU:C:2013:637. See also Jansen, "Case C-32/12, Soledad Duarte Hueros v. Autociba SA, Automóviles Citroën España SA, Judgment of the Court of Justice (First Chamber) of 3 October 2013", 51 CML Rev., 975–991.

duty in *Froukje Faber*[37]. With reference to distance contracts, the obligation of traders to inform the consumer about their right of withdrawal has become a fundamental requirement of consumer protection. In *Pia Messner*, the ECJ confirmed that consumers are in principle entitled to withdraw from distance contracts without paying usage compensation to the seller. The ECJ stated that a different judgment would harm the effectiveness and efficiency of the very right to withdraw by imposing a financial burden on consumers[38]. Moreover, in *Walter Endress,* the CJEU held that a national provision whereby a right of withdrawal lapses, at the latest, one year after the payment of the first premium, where the policy-holder had not been informed about the right to cancel the contract, was contrary to EU law[39]. In *Heininger*[40] and *Schulte*[41]*,* the ECJ went even so far as to extend the right of withdrawal concerning the Directive to doorstep selling to enable consumers not only to get out of contractual obligations years after concluding the contract, but also to get out of so-called linked contracts.

In *Kásler,* the ECJ adopted the average consumer concept of the Unfair Commercial

Practices Directive to give guidance on the assessment of unfair terms and more specifically, the transparency requirement in Article 5 of Directive 93/13 on unfair contract terms, which stipulates that terms must always 'be drafted in plain, intelligible language'.[42]

The contractual term at issue in the main proceedings concerned a mortgage loan agreement in a foreign currency. In this case the Court had to assess whether the 'reasonably well informed and reasonably observant and circumspect' consumer would be aware of the difference between the selling rate and the buying rate of exchange of foreign currency, generally observed on the securities market; it must also be determined whether the borrower would be able to assess the potentially significant economic consequences for him

37 C-497/13 *Froukje Faber*, ECLI:EU:C:2015:357. The CJEU's approach was highly consumer friendly as far as notification duty in consumer sales law under Directive 1999/44 is concerned. See for an in depth analysis (Rott, 2016).

38 C-489/07 *Pia Messner v. Firma Stefan Krüge,* ECLI:EU:C:2009:502, para. 6.

39 C-209/12 *Walter Endress v. Allianz Lebensversicherungs AG*., ECLI:EU:C:2013:864.

40 481/99 *Georg Heininger and Helga Heininger v. Bayerische Hypo- und Vereinsbank AG*, ECLI:EU:C:2001:684.

41 C-350/03 *Elisabeth Schulte and Wolfgang Schulte v. Deutsche Bausparkasse Badenia AG*, ECLI:EU:C:2005:637.

42 C-26/13 Árpád *Kásler, Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282, para. 79; C-453/10 *Pereničová and Perenič,* ECLI:EU:C:2012:144, para. 31, and C-168/10 *Banco Español de Crédito* EU:C:2012:349, para. 40 and case-law cited.

resulting from the use of the selling rate for calculating the repayments for which he would become liable.[43] The Court relied on the average consumer standard in the UCPD.

Moreover, in cases such as *Mohamed Aziz*[44]*,* the ECJ opened the door for an increased 'proceduralization' of the judicial review of unfair terms, where the national court was allowed to suspend mortgage enforcement proceedings in order to establish the unfairness of a contested term (where enforcement was initiated with respect to such term). Such interim relief was considered to ensure the judicial review of unfair terms.[45]

7. Normative concept of average consumer in trademark law

In trade mark law, where the ECJ interprets the way in which businesses try to influence consumer choice in the Trade Mark Directive (TMD)[46] and the Trade Mark Regulation[47], the jurisprudence of the Court is based on the average consumer test developed in free movement cases[48].

However, in *Graffione*, the Court did recognise that '[…] because of linguistic, cultural and social differences between the Member States a trade mark which is not liable to mislead a consumer in one Member State may be liable to do so in another'.[49] This implies that there is room for divergence from the average consumer concept in national law and enforcement. The Court also recognised that the level of attention of an average consumer is likely to

43 C-26/13 Árpád *Kásler* para 74.

44 C-415/11 *Mohamed Aziz v. Caixa* d´*Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa),* ECLI:EU:C:2013:164; C–226/12 *Constructora Principado SA v. José Ignacio Menéndez* Álvarez*,* ECLI:EU:C:2014:10.

45 This 'proceduralization' of the Directive was continued in *Sánchez Morcillo* and *Kušionová* by assessing whether national procedural law governing mortgage enforcement proceedings ensures the effective judicial review of unfair terms in consumer contracts.C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García* v. *Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2014:2099. C-34/13 *Monika Kušionová* v. *SMART Capital, a.s.*, ECLI:EU:C:2014:2189.

46 Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (codified version) (OJ L 299/25) replaces Directive 89/104.

47 Council Regulation 40/94 of 20 December 1993 on the Community Trade Mark (OJ 1994 L 11/1), as amended, and eventually codified by Council Regulation 207/2009 of 26 February 2009 on the Community Trade Mark (OJ L 78/1).

48 C-342/97 *Lloyd Schuhfabrik Meyer*, ECLI:EU:C:1999:323, para. 25.

49 C-313/94 *F.lli Graffione SNC v. Ditta Fransa*, ECLI:EU:C:1996:450, para. 22.

vary according to the specific category of goods or services at stake, and thus the average consumer test should be assessed *in concreto*[50]. Moreover, ruling on the Trade Mark Regulation in *Koipe Corporacion v. OHIM*[51], the General Court considered that the average consumer is not circumspect but makes impulsive purchases without considering all the information available[52]. This refers to insights from behavioural economics that looks at biases, heuristics and non-rational influences on behaviour which render individual consumer decisions sub-optimal. Consumers either do not use or only partially use the available information. The individual capacity for accumulating and processing information can be viewed as emotionally controlled and influenced by many environmental stimulants.[53] Accordingly, the way information is disclosed and framed is crucial for consumers.

The above analysis clearly shows that the EU's normative concept of the average consumer is not homogenous. In fact, it seems to be differing from the *Gut Springheide* test in various ways. The fact that the average consumer is not a rational, circumspect and well-informed person has also been confirmed in a recent empirical study.

50 C-342/97 *Lloyd Schuhfabrik Meyer*, para. 26.

51 T-363/04 *Koipe Corporación, SL v. OHIM*, ECLI:EU:T:2007:264.

52 The case concerned a figurative trade mark used for olive oil. The figurative trade mark of a competitor was rather similar, but there were also obvious differences between the two signs. See further J Stuyck: Consumer concepts in EU secondary law. In: F. Klinck – K. Riesenhuber (eds.): *Verbraucherleitbilder, Interdisziplinäre und europäische Perspektiven.* [Schriften zum Europäischen und Internationalen Privat-, Bank- und Wirtschaftsrecht 51] 2015. 115–136.

53 There are relevant determinants for the search, acceptance and the processing of information. An increasing rationality of purchase decisions due to additional information seems, therefore, to be subject to specific constraints (D. Kahneman: Maps of Bounded Rationality: Psychology for Behavioral Economics. *The American Economic Review*, *93*(5), 1449–1475. http://dx.doi.org/10.1257/000282803322655392; Loewenstein, G.F. (2009). Emotions in Economic Theory and Economic Behavior. *The American Economic Review, Papers and Proceedings*, 90(2), 426-432, http://dx.doi.org/10.1257/aer.90.2.426; D. Ölander – J. S. Thøgersen: Understanding consumer behaviour as a prerequisite for environmental protection. *Journal of Consumer Policy*, 18 (1995) 345–385. http://dx.doi.org/10.1007/bf01024160).

8. Normative concept of 'average consumer' in an empirical study

In an extensive study on consumer vulnerability published in 2016,[54] the EU Commission also examined the concept of the average consumer. The study looked at how the legal concepts of 'average' and 'vulnerable' consumers have been implemented and interpreted across EU Member States. The study examined the scope and the drivers of consumer vulnerability in the EU, however, it also investigated the concept of the average consumer. The study assessed the average consumer in two aspects – in relation to the indicators developed by the study to conceptualise consumer vulnerability, and in relation to the definition of average consumer in the UCPD, that is, referring to the average consumer as reasonably 'well informed', 'observant' and 'circumspect'. The study found that the concept of the 'well informed' average consumer, as represented by the median consumer response per indicator, feels quite informed about prices, declares that he/she reads communications from the Internet, banking and energy providers (but admits to only glance at them or skim read them), and states that he/she does not rely on information from advertisements only.

As concerns the elements of the concept of average consumer such as being 'observant' and 'circumspect', the study found that the median consumer sees him/herself as quite careful in dealing with people and in decision-making, as not very willing to take risks and that he/she does not believe that advertisements report objective facts.

The study argued that most of the above indicators reflect the self-reported average – as opposed to objective measures – of the concepts of being 'well-informed', 'observant' and 'circumspect' and should hence be interpreted with caution, as they are likely to be influenced – at least in part – by behavioural biases such as consumer overconfidence.[55]

9. The concept of the 'vulnerable' consumer

The notion of the 'vulnerable' consumer was first addressed in *Buet* where the Court referred to people who are behind in their education as the potential

[54] EU Commission (2016), Consumer vulnerability across key markets in the European Union. Retrieved from: http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_approved_27_01_2016_en.pdf

[55] EU Commission, 2016, p. 44.

purchasers of educational material. That fact makes them particularity vulnerable *vis-à-vis* salesmen who can easily persuade them to buy educational material which will improve their employment prospects[56].

The notion of the disadvantaged or vulnerable consumer is now part of EU law, and yet the exact definition of who the 'vulnerable' consumer exactly is, and what kind of intervention this position requires, is far from being decided. The definition of vulnerability remains within the competence of the Member States. Reich distinguishes three types of vulnerability: physical, intellectual and economic disability.[57] He clearly distinguishes the notion of 'vulnerability' from the concept of 'weakness'. While weakness is a typical characteristic of consumers, and also a frequent feature of B2C transactions, vulnerability characterizes a distinct and rare category of consumers.[58]

So far, the concept of a 'weak' consumer has mainly been interpreted by the CJEU, but other EU institutions also endorse a more protective policy that deals with the problem of vulnerable consumers. Both the European Parliament[59] and the Commission[60] addressed the problem of vulnerable consumers – however, this raises fundamental questions for both EU policy and law making[61] since, as a general principle, the definition of vulnerability remains in the Member State competence.

In EU law a reference to the 'particularly vulnerable consumer' can be found in Article 5(3) of the UCPD 2005/29: vulnerable consumers are those more exposed to a commercial practice or a product because of their: (a) mental or physical infirmity, (b) age or (c) credulity. While Recital 34 of the Preamble of the Consumer Rights Directive 2011/83 also refers to vulnerable consumers, the notion has not been included in the text of the Directive. Recital 8 of the

56 382/87 *Buet,* ECLI:EU:C:1989:198, para. 13.

57 N. Reich: Vulnerable consumers in EU Law. In: Leczykiewicz–Weatherill (ed.) op. cit. http://dx.doi.org/10.5040/9781474202510.ch-005 141.

58 Compare with I. Domurath: The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law. *Journal of European Consumer and Market Law*, 2013/3. 124–137.

59 On 22 May 2012 the European Parliament adopted a non-legislative report on 'vulnerable consumers'. European Parliament resolution of 22 May 2012 on a strategy for strengthening the rights of vulnerable consumers (2011/2272(INI)).

60 A European Consumer Agenda, cited supra 112. European Commission, Consumer vulnerability across key markets in the European Union Final Report, January 2016.

61 The Parliament urged a horizontal and sectorial approach, while the Commission emphasized the empowerment of consumers in order to enhance consumer knowledge. Commission Staff Working document on knowledge-enhancing aspects of consumers empowerment 2012-2014, SWD(2012)235 final, 19. 07. 2012.

Preamble of the General Product Safety Directive 2001/95 also mentions vulnerable consumers.[62]

The notion of the vulnerable consumer has, however, been most notably recognized in sector-specific Directives. The Universal Service Directive explicitly grants special rights to vulnerable consumers[63].

Both the Second and Third Energy and Gas Package, which focused on improving the operation of retail markets for electricity and gas consumers, introduced specific provisions for the protection of vulnerable consumers. Article 3(7) of Directive 2009/72[64] refers to necessary safeguards to protect vulnerable consumers mentioning transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms and the switching of suppliers. Member States should also define the concept of vulnerability by referring to, for example, energy poverty and, *inter alia*, to the ban on disconnecting electricity supplies to such customers in critical times[65].

The most recent proposal for a new electricity Directive[66] builds on the above mentioned provisions and introduces new provisions in order to better protect

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62 L. Waddington: Reflections on the Protection of 'Vulnerable' Consumers under EU Law. *Maastricht Working Papers,* (2013) 2.

63 See both Article 2 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108/51) and Articles 7 and 23a of Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 337/11).

64 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211/55).

65 Article 3(8) of Directive 2009/72 calls on Member States to take appropriate measures, such as formulating national energy action plans, providing benefits in social security systems to ensure necessary electricity supplies to vulnerable customers, or providing support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty. Art. 36(h) also obliges NRAs to help to achieve high standards of universal and public services in electricity supply contributing to the protection of vulnerable customers and contributing to the compatibility of necessary data exchange processes for customer switching. See also S. A. C. M. Lavrijssen: The Different Faces of Energy Consumers: Towards a Behavioral Economics Approach. *Journal of Competition Law and Economics*, 10(2), (2014) 1–35.; http://dx.doi.org/10.1093/joclec/nht046

66 Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity, Brussels, 30.11.2016 COM(2016) 864 final 2016/0380 (COD)

vulnerable consumers such as transitional price regulation,[67] restricted use of contract termination fees, transparent, easily comprehensible information, non-discriminatory access to consumer as well as general privacy provisions. Most notably, Articles 28 and 29 of the proposed Directive deal with vulnerable consumers and energy poverty.

The gap between the 'vulnerable' consumer standard in EU legislation and the 'weaker' consumer standard of ECJ jurisprudence shows that the concept of vulnerability needs to be implemented and concretized by national legislation and case law.

10. Conclusions

The normative concept of consumer is a core element of consumer law. It delineates the relationship between the State, markets and individuals. It defines the level of protection provided by the law and is decisive when it comes to which legal and non-legal tools are considered necessary to facilitate consumers in their daily transactions with businesses.

In EU law, the normative concept of average consumer was adopted in the jurisprudence of the ECJ with respect to free movement rules and later codified in the Unfair Commercial Practices Directive. While that jurisprudence has firmly regarded the average consumer to be well-informed, reasonably observant and circumspect, an analysis of consumer law Directives and their subsequent interpretation by the ECJ shows that in fact the consumer is perceived to be in a weak position *vis-à-vis* the seller or supplier, as regards both his bargaining power and his level of knowledge. Accordingly, the consumer may agree to certain contract terms drawn up in advance by the seller or supplier without being able to influence their content. Hence, the consumer should be protected, for example, by being able to withdraw from such contracts, even from linked contracts, or contest a contractual condition as unfair. Moreover, national courts must take action *ex officio* in order to re-establish a formal balance between the rights and obligations of contracting parties. In trademark law, the Court first recognised that the average consumer standard may differ across Member States due to linguistic, cultural and social differences. It then stated that the average consumer is not circumspect but, for example, makes impulsive purchases

[67] See Article 5 para 2: Member States shall ensure the protection of energy poor or vulnerable customers in a targeted manner by other means than public interventions in the price-setting for the supply of electricity.

without taking note of all the available information. A recent empirical study conducted across all Member States confirmed these interpretations of the notion of average consumer. It argued that the current concept of the average consumer concept should be applied with caution, as it is likely to be (partly) influenced by behavioural biases.

Looking at the normative concept of 'vulnerable' consumer, the legislative basis is limited to a few Directives, most notably on Unfair Commercial Practices and Consumer Rights, and its interpretation is meagre. The notion of vulnerable consumer has been most notably recognized in sector-specific Directives on energy and telecommunication. There seems to be a gap between the 'vulnerable' consumer standard in EU legislation and the 'weaker' consumer standard in ECJ jurisprudence.

This paper thus comes to the conclusion that while there are clear normative concepts of the consumer enshrined in legislation and EU free movement jurisprudence, their application in other fields of EU consumer law, point to a more nuanced image of the consumer. The average consumer is rational, but his behaviour should be seen in law enforcement as that of the person on the street who may also exhibit behavioural biases when taking his/her decisions. In certain markets, most notably in financial services, both EU courts as well as national enforcers consider consumers to be in a clearly weak position and, accordingly, lean towards more protective measures. The concept of vulnerable consumer is thus separate from that of weak consumers and often involves consumers with some kind of physical, intellectual or economic disadvantage.

This does not necessarily mean that legal rules should be changed but rather that their application, and the envisaged concepts of consumer need to be enriched through insights from law enforcement. Moreover, they must be informed both of how markets evolve and how the role of consumers changes as well as enlightened by results stemming from other social sciences, most notably behavioural economics studying consumer behaviour.

ADVERTISING AIMED AT CHILDREN – WHAT IS BLACKLISTED?

Krisztina Grimm*

1. Introduction

Advertising aimed at children is a recurring subject of investigations of authorities responsible for the enforcement of consumer protection law, and although it is not prohibited, both its content and appearance are subject to restrictions. As in my presentation at the 4th Unfair Commercial Practices Conference, in this article I would like to provide an overview of this topic, with a particular focus on the question of what is blacklisted. An introduction into the relevant legal background, along with some examples of the advertisements that have actually become "blacklisted", will also be given.

In the present article, "blacklisted" refers to commercial practices falling under point Nr 28 of Annex I of the Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices on the internal market (hereinafter referred to as UCPD) and that are in violation of the national laws of the member states implementing the UCPD.

In order to provide the reader with a better understanding of the topic, the article begins with an overview of the legal environment, before proceeding to discuss the actual cases and questions the authorities have faced during the application of the UCPD, and concludes with possible future considerations. The cases discussed include both Hungarian cases and cases from other member states of the European Union.

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2. Legal environment

Hungarian legislation contains a wide range of prohibitions regarding advertising aimed at children. Such legislation refers to the

– effect (e.g. physical, mental or moral harm);
– channel used (e.g. TV);
– situation shown (e.g. dangerous, aggressive);
– geographic area affected (e.g. school, kindergarten);
– product advertised (e.g. alcoholic beverages, gambling).

The relevant Hungarian statutes include Act XLVIII of 2008 on the Basic Requirements of Commercial Advertising Activities[1] (hereinafter referred to as Advertising Act), Act CLXXXV of 2010 on Media Services and on the Mass Media[2], which serves (among others) the implementation of Directive 89/552/

[1] Section 8
(1) No advertisement may be disseminated if it is capable of harming the physical, intellectual or moral development of children and young persons.
(2) No advertisement addressed to children and young persons may be disseminated if it has the capacity to impair the physical, mental or moral development of children and young persons, in particular those that depict or make reference to gratuitous violence or sexual content or that are dominated by conflict situations resolved by violence.
(3) No advertisement may be disseminated if it portrays children or young persons in situations depicting danger or violence, or in situations with sexual emphasis.
(4) No advertisement of any kind may be disseminated in child welfare and child protection institutions, kindergartens, grammar schools and in dormitories for students of grammar schools. This ban shall not apply to the dissemination of information intended to promote healthy lifestyles, the protection of the environment, or information related to public affairs, educational and cultural activities and events, nor to the display of the name or trademark of any company that participates in or makes any form of contribution to the organisation of such events, to the extent of the involvement of such company directly related to the activity or event in question.

Section 18
(1) No advertisement may be disseminated relating to alcoholic beverages that:
a) is addressed to children or young persons;
b) depicts children or young persons; […]
(2) No advertisement maybe disseminated relating to alcoholic beverages: […]
b) in theaters or cinemas before 20:00 hours, as well as immediately preceding any programmes for children or young persons, during the full duration thereof, and immediately afterwards;
c) on goods which have been clearly designed and manufactured for the purpose of a toy, including the packaging of such goods; and
d) in institutions of public education and in health care institutions, or on any outdoor advertising media situated within a two hundred-metre radius from the entrance thereof.

[2] Section 24
(1) The commercial communication broadcasted in the media service […]

EEC on television broadcasting[3], and Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content[4], which is enforced by the

(c) shall not directly exhort minors to purchase or rent products or to use services;
(d) shall not directly exhort minors to persuade their parents or others to purchase the advertised products or to use the advertised services;
(e) shall not exploit the special trust of minors placed in their parents, teachers or other persons or the inexperience and credulity of minors;
(f) shall not show minors in dangerous situations, if this is not justified;
(2) Commercial communications broadcasted in media services pertaining to alcoholic beverages
(a) shall not be aimed specifically at minors;
(b) shall not show minors consuming alcohol; […]

Section 30
(3) No product placement shall be used […]
(b) in programmes intended specifically for minors under the age of fourteen, with the exception of the case specified in Point (b) of Paragraph (2); […]

Section 33 […]
(3) The programme broadcasted in a linear media service, which […]
(b) is intended for minors under the age of fourteen and its duration does not exceed thirty minutes;
[…] may not be interrupted with advertisements or teleshopping.

[3] Until 31st of December 2010, Act I of 1996 on Radio and Television Broadcasting implemented the Directive as follows:

Section 14

(1) Advertisements shall not convey an outright suggestion to minors to pursuade their parents or any other adults to buy or use toys and any other goods or services.
(2) Advertisements shall not be misleading in respect of the actual nature and uses of a toy.
(3) Advertisements shall not show minors in violent situations and shall not encourage violence.
(4) Advertisements shall not exploit the special trust minors place in parents, teachers or other persons, nor shall they exploit their inexperience or credulity.
(5) Teleshopping shall not exhort minors to contract for the purchase (buying or rental) of goods and services.

[4] Section 19
(1) Linear media services may not include media content that could materially damage the intellectual, psychological, moral or physical development of minors especially by broadcasting pornography or extreme or unreasonable violence.
(2) Access to media content in on-demand media services that could materially damage the intellectual, psychological, moral or physical development of minors especially by displaying pornography or extreme or unreasonable violence may only be granted to the general public in a manner that prevents minors from accessing such content in ordinary circumstances.
(3) Access to media content in press products that could materially damage the intellectual, psychological, moral or physical development of minors especially by displaying pornography or extreme or unreasonable violence may only be granted to the general public in a manner that prevents minors, by the application of an appropriate technical or other solution, from accessing such content. In case the application of such solution is not possible, the given content may only be published with a warning label informing about its possible harm to minors.

consumer protection authorities and the National Media and Infocommunications Authority.

And then we have the UCPD, which bans direct exhortation to children in general. Point Nr 28 of Annex I of the UCPD states the the inclusion in an advertisement of a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them is an unfair, aggressive commercial practice. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.[5]

Point Nr 28 of Annex I of the UCPD is implemented as part of the Annex of Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against Consumers (hereinafter referred to as UCP Act) under Nr 28.[6]

The UCP Act is applied by a network of authorities: the Competition Authority (hereinafter referred to as GVH) launches a case if the commercial practices in question exert material influence upon competition, and – depending on the sector concerned – the Hungarian National Bank or a member of the network of consumer protection authorities handles cases having minor effects.

From the regulations above, Directive 89/552/EEC on television broadcasting and its implementation will be analysed in further depth. It should be noted that the UCPD itself also refers to this Directive, which is in line with the fact that the other regulations lay down more specific requirements and do not use the term "direct exhortation".

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(4) Media content in linear media services that could damage the intellectual, psychological, moral or physical development of minors may only be published in a manner that ensures, either by selecting the time of broadcasting or by means of a technical solution, that minors do not have the opportunity to listen to or watch such content under ordinary circumstances.

(4a) Minors may not be presented in media content in a manner that may substantially jeopardise their psychological or physical development corresponding to their respective ages.

(5) The detailed rules on the protection of minors against media content are laid down in separate legislation.

[5] Article 16

Television advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection:

(a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;
(b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;
(c) it shall not exploit the special trust minors place in parents, teachers or other persons;
(d) it shall not unreasonably show minors in dangerous situations.

[6] Hungary adopted the Annex as one complete list.

Television advertisement, as a commercial practice can be dealt with on the basis of both of the above-mentioned Directives, but when we look at them in detail, it is possible to identify a number of differences which suggest that they will not necessarily tackle the same behaviour regarding an advertisement broadcast on television. For example, the Directive on television broadcasting contains a narrower definition of what constitutes the direct exhortation of minors to purchase. The Directive requires an assessment of whether the direct exhortation "exploits the inexperience or credulity of minors" (which can be understood as an element of the assessment regarding vulnerable consumers – such as children – in case of the UCPD as well). Furthermore, in the case of persuasion of parents and others, the Directive uses the phrase encouragement (instead of exhortation), which can include a broader range of practices.

It could of course be of interest if there is a different outcome in the assessment of the same commercial practice depending on the implementation and the application of these Directives. There are no known cases that would indicate the investigation of an advertisement on the basis of both Directives by the authorities that apply them, the only decision even mentioning the topic and known at the moment was issued in one of the Hungarian cases, where the GVH received the position of a professional organisation (as it is mentioned below).

It is also important to note that the above-mentioned directives do not provide for a general ban on advertising aimed at children; furthermore, the decisions of the authorities also do not refer to such a general ban.

3. Practice – questions in general

Moving on to the application of the UCPD, there are a number of questions that must be dealt with regarding the basic definitions of the UCPD and the interpretation of the text in point Nr 28 of Annex I of the UCPD. These questions will be discussed in further detail below.

3.1. Aggressive practice – Does it have to be assessed?

One of these questions concerns the qualification of a direct exhortation to children as an aggressive practice. The blacklist can be divided into two parts: part one includes the misleading practices, and part two includes the aggressive practices. Point Nr 28 of Annex I of the UCPD belongs to the latter, and following

the general rules of the application of the UCPD, it is only necessary to consider the elements and wording of point Nr 28 of Annex I, and there is no need to look for further evidence of an aggressive element. Some decisions of the authorities of the Member States may refer to the fact that a practice is "aggressive in particular", but this may be due to the parallel application of other regulations as well (see below).

3.2. The transactional decision – Do we need it? Who decides to buy the product in question?

The advantage of the black list is that it is not necessary to prove that there has been a transactional decision. Furthermore, an interesting general characteristic of the provision of point Nr 28 of Annex I of the UCPD is that the consumer who ultimately decides whether to buy and pay for the product is usually not the targeted person, i.e. a child. Consequently, there is a "chain" of participants in the transaction, which does not affect the assessment of a commercial practice under point Nr 28 of Annex I of the UCPD, as has also been confirmed in relevant decisions. This phenomenon of more complex transactions is affecting a growing number of cases, and not only "blacklisted" ones, although the involvement of other participants and their acceptance of their involvement does not appear very much in the descriptions of other practices in the UCPD.

3.3. The consumer targeted – Should the practice be solely or specifically targeted at children?

Furthermore, it can be extremely difficult to determine which person an advertisement is directed at. In case of online games and applications there are a large number of products and services that are used by both children and adults. When investigating an advertisement related to such a product/service it needs to be determined whether the advertisement should be assessed as a commercial practice targeting children on the basis of point Nr 28 of Annex I of the UCPD. As it is mentioned in the Guidance of the European Commission on the implementation/application of the UCPD[7] (hereinafter referred to as UCPD

[7] See http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf, page 100 (31st of January 2017).

Guidance), a recurrent claim is made by many traders about the ban in point Nr 28 of Annex I that it can be difficult to distinguish between marketing directed at children and marketing directed at other consumers. However, the UCPD Guidance also emphasises that in their common position paper of July 2014, the CPC authorities[8] considered that point Nr 28 of Annex I of the UCPD also applies to games that are likely to appeal to children, and not only to those which are solely or specifically targeted at children. A game or application, and the exhortation contained within it, may be considered as directed at children within the meaning of point Nr 28 of Annex I if the trader could reasonably be expected to foresee that it is likely to appeal to children[9].

Moreover, the UCPD Guidance states that national enforcement authorities and courts are not bound by a trader's own definition of the target group for the commercial practice in question, although the definition may be taken into account.[10]

3.3. Definition of "children" – Which definition should be used?

In the event that it is established that children are the target audience of an advertisement, the fact that the UCPD (and the UCP Act) does not include a definition of children has to be dealt with. In such situations, the applicable national regulations and/or the enforcers in charge determine the necessary age group of "children". According to the Hungarian Advertising Act, children ("child-aged") are persons under the age of fourteen, and persons between the age of fourteen and eighteen are considered to be "young persons"[11]. Until the 30th of September 2009 the UCP Act used the word "minors", which can also

8 European national consumer protection authorities which are members of the Consumer Protection Cooperation (CPC) Network, whose framework for cooperation was established by Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

9 See http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf, page 102 (31st of January 2017).

10 See http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf, page 100 (31st of January 2017).

11 Section 3
For the purposes of this Act: […]
c) "young person" shall mean persons between the age of fourteen and eighteen;[…]
e) "children" shall mean persons under the age of fourteen; […] .

be found in the Hungarian Civil Code[12], and refers to persons under eighteen. As of the 1st of October 2009 the UCP Act switched to the use of the word "child-aged" for children (see above), but there is not (and was not) a direct link between the regulations and consequently it is necessary to consider the circumstances of the particular case.

Depending on the particular product in question, children of different age groups/characteristics may be targeted by commercial practices, and the outcomes of the assessment of such practices may differ on the basis, for example, of whether the targeted children can already read or not.

Furthermore, in the case of children their age specific characteristics must be taken into account. This means, for example, that their particular vulnerability due to their lack of experience must be considered, along with the fact that practices may have a different, more aggressive effect on them (even if the practice in question is not directly aimed at exploiting this characteristic). Consequently, it must be appreciated that children can be more sensitive to phrases such as "Don't miss out", or "buy now".

3.4. Direct exhortation – How far does it go?

It can also be unclear whether a commercial practice includes a direct exhortation to children or not. On the one hand, it has been debated whether the Hungarian translation has the same meaning as the English version of the text of the UCPD. The argument was that "exhortation" refers to the prohibition of an explicitly aggressive practice, and the Hungarian "felszólítás" (meaning exhortation) also prohibits more neutral practices; however, the GVH did not share this view.

On the other hand, it has also been debated whether the consumer must actually "buy" the advertised product in order for it to be considered as an exhortation to buy. The GVH decided that it is also considered as an exhortation to buy if the consumer pays for another product (e.g. a magazine or a beverage) in order to get the advertised product (e.g. a sticker or a toy).

Although the practices are to be assessed on a case-to-case basis, the decisions from other Member States will add further layers to the answer. There is also another document that is worth mentioning but which, due to the fact that it is

[12] Act V of 2013, Section 2:10 [Minority]
(1) Persons who have not yet reached the age of eighteen years shall be deemed minors. […]

not a decision, will be mentioned here and not further below. The document is entitled "Principles for online and app-based games" and was published by the United Kingdom's Office of Fair Trading in January 2014. The document contains the following example of a commercial practice that is "less likely or unlikely to comply" with the prohibition on direct exhortation to children: "A game that is likely to appeal to children and that requires the consumer to 'spend' in-game currency, which may be either earned through gameplay or bought for real money. When the consumer runs out of that in-game currency, he/she is prompted (or encouraged or incited through in-game statements or images), for example, to "buy more", visit the shop to "get more" or "become a member".[13]

3.5. General rule – Do we have one?

Given the fact that there are numerous aspects that must be taken into consideration, the assessment as to whether a commercial practice falls under point Nr 28 of Annex I of the UCPD can only be made on a case-by-case-basis as is pointed out by the UCPD Guidance and settled in the case law.[14] As cited above, some authorities and institutions have issued guidelines which largely support the compliance activities of the market players[15]. Despite this fact, it is essential that the relevant authorities and institutions have knowledge of the decisions made in cases in this area in order to remain as up-to-date as possible.

[13] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf, also in: http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf, see p. 101 (31st of January 2017).

[14] See http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf, page 100 (31st of January 2017).

[15] See for example https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf (31st of January 2017) and http://www.consumerombudsman.dk/Regulatory-framework/dcoguides/childrenmarketing (31s of January 2017).

4. Practice – cases

Several decisions have been made in cases relating to point Nr 28 of Annex I of the UCPD, three of which are Hungarian cases. I will deal first with the Hungarian cases as I have more information in relation to these.

The Hungarian cases mentioned include all of the cases that have been investigated by the GVH regarding point Nr 28 of the UCP Act, and as of 20th of May 2016, there had been no further cases investigated by the Hungarian Consumer Protection Authority or the Hungarian National Bank, with the result that we have a full list of initiated cases up until that date.[16]

As regards to the list of decisions from the other Member States of the European Union, I must emphasise that this list will most certainly not be a full one, due to the fact that the list is based on cases mentioned at conferences, in publications and on the online legal database of the European Commission[17].

4.1. Hungarian cases

4.1.1. "Filly" Royal Family and "Nappy" toy puppies

In case Nr. VJ/123/2009 the GVH investigated the advertisements of a trader regarding the"Filly" Royal Family and the "Nappy" toy puppies, which were supplied by the trader.[18]

The toys had non-transparent packaging, so consumers were unable to determine which of the "Filly" or "Nappy" products they had actually purchased. The television advertisements and posters assessed by the GVH contained a description of the products and the following sentences in Hungarian: "Collect them all!" (i.e. all of the members of the "Filly" Royal Family) and "Collect all of the 20 puppies!". The latter statement also appeared on the posters promoting the "Nappy". The website of the trader recommended the "Filly" products for children aged between 3-9 years, and the "Nappy" puppies for children aged

16 To my knowledge, this also includes the decision given in the case on 31st January 2017.

17 See: https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.directive.browse2&elemID=224#article_233. Since I did not have the full text of the decisions in English, I will discuss the cases based on their summaries. The Commision will extend the database to cover the wider consumer acquis and integrate it into the e-Justice Portal in the first half of 2017 (http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm, last update on 24th of November 2016).

18 See: www.gvh.hu//data/cms993212/Vj123_2009_m.pdf (23rd of January 2017).

between 5-12 years, and children of primary school age were used in the television advertisements promoting the products.

According to the opinion of the trader, the investigated parts of the text of the advertisements did not constitute an unfair commercial practice according to point Nr 28 of the Annex of the UCP Act. Furthermore, the trader pointed out that the parts of the text in question had been word for word translated form English to Hungarian. The original English versions and further translations of them were presented in several Member States of the European Union and the trader had no knowledge about additional, similar investigations regarding any of these television advertisements.

Regarding the invitations, the trader was of the opinion that they could not be assessed as an incentive to buy. Since the consumer could buy 20 different "Filly" and 20 different "Nappy" products, the likelihood of the consumer acquiring all of the products via numerous purchases was minimal, and virtually impossible. The trader further claimed that the complete collection could only be acquired by the consumer through exchange with others, which was at heart of the game, and that the invitations were, at the very most, guidance that the toys could be acquired via this exchange and that they could be collected as a hobby. Given the above, the trader stated that the advertisements by no means amounted to exhortation to buy, or to use them.

The trader mentioned purchase and exchange as ways of acquisition of the product. Regarding the latter the trader pointed out that there were daily exchange activities in toyshops that sold the products and that there was also a continuous exchange of the products on several websites.

Additionally, the trader noted that the leading players in the toy and confectionery industry have interpreted point Nr 28 of the Annex of the UCP Act in a similar way, since almost all of them use the slogan "collect them all". The trader argued that even if the GVH interpreted the slogans as incentives to purchase aimed at their targeted audience, (children) then these incentives could still not be qualified as a direct exhortation to buy or use. Every advertisement – consequently including advertisements for toys – indirectly encourages consumption (purchase, usage) and this is the very purpose of their creation. Therefore the invitation to exchange can be best qualified as an indirect invitation to consume (purchase). For example, a declaration could qualify as an invitation to purchase, in case it clearly alleges that the consumer should acquire a product in the course of trade for financial consideration. According to the trader, this is not the case with the slogan used in the advertisments in

question and these could not be considered as an invitation to persuade parents or other adults, either.

In order to prove its own viewpoints, the trader asked for the opinions of the Hungarian Advertising Association (Magyar Reklámszövetség, MRSZ), the company that translated the television advertisements, and the media agency under contract to the trader, as to whether they felt that the advertisements would result in an infringement of the law; however, not one of them believed that the given advertisements would be of concern.

The Hungarian Advertising Association assessed the advertisements with regard to Section 14 (1) of Act I of 1996 on radio and television broadcasting, which contained a prohibition similar to the one in point Nr 28 of the Annex of the UCP Act. Section 14 (1) of Act I of 1996 laid down that advertising shall not directly exhort minors to persuade their parents or other adults to purchase or use toys, or other products or services. However, it has to be mentioned that this regulation was repealed and replaced on 1st January 2011 by Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content cited above, which also served the implementation of Directive 89/552/EEC on television broadcasting. According to the position of the Hungarian Advertising Association regarding the television advertisements in question, the facts required in case of Section 14 (1) of Act I of 1996 were missing. The advertisements targeted minors, since the products themselves were intended for children, but did not exhort the children to buy, especially not directly, and did not amount to an inducement to exhort parents to buy. The collection of the figures – on the basis of the information provided by the advertiser – could be realised not only through purchases but also through exchanges among peers, with the result that the exhortation to induce parents to buy might have been even less relevant. According to the Hungarian Advertising Association, the prohibition by the legislator was not accidentally limited to direct exhortation, since with the aim of protecting children such a prohibition would result in a disproportionate interference of the freedom to commercial free speech or, when interpreted differently, to conduct a business if inducement to purchase would not be allowed, even in an indirect form, in the advertisement of products for children. Advertising is used as a tool to encourage consumption, so this would mean that a ban on advertising would be established in all cases of products for children. This is mutatis mutandis not addressed, only the direct exhortation, which could not be assessed in case of these advertisements. Consequently, in the case of the television advertisements in question the facts required by the regulation were missing.

In its decision the GVH concluded that the trader had committed an infringement under point Nr 28 of Annex of the UCP Act, based on the information below.

The investigated advertisements targeted minors, especially those aged under 10 years, as supported by the recommendations contained on the trader's website and the persons seen in the television advertisements cited above. In view of this the GVH stated that the commercial practice was likely to distort the behaviour of a group of consumers, the members of which were particularly vulnerable to the given practice because of their age. This was also reasonably foreseeable by the trader engaging in the practice and therefore the practice had to be assessed from the perspective of the average member of that particular group. This assessment has already been made by the legislator in Section 3(4) of the UCP Act, which provides that the commercial practices contained in the list of the Annex shall in all circumstances be regarded as unfair. Also the Budapest-Capital Regional Court emphasised in its decision Nr. 11.K. 33.874/2010/13 (related to the case Vj-143/2009 of the GVH) that the acts contained in the list of the Annex of the UCP Act are "blacklisted", and that resultingly the fact patterns listed in it shall be regarded as unfair without further deliberation, so it is not necessary to separately prove that the practice was likely to influence the choice of the consumer.

Taking into consideration the age of the targeted consumers, the GVH stated that among the minor-aged consumers reached through the advertisements at the point of purchase (the posters), there may have also been some consumers who were already able to read, with the result that the message of the advertisements may have reached them.

Point Nr 28 of the Annex of the UCP Act includes two types of behaviours: the direct exhortation of minors (according to the text of the UCP Act since 1st of October 2009 those of child age)

a) to buy, or use the advertised product. It has to be emphasised that this phrase points out that making a transactional decision according to the UCP Act does not necessarily require the rules on the the conclusion or validity of a contract according to civil law to be realised. The practice regulated in point Nr 28 of the Annex may also be carried out if the minors cannot conclude a valid sale contract concerning the advertised product;
b) to persuade their parents or other adults to buy the advertised product for them. It is to be emphasised in this context that the UCP Act does not only prohibit those unfair practices that target consumers who actually

> buy the product, but also those that target consumers who may influence the transactional decision of the consumers who actually buy the product. In the present case and the given circumstances even through the so-called "nag factor", minor-aged children may significantly influence their parents or other adults to purchase the particular good.

The law only requires the advertisement to exhort the minor-aged consumer to buy (consume) and does not contain a requirement that the conclusion of the purchase is directly made by the minor-aged consumer. In case of both instances of point Nr 28 of the Annex there is a requirement that there is direct exhortation of the minor-aged consumer by the trader, but it bears no significance as to whether or not as a result the minor-aged consumer by himself/herself persuaded another person to buy the advertised product. Furthermore, even the conclusion of the purchase is not a requirement for the infringement to be determined, since according to point Nr 28 of the Annex of the UCP Act, the mere fact that there has been exhortation of the minor-aged consumer is sufficient to establish an infringement.

In the present case the investigated advertisements did not directly exhort minor-aged consumers to convince their parents or other adults to buy the products advertised.

A direct exhortation of minor-aged consumers to purchase or consume an advertised good does not only take place if the advertisement in question contains the phrase "Buy this product", or another expression with similar content, as point Nr 28 of the Annex of the UCP Act also includes any type of exhortation that attracts and motivates minors to acquire the advertised product, either for financial consideration or without it.

Advertisements with the content "Collect them all!" and "Collect all twenty puppies!" directly exhort minor-aged consumers to buy the advertised products, since collecting them and completing the collection is only possible if the ponies or the puppies are purchased.

Given the fact that the packaging of the products was not transparent, consumers could not know if they were buying the "Filly" or the "Nappy" products. In the opinion of the trader, there was a minimal chance, or to be put it more bluntly, it was virtually impossible for a consumer to acquire all of the products simply by purchasing them; consequently it was only possible to acquire the entire collection through exchange and the slogan contained in the advertisements referring to "collecting" could not be considered as exhortion to acquire the products. However, the GVH referred to the fact that while most

of the products could be gained through exchange, this exchange would only be possible in practice if a number of the products in question had already been purchased. According to the GVH, the commercial practice carried out by the trader demonstrated that the codification of point Nr 28 of the Annex of the UCP was justified. The commercial practice in question endeavoured to persuade minors, who were not able to realisee the consequences of their transactional decision, to engage in a purchase in relation to which it was not possible, even for an adult consumer, to estimate both the amount of immediate money, and future potential money, that would need to be spent on the good(s) (it was impossible to assess how many purchases would be necessary in order to collect all the toys, and for what expenditure the missing toys could be acquired).

In this context it is to be emphasised that the advertising appeal coming from the "world of adults" can have different, stronger effects on minors who are raised to follow the rules constituted by adults than on consumers that are not minors, and that such an advertisement - as acknowledged by point Nr 28 of the Annex of the UCP Act – can be regarded without any further examination as being able to influence the behaviour of minor-aged consumers in a way that is advantageous for the trader. Furthermore, the commercial practice of the trader strengthened the influence of peer groups on the behaviour of the minor-aged consumers, due also to the fact that the trader mentioned that the exchange activities connected to the product in question had become common practice and that the product was actively being exchanged on several websites.

It is also worth noting that the decision of the GVH stated that the above-mentioned position of the Hungarian Advertising Association regarding the television advertisements under investigation, and referenced by the trader, had no bearing on the decision of the GVH. The position of the Hungarian Advertising Association did not bind the GVH in any way and the position was issued after the broadcasting of the television advertisements and there is a major difference between Section 14 (1) and point 28 of the Annex of the UCP Act, as the former only prohibits advertisements that directly exhort minor-aged consumers to encourage their parents or other adults to buy or use toys or other products or services, but – unlike point Nr 28 of the Annex of the UCP Act – does not cover situations in which advertisements directly exhort minor-aged consumers to buy or use the advertised products themselves.

4.1.2. "Egmont Publishing is 20 years old"

In case VJ/124/2009, the GVH decided that the trader had conducted unfair commercial practices towards consumers under point Nr 28 of the Annex of the UCP Act, regarding the sweepstake "Egmont Publisher is 20 years old", when the trader directly exhorted minors to buy the advertised good in its own magazines and on its website, as well as on shop-window posters in Budapest.[19]

The trader had a portfolio of 18 regular publications on the market of children's magazines, among which there were publications for children of kindergarten-age, preschool-age and for teenagers.

The trader carried out the sweepstake "Egmont Publisher is 20 years old" in 2009. In the course of the game in 2009 there was an Egmont sticker placed on each Egmont magazine. The participants of the game had to collect six same-coloured stickers in a specific collector booklet and then send the booklet to the magazine if they wished to take part in a draw (possible prizes were vouchers for toys, and an Egmont book-pack); in addition, the first 20 individuals to send in their booklets were offered a quarter-year, optional Egmont magazine subscription as a gift. On 14th of December 2009, 1,000,000 HUF was drawn among all senders.

The GVH was of the opinion that the advertisements also targeted minors, which it claimed could be established in light of the content of the advertisements and the nature of the affected magazines.

In its decision, in addition to its comments relating to the evaluation of the "vulnerable consumer" and its assessment as to whether the practice fell under the scope of the black-list, the GVH also assessed the following aspects. The commercial practices in question (and therefore the messages they conveyed) reached children who were capable of reading the text of the advertisements, especially those of kindergarten-age and teenagers, although this could also not be excluded in relation to pre-schoolers. In this case the consumer had to buy the stickers to participate in the game and the availability of the stickers was linked to that of the magazines (on which the stickers were attached). Consequently, the invitation of the children to collect the magazines was equal to an exhortation to buy the magazines.

The GVH could not take into consideration, as stated by the trader, that the manner in which the game could only be won was evidence of the fact that the advertisement was aimed at adults. The exhortation was – through its wording –

[19] See: http://www.gvh.hu//data/cms993216/Vj124_2009_m.pdf (23rd of January 2017).

aimed at minors, as was also acknowledged by the trader, irrespective of whether this was the actual intention of the trader.

4.1.3. "KUBU – the football champions" ("KUBU – a foci bajnokai)

In case VJ/22/2013, the GVH investigated the commercial practice in connection with the soft drink "Kubu". The slogan of the advertising campaign in question was "the football champions" and the consumer had to collect the stickers from the bottles, and send the codes from under the labels of the products to the trader in order to receive one of the gifts guaranteed by the trader.[20]

The trader argued that it had not committed an infringement under point Nr 28 of the Annex of the UCP Act. Furthermore, the trader pointed out that before publishing any promotional campaign it seeks the opinion of the Advertising Self-Regulatory Board (Önszabályozó Reklám Testület, ÖRT). The trader stated that in the case in question the opinion of the Advertising Self-Regulatory Board in relation to the investigated promotion had been taken on board.

According to the Advertising Self-Regulatory Board, point Nr 28 of Annex I of the UCP Act only applies to direct exhortation, and therefore does not apply to commercial practices which result in children obtaining gifts or vouchers in case of a purchase not preceded by a direct exhortation to buy, or after the purchase. Therefore, in the opinion of the Advertising Self-Regulatory advertising aimed at children is not in itself banned and the phrase "direct exhortation to buy" should be interpreted strictly, in accordance with its literal meaning.

The trader agreed that point Nr 28 of the Annex of the UCP Act cannot be interpreted as an absolute ban on advertising aimed at children, which would breach the provisions of the Treaty on the European Union and it is unlikely that this would have been the intention of the Union legislator. Furthermore, the trader pointed out that point Nr 28 of the Annex of the UCP Act belongs to those commercial practices that are listed as aggressive ones and that its assessment should therefore be based on an examination of the definition of aggressivity (which has physical and/or psychological pressure as its core element, impairing the consumer's freedom of choice). The trader emphasised that children think differently to adults and that they generally want to comply with the expectations of adults, as they are typically raised to behave this way and they

[20] See: http://www.gvh.hu//data/cms1022296/Vj022_2013_m.pdf (23rd of January 2017).

cannot distinguish between an exhortation through a television advertisement and that through a nursery school teacher. The trader also indicated that from a grammatical point of view, while "exhortation" has a quite neutral character in Hungarian, it has a stronger, more aggressive meaning in English. This fact also confirms that in order to assess a commercial practice as a banned one its aggressivity needs to be assessed and solely the use of the imperative mood is not sufficient to determine the infringement and advertisements with a positive message can definitely not be challenged.

The trader claimed that no direct exhortation had taken place based on a number of factors: 1) advertisement in question did not praise the products, 2) the exhortation did not put pressure on the consumer, 4) it only contained leverage messages, 5) there was no direct exhortation to buy, 6) there was no need to buy (since the stickers could be obtained as a gift or through an exchange), and 7) it contained positive messages (establishing a football-related connotation). The trader also referred to the first case mentioned above (VJ/123/2009) and agreed with the GVH that a direct exhortation to exchange is indeed an infringement, but it argued that in the case in question the advertisement did not target the acquisition of the whole product collection and rather contained an exhortation to acquire the gifts. Consequently, according to the trader, even if in the opinion of the GVH the necessary codes could only be obtained by purchasing the bottles, this would only amount to indirect and not direct exhortation.

The GVH stated that the commercial practice investigated primarily targeted young consumers who were mainly under the age of 14 years. The television advertisements of the products featured children aged between 10-12 years. The advertisement was broadcasted on more than one children's television channel and it attracted the interest of its target group with the phrases "football", "champion", "gift", which in this particular target group are effective for creating a need for the products. Furthermore, the communications were designed in such a manner that they wouldhave an emotional impact on the target group (e.g. "Be a football champion", "KUBU the champions of football"). One of the advertised gifts was also primarily suitable for raising the interest of minors (e.g. face paint kit). All of these factors facilitated the creation of an intention to participate in the game, which could solely be realised through the purchase of the product. It is irrelevant that according to the rules only persons above 14 years could participate in the game and that a distinction was made between the persons (the minors) impacted by the advertisement and developing an intention to buy and the actual person (the parent), who in fact purchased the product so that the child could obtain the gift. It could be stated without doubt that the two

groups did not necessarily coincide. Nevertheless, the legislation only requires that the exhortation is directed at children, and it does not matter whether the purchase is made by a minor or an adult; furthermore, as emphasised by the GVH, it is not necessary that the product is actually bought.

The GVH did not accept the position of the trader that the assessment under point Nr 28 of the Annex of the UCP Act requires additional elements (e.g. aggressivity) to those contained in the text of point Nr 28, since the Union legislator has already weighed these.

Consequently, it is also not necessary to undertake a further examination of the extent to which the transactional decision has been influenced. However, since in the course of the same proceeding the GVH undertook an investigation of a misleading omission of the trader regarding the same advertisements, the GVH also examined the issue of the transactional decision made by the consumer, and the outcome of this investigation may be of interest for the issue at hand too. The GVH found that the claims made regarding the winnings were likely to affect the transactional decision, on the one hand in relation to the children by facilitating a desire to collect and persuade their parents to buy the bottles, eventually resulting in participation and therefore in the registration process, and on the other hand in relation to the parents by convincing them to make the purchase and participate in the registration process.

The GVH also noted that aggressivity under the UCP Act does not coincide with its understanding in everyday language, and even in the case of claiming something positive (e.g. a winning) a commercial practice can become inconvenient for the consumer and be assessed as an aggressive commercial practice (see the cases Nr. VJ/117/2009, VJ/3/2010, VJ/119/2010).

Furthermore, the GVH did not share the opinion of the trader that the English version of the text of the UCPD only prohibits a much stronger, more aggressive form of exhortation in case of advertisements aimed at children. The GVH pointed out that the Hungarian meaning of "exhortation to do something" has the meaning of "buzdítás, serkentés valami megtételére" according to the English-Hungarian dictionary[21], which is similar to the phrases used in the German and the French versions.

The GVH found the sentences "Drink a KUBU labelled "football champions"!", "Collect the glowing stickers from under the KUBU labels!" to be unfair irrespective of the fact that the advertisement did not use the word

[21] The GVH referred to the "angol-magyar nagyszótár", which ispresumably the dictionary of the Akadémiai Kiadó (Academic Publisher), Budapest.

"buy", since solely the purchased product could be drunk and the stickers could only be collected after the product had been purchased. As regards to the findings of the GVH, it did not matter whether or not the gift appeared in the advertisement, or whether or not it could be automatically received.

Based upon the above findings, the GVH concluded that the investigated commercial practice amounted to an unfair commercial practice under point Nr 28 of the Annex of the UCP Act.

The trader sought a judicial remedy against this decision but the court found the decision of the GVH lawful in the first, and in the second instance; moreover, the court stated in its judgment in the second instance[22] – among others factors - that the verbs "buy" and "collect" were used in the imperative mood, were directly aimed at children, and that the exhortations amounted to an invitation to purchase the product since – as mentioned above – solely the purchased product could be drunk, and the sticker could only be collected after the product had been purchased.

4.2. Cases from other Member States

4.2.1. Austria

4.2.1.1. Pony Club

The trader was a seller of books and magazines and also offered a membership subscription to its "PonyClub", via which subscribed members could receive a monthly package of books, gifts and other surprises for for either EUR 17,95 or 23,95. The trader sent letters to children at schools, containing promotional material for a trial price of EUR 4,95.

The Supreme Court stated that the commercial practice was unfair, but assessed the advertisement as a misleading one since the Court set out that point Nr 28 of Annex I of the Austrian regulation which implements point Nr 28 of Annex I of the UCPD is only to be applied in case of direct exhortations to purchase (such as "Buy this book!" or "Tell your parents to buy this book!") but not to indirect ones.[23]

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22 http://www.gvh.hu//data/cms1031661/Vj022_46_2013_FT.pdf, (23rd of January 2017).

23 https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=247&articleID=196&elemID=196&countryID=AT&ret=196, brought on 8th of July 2008, by the OGH (Oberster Gerichtshof, Austrian Supreme Court), Wien (Vienna), under the national ID 4 Ob 57/08y (23rd of January 2017).

4.2.1.2. Stickeralbum

The trader in question operated a chain of supermarkets in Austria, selling groceries and other consumer goods. Between January and March 2011 the consumers received a package containing five stickers every time they spent at least EUR 10. The trader also sold a sticker album for these stickers at a price of EUR 1,99. It was also possible to acquire stickers separately for a price of EUR 0,50 per sticker. The trader advertised this offer on its website, on TV and in the supermarkets in the following way: "Get a sticker album and collect stickers.", "Get a sticker album for EUR 1,99. ", "Get the animal stickers at the counter."

The Supreme Court argued that in case of the sticker album the commercial practice constituted without doubt a direct exhortation to children to buy the advertised products. In case of the sticker collection campaign and the exhortation to collect the stickers the Court argued that such actions may constitute aggressive commercial practices, but that the practice in question did not satisfy the necessary legal requirements as there appeared to be no other misleading or unfair practice; the parts of the advertisement which were not related to the sticker album were not viewed as imperative. The Court set out that addressing advertisements to children does not, in itself, constitute an aggressive practice, as the parents can be expected to control the children's wishes.[24]

4.2.1.3. Videospiel DUniverse

The defendant had operated a web site www.d******.de and advertised both on this website and on Austrian television, a video game "D*****-Universe" for schoolchildren (up to 14 years). The advertisement contained general wording such as "now available", "available now in retail" and also included information on the different ways that the product could be ordered (e.g. a reference to the website link where the product could be purchased). The advertisement also contained general descriptions portraying the game as desirable.

Both the first instance judge and the court of appeal ruled that this practice was aggressive, in particular due to the fact that information was given on how to purchase the product (links on the website). According to both instances, these expressions were direct exhortations aimed at children.

[24] https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=565&articleID=196&elemID=196&countryID=AT&ret=196, brought on 19th of March 2013 by the OGH (Oberster Gerichtshof), the Austrian Supreme Court, Wien (Vienna), under the national ID 4Ob244/12d (23rd of January 2017).

The Supreme Court followed its earlier case law (refered to as 4 Ob 244/12d, see above under 4.2.1.2. Stickeralbum) and made a distinction between "direct exhortation", i.e. advertisements formulated as a request to purchase a product (e.g. "get a sticker album" etc.), and mere "indirect exhortations". According to the Supreme Court, there is an indirect exhortation if the consumer has to take an intermediate step between the advertisement and the decision to purchase and if the advertisement only generally describes the product as desirable and presents options on how to move ahead with a purchase. In the case at hand, the Supreme Court considered that the expressions used by the defendant were indirect exhortations. The Court repeated that advertisements directed to children do not automatically constitute unfair commercial practices. The Supreme Court overruled the decisions of both the first instance judge and the court of appeal.[25]

4.2.2. Finland: direct marketing letters to children turning 10 years old

The Finnish Consumer Ombudsman ruled that a bank sending direct marketing letters to children turning 10 years old constituted an aggressive practice (the UCPD Guidance mentions the case among the examples of the practices assessed under point Nr 28 UCPD). The children were welcomed to a branch office of the bank to obtain a personal Visa Electron card to mark their 10th birthday.[26]

4.2.3. Germany

4.2.3.1. We-radio vith headphones

The German court ruled that the advertisement directed at children containing the statement "YOUR EXTRA COOL WE-RADIO WITH HEADPHONES" and "DO NOT MISS – FROM 15 OF APRIL AT YOUR KIOSK" constituted a

[25] https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=570&articleID=196&elemID=196&countryID=AT&ret=196, brought on 9th July 2013, by the OGH (Oberster Gerichtshof, Austrian Supreme Court), Wien (Vienna), under the national ID 4Ob95/13v (23rd of January 2017).

[26] http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf, see p. 101. (23rd of January 2017).

commercial practice under point 28 of the Annex to § 3 III UWG (the German Unfair Competition Act).

Furthermore, the court stated that inciting children through an advertisement to buy a product constitutes a violation of the German Unfair Competition Act (UWG). A direct exhortation to children to buy products is an unfair practice *per se* pursuant to point 28 of the Annex to § 3 III UWG, which implements the UCPD. In this case, a direct exhortation was present because it is generally not possible to inspect a magazine in a German kiosk without buying the magazine. Consequently, the advertisement could not be qualified as amounting to the mere provision of information about the release date.[27]

4.2.3.2. Runes of Magic

The trader provided an internet-game under the name "Runes of Magic" and advertised on its website a week-long offer to upgrade the characters of the players. The court took account of the fact that the communication used the informal version of "you" (the use of which is also no longer unusual in relation to adults) together with child-specific terms and anglicisms. It was not considered crucial that the adults which were also addressed by the advertisement should also in fact play the game. Considering the overall context of the advertisement, the Supreme Court of Justice stated that the advertisement directly addressed children under the age of 14 years. The court assessed the sentence "Seize the advantageous opportunity and add that certain something to your armour & weapons" – as meaning "buy yourself", "get yourself", and as a direct exhortation under point Nr 28 annexed to Section 3 (3) UWG; furthermore, the fact that the products and prices were detailed on a further internet site, connected through a link to the investigated one was enough to amount to a direct exhortation. In the opinion of the court, the fact that a link had to be used in order to gain access to further information about the products was not to be considered as a further step which could be separated, since on the one hand it was clear that the target group was exhorted to buy the products, and on the other hand this could lead to the ban set out in point Nr 28 being bypassed. With

[27] https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=61&articleID=196&elemID=196&countryID=DE&ret=196, brought on 17th of March 2010, by the Landgericht (Regional Court), Berlin, under the national ID: 103 0 171/08, (23rd of January 2017).

its decision, the Federal Court of Justice adopted an opposite position to both of the lower courts that had previously heard the case.[28]

4.2.3.3. "Bring your report card"

In a different case, the trader in question told children to "bring your report card [to …] and receive a 2 Euro discount on any product for each "A". The court found that the advertisement was not aimed at the sale of a specific product or products, but rather advertised the offers of the trader in general; consequently, no infringement was found under point Nr 28 annexed to Section 3 (3) UWG.[29]

4.2.4. Latvia: first grader's safety package

On 1st of September 2008, the defendant (one of the leading telecommunications providers in Latvia) gave out packages entitled "*Pirmklasnieka drošības komplekts"* (first grader's safety package) to first-graders in several schools in Latvia. The package contained a reflector, a list of classes, and a prepayment card "Zelta Zivtiņa" SIM card with a credit balance of LVL 1. It also contained an informative booklet about the correct usage of a phone (first lines were in Latvian: "*Greetings, first-grader! Congratulations on your first personal phone number. With it you can call your mum, dad, your friends, but not your cat, doggy or teddy bear*!") and a letter to parents (which amongst other things included information regarding recommended tariff plans for "Zelta Zivtiņa" and renewal cards).

Providing young children with SIM cards, inciting them to use mobile phone services, and giving them information regarding prepayment cards is an aggressive commercial practice that violates point Nr 28 of Annex I of the UCPD, according to the decision of the court. In such a case, it is not necessary to evaluate the other conditions of the UCPD in order to determine whether this practice should be prohibited.

The Consumer Rights Protection Centre (CRPC) first concluded that the provision of SIM cards containing credit, and congratulating children and pointing out that they can make calls to their mothers, fathers and friends and

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28 http://lexetius.com/2013,5210, brought on 17th of July 2013, by the Bundesgerichtshof (Federal Court of Justice), Berlin, (23rd of January 2017).

29 http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=68950&pos=0&anz=1, brought on 3rd of April 2013, by the Bundesgerichtshof (Federal Court of Justice), Berlin (23rd of January 2017).

describing the possible opportunities of the prepayment card, must without any doubt be considered as a direct invitation for children to use the trader's telecommunication services.

The CRPC then considered that children belong to one of the most vulnerable categories of society, because they can be easily influenced due to their age and lack of knowledge. Receiving gifts of this kind can negatively influence children, because receiving a gift that cannot be used can create a feeling of insecurity, inferiority and shame for being different to others.

The CRPC continued by considering that although the trader intended to give information about telecommunication services to the parents of the children, the direct recipients of the information were in fact children. In practice, the children only gave information to their parents after they had become acquainted with the content of the package (including their personal number and credit balance of LVL 1).

The CRPC concluded that the advertisement included a direct invitation for children to receive services, and that this should be considered as an aggressive commercial practice as defined in point Nr 28 of Annex I of the UCPD.[30]

4.2.5. Norway: Belibers

A concert organiser advertised tickets for a Justin Bieber concert on his Facebook page using the following phrases: "Belibers – there are still RIMI – cards available at many stores. Run, jump on your bike or get someone to drive you" and "Remember to also buy tickets for the Bieberexpress when you buy concert tickets at RIMI today". The Norwegian Market Council found this to be in breach of point Nr 28 of Annex I, taking the decision by the Swedish Market Court in the 'Stardoll case' into account (see below).[31]

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30 https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.cases.showCase&caseID=77&articleID=196&elemID=196&countryID=LV&ret=196, brought on 11th of December 2008 by the Patērētāju tiesību aizsardzības centrs (Consumer Rights Protection Centre), Riga, under the national ID: Consumer Rights Protection Centre Decision Nr. E03-RIG-511 (23rd of January 2017).

31 http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf, see p. 100 (23th January 2017).

4.2.6. Sweden: Stardoll AB

The trader ran a gaming community on the internet. The participants received a virtual doll which they could dress and buy furniture for; furthermore, the participants could communicate with one another and participate in different games and activities. The community was aimed at girls aged between 7 and 17 years. The website contained the following information: "buy", "buy more", "buy here", "upgrade" and "upgrade now" with direct links to buy products. The trader also sent direct marketing e-mails to the minors' mailboxes without consent from their parents. In these emails, the addressees were also exhorted to "Buy before it's too late".

The judgment of the court set out that information on a gaming community on the internet, aimed at children, and containing the statements referred to above, with direct links to buy products, is considered a direct exhortation to children to buy the advertised products and therefore constitutes a blacklisted commercial practice.[32]

4.2.7. United Kingdom: Super Moshis

The UK Advertising Standards Authority ruled against a trader in relation to two online games which provided in-app purchases containing direct exhortations to children. Participation in the games was free, however certain activities required participation in a paid-membership system, which entitled members to additional benefits. The authority found that several statements promoting membership or the purchase of in-game currency were phrased as commands to the players. These included statements such as "JOIN NOW"[33], "The Super Moshis need YOU" and "Members are going to be super popular", which the authority considered as putting pressure on children to make a purchase.[34]

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[32] The description of the case in the legal database of the European Commission also refers to the assessment of the practice as an aggressive one, but other sources mention that the court set out the aggressivity under other regulations; consequently , I do not refer to this part of the description (see: http://www.consumerombudsman.dk/Global/404Page?item=/archive/dcoguides/childrenmarketing&site=consumerombudsman&user=extranetAnonymous&url=%2farchive%2fdcoguides%2fchildrenmarketing, 23rd of January 2017).

[33] https://www.asa.org.uk/Rulings/Adjudications/2015/8/55-Pixels-Ltd/SHP_ADJ_305045.aspx#.VjnevP7luUk.

[34] https://www.asa.org.uk/Rulings/Adjudications/2015/8/Mind-Candy-Ltd/SHP_ADJ_305018.aspx#.VjnfC_7luUk; http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf, see p. 100-101. (23rd of January 2017).

4.3. The Consumer Protection Network

In 2013 and 2014, European national consumer protection authorities, acting through the Consumer Protection Coperation (hereinafter referred to as: CPC) Network, carried out a joint enforcement action on online games that offer possibilities to make purchases while playing (in-app purchases) and that are likely to appeal to or to be played by children. [35] In July 2014, the European Commission announced that real progress with tangible results had been achieved due to this joint action.

In their common position paper of July 2014, the CPC authorities were of the opinion that Article 5 (3) and (5) and point 28 Annex I to the UCPD apply to games that are likely to appeal to children, and not only to those that are solely or specifically targeted at children. A game or application, and the exhortation contained within it, may be considered as directed at children within the meaning of point Nr 28 of Annex I if the trader could reasonably be expected to foresee that it is likely to appeal to children. When assessing marketing directed at children, due account should be taken of the way messages are presented and of the context of those messages. In other words, a case-by-case assessment of the facts and circumstancesis, to a large extent, necessary. However, national enforcement experience confirms that expressions like "buy now!" or "up-grade now!" are deemed to be in breach.[36]

5. Conclusion

While advertising aimed at children is blacklisted and account should be taken of the applicable sectoral regulations, as is apparent from the above discussion, it is not banned per se.As for the application of point Nr 28 of Annex I of the UCPD, some questions seem to have been answered, for example aggressivity does not have to be assessed, and the commercial practice in question does not have to be exclusively aimed at children. The cases also show that children can be affected by commercial practices in a number of different ways depending on, for example, their level of knowledge and their preferences. Furthermore, while the word "buy" does not necessarily have to appear in the investigated

[35] http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf, see p. 102. (23rd of January 2017).

[36] http://ec.europa.eu/justice/newsroom/consumer-marketing/news/1401222_en.htm (23rd of January 2017).

advertisement, all of the particular circumstances relating to the practice have to be carefully considered, on a case-by-case basis. We can still wait if the fitness check of the UCPD brings new elements to the regulation and emphasise the importance of information sharing, a renewed database and further joint actions and communications within the framework of the CPC network. However, last but not least to be mentioned is compliance. The development of a culture of compliance amongst traders, and of informed decision-making amongst consumers, via educational campaigns aimed at the identification of blacklisted practices, is vital for achieving both of these objectives and protecting future generations of consumers.

BRIEF SUMMARY OF THE 5TH MEDIUM TERM CONSUMER PROTECTION POLICY OF HUNGARY AND ASPECTS OF UNFAIR COMMERCIAL PRACTICES

István Szente*

Foreword

The prelude to this summary was that I had the opportunity to make two presentations at the Third and Fourth Annual Conference on Unfair Commercial Practices organized at Pázmány Péter Catholic University.

Nowadays the importance of consumer protection policy is undeniable and it affects the everyday life of all citizens.

In this document I briefly summarize the overall objective of the medium term consumer protection policy of Hungary, and present the challenges, objectives and professional target areas that will occur during its implementation.

Digital consumer protection features as an important issue in the medium term policy: the Hungarian consumer protection system must be prepared to deliver efficient responses to the challenges of the digital age. Among the horizontal objectives of the medium term policy the protection of vulnerable consumers appears as a priority area.

Therefore, the second part of this summary concentrates on the so-called product presentations (a special category of commercial practices usually resulting in consumer contracts concluded away from business premises), which is nowadays one of the main challenges to the protection of vulnerable consumers in Hungary. The infringements connected to product presentation usually breach the provisions of the Unfair Commercial Practices Directive; I

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shall therefore summarize the applicable rules. This part is followed by a brief description of product presentations and an example from our practice.

1. Main competences of the Hungarian Authority for Consumer Protection

The Hungarian Authority for Consumer Protection (hereinafter referred to as the "HACP") is one of the three governmental authorities which have the competence to investigate Unfair Commercial Practices (the other two institutions are the Hungarian National Bank and the Hungarian Competition Authority).

The HACP is entitled to carry out the basic and primary tasks related to consumer protection in Hungary. Its tasks include ensuring the protection of consumers' life, safety and health through the active market surveillance of the distribution of non-food products, and ensuring the protection of the economic interests of consumers. Therefore, the HACP carries out continuous inspections in the commercial and services sector. In the course of these inspections, the HACP verifies whether legal requirements pertaining to the provision of adequate information to consumers have been complied with, filters out unfair terms and conditions from contracts and seeks to prevent traders from implementing misleading business-to-consumers commercial practices or applying aggressive marketing methods.

2. The overall objective of the medium term consumer protection policy

The medium term consumer protection policy for the period between 2014 and 2018 in Hungary has three demarcated objectives and strives to achieve these goals. It is important to distinguish between strategic and horizontal objectives.

The first strategic target concentrates on raising consumer awareness and promoting consumer-friendly business practices. The second strategic target aims at creating a transparent and predictable institutional and regulatory environment in order to guarantee consumer rights. The third strategic target underlines the importance of market surveillance, and stresses that action must be stepped up in the field of market surveillance as well. As noted above,

the medium term consumer protection policy also defined horizontal goals. The first horizontal goal underlines the importance of the digital aspects of consumer society as well as the protection of vulnerable consumers. The second horizontal objective emphasizes the protection of vulnerable consumers from misrepresentation. The third horizontal pillar notes that strengthening consumers' sustainable thinking and health awareness is inevitable.

3. The main tasks of consumer protection

The strategy also summarizes the overall objective of consumer protection policy, which is to ensure a comprehensive strategy in order to increase consumer confidence, long-term sustainability and a high-level of consumer protection. In addition, a comprehensive strategy is needed, which serves consumers effectively through guaranteeing the safety of available products and services, enforcing the rights of consumers and providing access to an alternative dispute resolution system. In order to protect consumers effectively, a flexible organizational system is indispensable which easily adapts to European and international market changes.

Well-informed and conscious consumers can effectively boost innovation and growth more than ever before, because they expect high quality products and services. Following the economic crisis new demands arose, while new forms of purchasing gained ground, such as e-commerce and digital services. Rules governing consumer information must be adjusted to market developments. In addition, a number of new social challenges must be tackled – such as more complex consumer decisions, the urgent need for sustainable forms of consumption, the possibilities inherent in and the hazards of digitalization, the increasing number of vulnerable consumers and the ageing population. Well-informed and conscious consumers, who are aware of their rights and possibilities will purchase more carefully and rationally. They make their consumer decisions cautiously taking into account financial, quality and environmental aspects as well, which results in less purchased goods at the level of the individual and thus less consumer disputes, cost-efficiency, enhanced competition at the national level, and the improvement of product and service quality.

In order to increase consumer confidence, efforts should be made to promote conscious, self-aware consumer behaviour and to strengthen instruments which could further the enforcement of consumer rights. Achieving these objectives

should be the common interest of Hungarian society and all stakeholders of the Hungarian economy. Therefore, the consumer protection policy of Hungary up to 2018 is based on an approach which underlines the cooperation between businesses and stakeholders of the public consumer protection system, openness of information and continuous two-way communication between parties, as well as the development of instruments and organizations which promote the enforcement of consumer rights. A sustainable and high level of consumer protection shall be achieved through cooperation between the major stakeholders (transparent and effective consumer protection organizational system, alternative dispute resolution bodies, and NGOs representing consumer interests). Through consumer policy the Hungarian Government intends to enhance the well-being of the Hungarian people, to contribute to the improvement of living conditions, and to facilitate fair market operation while improving the competitiveness of Hungarian businesses.

4. Objectives of consumer protection

4.1. Vision

The vision of consumer protection is to build a society based on conscious and sustainable consumption, where consumer trust and fair market operation is grounded on the mutual cooperation between law-abiding businesses and a strong authority ensuring an effective legal environment.

4.2. General mission

The medium term strategy also defines the general mission of consumer protection, which includes the protection of the health, physical integrity and property interests of consumers by taking into account environmental sustainability aspects. This mission shall be fulfilled by an organizational system that is easily adaptable to European and international changes.

Consumer organizations completing their tasks and cooperating at a professional level shall provide information to members of society and the market on an ongoing basis, and shall contribute to developing competencies related to sustainable consumption. The field of consumer protection is a complex multi-player system.

In order to operate an efficient and successful system, which is capable of serving both consumer and business interests, the following principles must be considered:

Efficient and effective public intervention is essential for establishing a well-functioning consumer protection structure. A consumer protection system can only operate successfully, if it recognizes that effective consumer protection is in the PUBLIC INTEREST.

Effective consumer protection could not exist without the cooperation of various interrelated stakeholders. In this system every stakeholder affected must recognize that successful consumer protection is their COMMON responsibility.

It is necessary to think in the terms of a system, which is understandable and recognizable to all of its stakeholders and which aims at raising consumer awareness and providing information in CLEAR manner.

4.3. Comprehensive strategic objectives, sub-objectives

The general objective of consumer policy is to ensure sustainable high-level of consumer protection, to provide consumers with appropriate tools putting the interests of the consumer into the center.

In the period up until 2018 the consumer policy strives to achieve the aforementioned goals alongside the following three strategic objectives:

- achieving consumer awareness and a consumer-friendly business attitude;
- shaping a transparent and predictable organizational and regulatory environment guaranteeing consumer rights;
- effective action targeting the priority areas of consumption and risk through an efficient surveillance of goods and services available on the market.

4.3.1. Achieving consumer awareness and a consumer-friendly business attitude

A priority area of consumer protection is to inform and educate consumers, manufacturers, distributors, service providers and the affected economic stakeholders on an ongoing basis in order to encourage consumer confidence through cooperation based on mutual market interest.

Key sub-objectives:

- Continuously informing consumers in order to reinforce consumer awareness;
- Informing and educating market stakeholders in order to encourage and develop a law-abiding business attitude;
- Reinforcing confidence and cooperation between consumers and businesses.

4.3.2. Shaping a transparent and predictable organizational and regulatory environment, guaranteeing consumer rights

Well-functioning, reliable consumer protection that forges confidence between the various stakeholders depends on a consistent and predictable legal environment. An element of this idea is to integrate competences of different organizations, authorities dealing with consumer protection into a unified legal framework.

Key sub-objectives:

- Coherent regulation: review of legislation, rationalization of current rules, shaping a consistent legal background, a predictable and coherent system of fines;
- Ensuring resources and operational conditions necessary for conducting a systematic and purposeful inspection activity;
- Boosting the role of alternative dispute resolution bodies besides state-actors involved in consumer protection, and supporting organizations representing consumer interests;
- Reinforcing the legal enforcement of consumer rights.

4.3.3. Effective action targeting the priority areas of consumption and risk, through an efficient surveillance of goods and services available on the market

The consumer protection policy promotes fair market operation and consumer trust through shaping a predictable legal environment and continuously providing information to the participants of the consumption chain, while conducting a foreseeable and consequent monitoring activity.

An element of this activity is the regular and thematic inspection of goods and services, and the application of a consistent system of fines.

Key sub-objectives:

- Defining and widening inspection areas – based on European, national, and international tendencies – inter alia in the following areas:
  - activity of public utility service providers and info-communication services;
  - services targeting vulnerable consumers;
- Developing market surveillance activities.

4.3.4. Horizontal objectives

Besides the objectives targeting the professional operation of businesses, the national consumer protection policy identified three main priority areas, where it shall seekto promote fair market behaviour, to strengthen consumer trust in a comprehensive manner until2018 in connection with all three strategic objectives.

Horizontal objectives:

- dealing with the digital aspects of consumer society;
- protecting vulnerable consumers;
- building a sustainable and health-conscious consumer mindset and attitude.

4.3.4.1 Responding to digital challenges

The Digital Single Market Strategy (hereinafter referred to as the: Strategy) – adopted on 6 May 2015 by the European Commission – defined 16 measures based on 3 pillars, that are completely separate regarding their objective and the current European market situation. The first pillar "Better online access for consumers and businesses across Europe" is meant to break down barriers to cross-border online and offline activity. In these fields, the online market is developing at the national level. This phenomenon is confirmed by the volume of services and the number of providers and recipients on the market. At the same time, however, the volume of cross-border online activity is significantly less compared to the level of development of offline activities. Therefore, a main objective must be to develop the appropriate European regulatory environment in this respect. Tasks related to this pillar are well-defined, regulatory principles

in the offline world are clear: the Strategy draws attention to ensuring the application of these principles also in the online world.

The most relevant tasks in this pillar from a consumer protection aspect are to adopt rules which strengthen consumer and business trust, and to monitor them from a cross-border e-commerce perspective. Responsibilities in this context are the following:

– introducing EU-level legislation related to the purchase of online content;
– strengthening consumer trust: introduction of "European Trust Mark" for businesses who apply the sample General Terms and Conditions (GTC), which will be available in the annex of the forthcoming legislation governing cross-border online sales;
– revising Regulation (EC) 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), while building effective cooperation, strengthening market surveillance competencies of authorities and paying special attention to digital content.

The consumer society of the 21st century faces technological developments that are difficult to tackle with the ordinary tools of consumer protection. Therefore, the national consumer protection policy strives towards a professional and sectoral approach, which handles digital challenges as a whole, and foresees comprehensive solutions for the following areas:

- Infringements carried out via the Internet;
- New online trends and services;
- E-commerce, m-commerce, downloads;
- E-administration;
- E-payment solutions;
- Complaints over the Internet and complaint handling;
- Consumer information through web-interface;
- Web 2.0 consumer protection forums, and the impact of social media on the consumer protection system;
- E-learning, web-based education.

The composition of consumer society entails a progressive shift towards digital consumption and this phenomenon must be dealt with effectively through national consumer protection policy. As a consequence of the rapid spread of digital technologies, a number of new dangers may emerge that are not

foreseeable to consumers. They mayencounterunknown new business practices in the online world, which may increase their vulnerability. (e.g.: social media platforms, online auction sites, comparative sites, subscription traps, free trial periods, fake consumer reviews, online intermediaries, etc.). Therefore, the ongoing monitoring of e-commerce services is a priority task.

In parallel to the emergence of so-called "smart tools" (smart phones, tablets), the volume of payable applications and media content (music, film, and games) has increased. Moreover, there are online games and social sites containing amusing and advertising elements, targeting mainly children and adolescents. These sites encourage them to purchase goods and services, or persuade their parents to make these purchases. Since young consumers are less aware and hardly understand consumer warnings, or do not pay sufficient attention to them, such types of online marketing constitute a potential threat. While this is a Europe-wide problem, the fact that in Hungary these warnings usually appear in a foreign language (mainly in English) aggravates the situation, because minors do not understand these messages.

Despite the fact that legislature made efforts in recent years to adjust legislation to the digital era, there are still certain fields (e.g. online marketing), where further clarification of the legislation is needed.

4.3.4.2 Protecting vulnerable consumers

Consumer protection policy should provide a high level of protection to all consumerswhile paying special attention to vulnerable consumers. An important element of the Government's consumer protection policy is to improve the situation of vulnerable consumer groups. For this purpose, a number of measures protecting the interests of consumers and their rights were taken in the past few years. Nevertheless, the number of consumer complaints is still high, therefore further efficient measures must betaken.

As far aschildren are concerned, it is important to help them become conscious consumers, therefore,in accordance with European priority objectives, the new consumer protection policy puts a strong emphasis on this issue as well.

It would be expedient to pay particular attention to chilren with learning difficulties and behavioural disorders, since they are typically more vulnerable to sales promotion methods applied by businesses and media.

The enhanced protection of consumers disadvantaged because oftheir income, education, residence, or those who are more vulnerable due to their health status orage–including consumers who are particularlyvulnerable due to their age, credulity, education, social status, physical or mental disability – is

also of strategical importance. Special attention mustbe paid to the fact that these consumers are unabletomakeconscious consumer decisions.

In view of the above a special attention must be paid to the following areas:

- Product safety inspections;
- Follow-up advertisements, in particular those targeting children;
- Inspections targeting the sale of alcoholic beverages and tobacco products to minors;
- Online and offline marketing activity offered to minors and vulnerable consumers;
- Inspection of product presentations;
- Inspection of consumer groups.

4.3.4.3. Buildingasustainableandhealth-consciousconsumermindset and attitude

Promoting sustainable development is an important objective expressed by the European Union (Sustainable Development Strategy, 2001, 2005) and by the UN (Sustainable Development Goals2015-2030). In line with these trends, the consumer protection policy of Hungary puts a strong emphasis on building a sustainable and health-conscious consumer mindset and attitude.

An element of this goal is to transform the structure of consumption in order to reduce the environmental impact of purchased goods and services. The overall objective is that this approach should also appear in consumer attitude.

The objective of consumer protection policy is to create the conditions for a sustainable (economic, social and environmental) attitude through the instruments available to consumer protection.

5. Legal background related to UCP affairs

As it has been mentioned in the previous chapter, protecting vulnerable consumers is a priority issue laid down in the medium term consumer protection policy. The policy pays special attention to product presentations, a practice that systemically targets elderly people. The marketing and business practices related to product presentation are usually considered to be unfair commercial practices, because such techniques mislead these vulnerable consumers.

In Hungary, Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices comprises the relevant provisions concerning misleading and aggressive commercial practices.

Section 6(1) of Act XLVII of 2008 sets forth that a commercial practice shall be regarded as *misleading* if it contains false information and is therefore untruthful or in any way, including the 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 elements listed in Section 6(1) of Act XLVII of 2008 (e.g. the price of the goods or the manner in which the price is calculated, or the existence of a specific price advantage or discount), and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. Such commercial practices are considered to be *misleading acts*.

Pursuant to Section 7(1) of Act XLVII of 2008, a commercial practice shall be regarded as misleading in case:

a) taking into account all its features and circumstances and the limitations of the communication medium, it omits or conceals material information that the average consumer needs, according to the context, to take an informed transactional decision, or provides such information in an unclear, unintelligible, ambiguous or untimely manner, or fails to identify the commercial intent of the commercial practice if not already apparent from the context; and
b) thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

These commercial practices are considered to be *misleading omissions*.

6. Product presentations

In Hungary, *misleading commercial practices* are usually conducted in the course of product presentations. During these events, consumers can buy for example mattresses, sleeping sets, dish sets and air purification devices offered at a discounted price. Furthermore, sometimes phony or misleading travel offers are also presented. In fact, these prices are not actually discounted what is more, the prices presented are several times higher than the actual value of these goods. Usually these magic devices are of bad quality. Offers are addressed to pensioners or vulnerable consumers, who are more easily influenced by advertisements due to their state of health, age or difficult financial situation.

These events are often advertised as invitations for a health check and it is common that a free lunch, dinner or city tour is included in the program.

The most common engaging slogans and sentences - to persuade people to participate in these presentations - are *"Special offer, only for you, only today!";* "You are so lucky that you have been chosen"; "Congratulations, you have won a prize!" The salesmen often mention that the presented products are available only on the given day, at the given price and they are limited editions. Furthermore, it is usually alleged that the offered product is recommended by a doctor, a hospital or health organization and that the product was tested by them. During these events, the target group does not have the opportunity or time to make an informed decision by looking around in the market or to gather information about the truthfulness of the alleged recommendation. At the same time, a lot of *information* about these products, consumer rights and guarantees *are concealed*. In addition, presenters often falsely claimed that the presented product or machine is capable of curing serious diseases.

The salesmen create the false impression that the consumer has already won or will win something. In fact, before the game starts, everybody has to sign a contract which ensures, if the consumer won, he or she will only obtain the present if he or she buys the offered 'miracle' product. In most cases, consumers do not read the entire contract or they do not understand it and information may be concealed as well. This is why they do not recognize the true nature of these commercial practices.

The most typical misleading commercial practices are the following: misleading advertisements, misleading information about the products, phony medical examinations during product presentations, medical devices, fake 'miracle products', phonytravel promises and last but not least the problem with fake food supplements.

Section 8(1) of Act XLVII of 2008 sets forth that a commercial practice shall be regarded as *aggressive* if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence for exploiting a position of power in relation to the consumer so as to apply pressure, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct and the consumer's ability to make an informed decision with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

Sometimes, aggressive commercial practices are conducted by way of scare tactics. In the most common cases, presenters try to exert emotional pressure on elderly people. For example, salesmen allege that if the potential customers do not buy the offered product, they will develop a serious disease or they will

die soon (for instance cancer will develop). In this case, pensioners are shocked into 'realizing' that they need the offered product and they are in the belief that the product will save their own or their relatives' lives.

The HACP draws consumers' attention to all of these unfair commercial practices and aims to raise consumer awareness.

Due to the large number of consumer complaints received concerning product presentations and due to the experiences gathered in the course of the thematic inspections conducted by the authority in the previous year, the HACP allocates inspections in this field each year.

In 2014, 68 out of 99 product presentations were not compliant with all relevant regulations. This means a 68% objection rate.

7. The true nature of product presentations

Finally, let me describe a concrete example from the aforementioned infringements.

On 20 March 2014, the inspectors of the Consumer Protection Inspectorate of the Government Office of Borsod-Abaúj-Zemplén County (hereinafter referred to as the 'inspectorate') participated in a product presentation organized by a Ltd. in Kazincbarcika, Hungary. The inspectors objected to the following statements made during the product presentation: "One in four households in Hungary has one person who has cancer. One in four. This is why we have to protect ourselves against radiation. But thank God, we now have the appropriate technology which I will show you now. Here you can see the latest radiation protective mattress of Pierre Cardin. Has somebody already met him? (A participant answered yes). Do you know who he is? (A participant answered yes). Excellent. Well, you are those participants to whom I cannot convey new information. You are people who do not focus on money. Then what do you focus on? You care about protecting the health of your family. Despite what others do, you decided to tighten your belts once in a lifetime in order to ensure your family's healthy and cancer-free life. To all the others, I would like to present the latest radiation protective mattress of Pierre Cardin." "During this ten-minute break, please come and see this product, touch it, collect information from those participants who already use and recommend this product, which protects against radiation. Many people know that the certificate was issued by the national Radiation Biology Institute. Here you can see the expert opinion

issued by a chief doctor. It contains medical test results carried out with patients who did not use a radiation protective mattress. And this is a license issued by the National Public Health and Medical Officer Service. Later on, I will tell you more about it. And this is the expert opinion concerning the measurements conducted on children using a radiation protective mattress." "A long time ago, when a washing machine was broken, it was repaired. Nowadays, when a washing machine breaks down, people buy immediately a new one since people have enough money to do so. May I ask you whether you have enough money for the medical treatment of yourself or your child and grandchild? No. And why not? Because you buy a new washing machine or TV for 100,000 HUF (323 EUR). I think I may be missing something here. You think you deserve a new TV, washing machine, laptop, computer and mobile phone. Then let me ask you: if the kidney, liver, lung, colon break down, do we deserve a new one? We should deserve the new one. Please decide. What is more important? Comfort or health, life?"

Based on the aforementioned statements, the Inspectorate established that psychological pressure was exerted against elderly people which impaired the consumers' freedom of choice or conduct and the consumers' ability to make an informed decision with regard to the product, thereby causing him or likely causing him to take a transactional decision that he would not have taken otherwise. Considering this, the Inspectorate imposed a consumer protection fine and prohibited the continuation of the practice in question.

RECENT LEGAL AND POLICY DEVELOPMENTS IN POLAND

Third Annual Conference on the Unfair Commercial Practices Directive

Speech by
Adam Jasser*

1. Directive on unfair commercial practices

The Directive on Unfair Commercial Practices ("the Directive") was an attempt to create a uniform approach to consumer protection and rid the single market of unfair commercial practices. The idea was that consumers across the single market should be protected by the same basic rules, and it was also important for businesses to see some consistency in legislation.

The Directive constitutes the general body of EU legislation regulating misleading advertising and other unfair practices in business-to-consumer transactions. It has allowed national authorities to adapt to fast-evolving products, services and sales methods.

The Directive has worked as a 'catch-all' system, setting forth some general principles, but also providing for concrete examples – a specific black list of activities that are considered to be unfair practices – a list which in most countries was directly transposed into national law.

This black list of practices banned under all circumstances provided national authorities with an effective tool to tackle common unfair practices such as bait advertising, fake free offers, hidden advertising and the direct targeting of children.

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* President of the Polish Office of Competition and Consumer Protection.

2. Implementation of the Directive in Poland

In Poland the UCPD Directive was implemented and introduced into the legal system in 2007, and, since then, it has proved to be a very important tool for the Office of Competition and Consumer Protection (UOKiK) in its enforcement activities aimed at protecting weaker market participants.

In 2014 roughly one fourth of the decisions issued by our Office were based on the unfair commercial practices legislation.

From our experience, it seems that the Directive, at least in Poland, has considerably improved consumer protection. We have the impression that the same applies to other member states as well. In our view, it has also been an important factor in driving fair competition through eliminating unfair business practices.

This is very important for an agency like ours, since we have the combined mandate of protecting both competition and consumers. This integrated approach, which we thoroughly believe in, was introduced in 1996. Originally the Competition Office was considered to be a purely antimonopoly office. But following a number of rulings rendered by the Supreme Court, which pointed out that our decisions on antimonopoly issues should look very closely at how consumers are being affected, leading academics persuaded legislators to combine the two areas in one single act.

I came to the Authority last year and from the beginning it was very clear to me that the fine-tuning of our mission means putting the consumer at the heart of what we are doing. This was because we had the impression that there were a lot of things going on in the market that were not necessarily clear violations of competition as such, but which in a way distorted competition through exploiting the consumers.

To illustrate how we connect this with the values that guide us – competition in a free market is based on three basic principles:

- openness of competition – namely that every entrepreneur has the right to be free from the anti-competitive behaviour of other market players, meaning collusion, price fixing, abuse of dominance and the like.
- a level playing field – this is the absence of state intervention which picks winners and losers, or tries to meddle in business, unless there is an overriding public interest. Of course, one can imagine a number of areas where there is an overriding public interest that justifies state intervention (e.g. security, energy).

- fairness of competition – understood as conducting business in a fair, transparent, decent way. And this fair way of conducting business applies to your competitors, your suppliers, your business customers, and ultimately – and foremost – to consumers. It is most often referred to as good commercial practice, commerce with a conscience; yet I prefer the term "commercial integrity". In Polish there is an old-fashioned term which translates as "merchant's honesty" (*pl. "uczciwość kupiecka").* Whatever we choose to call it, fairness and integrity should both guide us in our approach to competition.

All these terms are compatible with the wording of the Directive, which speaks of "professional diligence" in relation to consumers – which means "the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity".[1]

We most likely fail mention this definition often enough in our advocacy activities and so do companies in their compliance efforts.

There is sometimes the perception that it is hard to define commercial integrity or diligence in legal terms. Can they be precise enough to give everyone guidance on what to do and what to refrain from? After all, we are talking about values and values sometimes escape legal definitions.

There is an understandable fear that arbitrary intervention in business to enforce such values may create a certain risk, because such interventions may ultimately become anticompetitive, unfair to businesses and consumers, and they may stifle innovation or be generally to the detriment of welfare. That is true. Skeptics say that consumers should be more careful when entering into contracts, they should vote with their feet if they are subject to unfair practices, and they should switch to another provider if they feel cheated. In the long run, they say, the market will sort it out. This is true to some extent. It is also true that in the age of the internet consumers are becoming increasingly powerful to make informed choices and to quickly react to abuse. But this does not change the fact that consumers continue to remain the weakest market participants. Anyone of us who had dealt with consumers who felt wronged, who lost their savings or were sold bad products and cannot get justice, know that such desperate people will not be consoled by the fact that on the long run the market will correct unfair practices and wean out dishonest businesses. Redress on the

[1] Article 2(h) of the UCP Directive.

long run is no consolation for consumers, particularly less affluent ones, who quite often lose a significant portion of their income.

Making the call when and whether to intervene on behalf of consumers is often a challenge for the reasons mentioned above. But if we look at the events unfolding during the crisis, I think we have seen enough of misselling, short-termism, scams, false advertising and the role these all played, particularly in the financial services industry, in bringing the world to the brink of another great depression. It shows that indeed, we need some reaction from regulators and from consumer protection bodies. And yes – it is hard to presume ulterior motives, and yes, there is considerable room to make mistakes, but I don't think that should prevent us entirely from taking action in case consumer abuse is a strong possibility. Companies which baited consumers with promises of the "cheapest offer", the "best bargain", a "risk-free investment", a "golden opportunity" or "guaranteed satisfaction" should not be given the benefit of the doubt that they may perhaps be charities. To paraphrase Groucho Marx, if it walks like a duck, swims like a duck and quacks like a duck, it is a duck. Not a pigeon.

In our region, where, following years of communism the free market has been enthusiastically embraced, there appears to be some reluctance to tell ducks from pigeons. And from that stance, there is a certain tolerance of something people consider to be a necessary side-effect of the free market. Misleading advertising, abusive contract clauses, additional costs hidden in contracts in the fine print and the overstatement of consumer benefits - these seem to be quite common – interestingly, even among some international companies, which seem to be pushing the envelope a little bit in the new markets, compared to how they act in their domestic markets. When we challenge them about this, they say that this is the particular nature of these markets and since everybody else is playing by such rules, they have to abide by them as well. What often escapes our attention is that such logic leads to a race to the bottom in terms of commercial integrity - everybody is chasing the lowest common denominator instead of trying to raise the bar for best quality and service and stick to the values mentioned above, i.e. a level playing field, openness and fairness of competition.

Ultimately there is a cost for businesses for not complying with these values.

The prominent Polish thinker, Professor Marcin Król, who is a philosopher of ideas, not a competition or consumer expert, calls this "the snowballing phenomenon of 'petty cheating'".

> "Petty cheating has become so widespread that we don't even realize we are surrounded by it", he wrote in a recent essay. "I understand in principle that that is how business works. But there is another side of the coin: everyone has got used to the fact that minor, soft cheating is the normal state of affairs and has become permissible".

Professor Król goes on to say that there is an enormous social as well as material cost arising from this lack of commercial integrity. Not only does it hurt consumers' wallets and welfare, but it also violates their sense of justice. It undermines trust in the market and in entrepreneurship, and even undermines trust in the liberal democratic model. We see examples of this erosion of trust across many countries in Europe, not just in our part of the world. We increasingly also hear calls from the different parts of the political spectrum that this kind of liberal free-market model needs to be replaced by some form of command and control, with the state assuming a powerful role.

This, in my opinion, would be a huge mistake, because in this region we experienced what a command economy, command and control system can do. It ultimately fails to provide the welfare we all desire. Consumer welfare and civil liberties best thrive in a free market environment. This is largely thanks to the benefits of unfettered competition, innovation and consumer choice. It is not by chance that the most innovative, consumer friendly companies around the world very often also enjoy the highest market valuations. Thus, there is a virtuous cycle to all of this as well.

But in order to protect the free market and honest competition, we must vigorously enforce consumer rights.

3. The financial sector

One can detect unfair commercial practices in many sectors, but in the financial sector these take on a scale which is really worrisome. Whether we are speaking of selling mortgages in foreign currencies, offering pay-day loans or investment products, we have seen a lot of abuse based on the asymmetry of information, where consumers are deprived of basic information, misinformed, not given the full picture or where risks are clearly understated.

We believe that this is completely at odds with commercial integrity and it destroys trust in the financial sector. And the financial sector, of all sectors,

should be a paragon, the shining example of commercial integrity because it is indispensable. Therefore it carries a very serious obligation and responsibility.

In advertising we see short-term loans and insurance-linked investment products, which are products that combine insurance with investment, but while insurance is only a small fragment of the product, the rest is high-risk investment, and it is sold as a basic deposit in a bank, with very little risk indicated. In advertising and presale terms such as: "this is an incredible opportunity", "it comes for free," "there is guaranteed profit" or "you cannot lose" are employed. We hear a lot of this. The costs and the risks are often indicated in fine print at the bottom of the advertisement. On television it flashes for a mere five seconds. What kind of a warning is that?

The legal obligation to provide the actual interest rate is concealed in the same way – it flashes on the screen for a moment and then it disappears. Very often what you see is the interest rate, but all the other costs are concealed. And if you combine them all together, the actual interest rate is much higher. This is where I come to the fair competition part, since it makes comparing offers impossible.

In Poland we have a specialized branch of journalism dedicated to interpreting all these offers and putting them into tables, and making comparisons that are relevant to consumers. I think this is an aberration. Comprehensive information should be available to consumers as they approach these offers. Banks and the financial industry should ensure that they have a common standard they all stick to.

When you look at unit-linked insurance products, you can see that these businesses worth fifty billion zlotys, or twelve billion euros emerged from nothing, within just five years. And of course initially many consumers didn't even realize that they were subjected to unfair practices, because the description of the product was so glorious that people just believed that they were looking at an improved version of a simple deposit or life insurance policy.

But then a sea of complaints welled up. For example, these products were often sold to pensioners with low pensions, who very quickly found themselves unable to pay installments and wanted to cancel them like a deposit, only to find out that they would lose a staggering 70 percent of what they had actually paid.

Complaints and evidence of misselling from other institutions, including from the Polish Insurance Ombudsman, laid the basis for opening proceedings. In October 2014 we issued four precedent decisions in such cases, establishing that illegal methods were used, and we imposed 10 million euro fines on four institutions for selling these products.

UOKiK concluded that the companies misled consumers by withholding information on complicated insurance-based investment products as well as on the rights and obligations of the contracting parties.

As soon as we issued these decisions we had some insurance companies contacting their clients and offering redress through the system of the private enforcement. The industry also undertook efforts to self-regulate but unfortunately on the whole there has only been a poor attempt to respond to the complaints of aggrieved clients in a meaningful way. Attempts at self-regulation seemed at best half-hearted. This is a pity, because self-regulation can and should do the trick.

In the Charter of Investor Rights issued by the CFA Institute[2], an American institute representing financial advisers, one reads that an advisor or person selling financial products should adjust their product or service to the client's overall economic situation, and seek for the optimal solution suiting him individually. The Charter further states that the adviser should put the welfare of the consumer before the financial institution's or his own interest - that means regardless of the commission he stands to earn.

Robert Schiller, the 2013 Nobel Laureate for Economics, praised these principles as a means for the financial sector to self-regulate, calling them a moral foundation that went amiss prior to the financial crisis.

There is considerable room for self-regulation in this context. At the Authority, we in principle believe that self-regulation is the best answer. However, it is also true that in some cases governments lose patience waiting for self-regulation when it never seems to occur.

4. Amendment of the Act on competition and consumer protection

In Poland the government has indeed lost its patience in this regard and increased our budget by about 10 percent, and initiated legislation that would give our agency new consumer protection tools to enhance those we already have in place, thanks to the Directive and also to our consumer protection act.

Key legal changes that were proposed include the following:

[2] See: https://www.cfainstitute.org/learning/future/getinvolved/Pages/statement_of_investor_rights.aspx?PageName=searchresults&ResultsPage=1.

- Introducing a new definition of abusive practices that infringe collective consumer interests consisting in "offering consumers financial services not suited to their needs based on the information available to the enterprise on the characteristics of those consumers or offering such services in a way that is not appropriate for their profile".[3] We will have a legal definition of misselling in the financial sector.
- Giving UOKiK the competence to issue temporary decisions obliging an undertaking to cease specific practices that infringe collective consumer interests, while the proceedings are still in progress, in cases when continuing such practices could cause a major and irreversible threat to collective consumer interests.
- Allowing UOKiK to conduct mystery shopping as a way of collecting additional evidence for the investigation of practices violating collective consumer interests. While we will have to have an open proceeding in order to do mystery shopping, we will do it because we have found that very often it is word against word in the presale stage in a bank. We cannot really verify what happened between the seller and the consumer after the fact. Therefore we want to do mystery shopping to ascertain what actually happened.
- Allowing the Authority to issue a formal opinion in individual or collective private enforcement cases before the common court, should the public interest so require. Now we will be able to let our voice be heard in court, which can then of course be taken it into consideration or not, but at least it will serve as additional information. For us this is important in rendering enforcement measures against unfair commercial practices complete. We believe this is going to raise the overall effectiveness of doing away with unfair commercial practices.
- Allowing UOKiK to publish statements and alerts in public TV and radio – these will ensure swift and efficient warnings to consumers about practices and situations which are liable to put their interests at risk.
- Simplifying the current complex system of eliminating unfair contract clauses, which has proven ineffective; it will be replaced by a model of abstract control of contract terms. As part of an

[3] Draft amendment to the Act of 16 February 2007 on competition and consumer protection.

administrative decision, the Authority will be able to rule on abusive terms of contracts and forbid their further use. These decisions will be subject to review by the courts.

These changes were adopted by the Council of Ministers at the beginning of July and are now under reading in the Parliament, which is planned to give its approval during the summer.[4] The new regulation foresees a six-month *vacation legis* to allow businesses to adjust to the new provisions.

These changes were subject to comprehensive consultations with key stakeholders, including the business community, lawyers and consumer organizations. We took active part in shaping these regulations because our experience shows they will improve our ability to combat infringements.

5. State of competition

An important reason why we believe that new provisions are needed is their potential impact on the state of competition. Consumer abuses often lead to serious distortions in competition by preventing consumers from making informed choices and rewarding dishonest business practices with higher market shares. This happens at the expense of those companies that are actually acting in accordance with commercial integrity.

Like in the case of competition enforcement, where fines and personal liability of managers have their preventive role to play and foster a culture of compliance, the prospects of tougher consumer enforcement should encourage better self-regulation and something I call "consumer compliance" among firms. Consumer compliance should be part of overall competition compliance. I don't think they can be separated.

Ultimately, there is no contradiction between tougher enforcement and the free market – on the contrary, tougher enforcement provides a better chance of creating a sound business environment based on a level playing field, which is what businesses ultimately want most from competition policy.

We have already entered into a dialogue about "consumer compliance" with industry organizations in many sectors, including finance, and we see some promising signs of change. But we also know very well that unless self-

[4] The amended Act was adopted by the Parliament on 4 September 2015, and signed by the President on 26 September 2015.

regulation is backed by a credible power to enforce, this advocacy effort is not going to bring the effects we all desire. And this would be to the detriment of consumers and ultimately businesses as well.

EXPERIENCES WITH THE ENFORCEMENT OF THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE IN THE NETHERLANDS[1]

Anita VEGTER[*]

Ladies and gentlemen, good morning.

I would like to extend my warmest thanks to the Pázmány Péter Catholic University, Faculty of Law and Political Sciences and the Competition Law Research Center, for this wonderful initiative to organize the 4th Conference on the Unfair Commercial Practices Directive. And I would like to congratulate Mr. Tihamer Tóth and his team for organizing this congress.

And, most of all, thank you so much for inviting the Netherlands Authority for Consumers and Markets (ACM) to speak in this first panel session of the day. I will take the opportunity to share with you some of our experiences from the daily practice of enforcing the Unfair Commercial Practices Directive.

My name is Anita Vegter, and I am a member of the board of the ACM. I hold the Consumer portfolio and the Legal Affairs portfolio. I am also in charge of Corporate Services management (including HR and Finance). ACM was created on 1 April 2013, by merging three authorities in the Netherlands, the Consumer Authority, the Independent Post and Telecom Authority and the Competition Authority. As a result, consumer protection and market oversight are now housed in a single independent authority. This has laid the foundation for an effective and efficient oversight, leading to well-functioning markets for the purpose of maximizing consumer welfare. Our mission is to create opportunities and options for businesses and consumers.

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[1] Keynote speech**:** *4th Annual Conference on the Unfair Commercial Practices Directive, Pázmány Péter Catholic University, Budapest, Hungary, 20 May 2016.*

[*] Netherlands Authority for Consumers and Markets.

To give you a very brief introduction to the ACM, I would like to show you a short video.

https://peppermintmedia.wistia.com/medias/7foy8q2cwt

My speech will include the following elements:

– About the ACM in general.
– The landscape of consumer protection in the Netherlands:
  • Why the public enforcement of private consumer law?
  • Responsibilities and legal powers
  • Relationships
– How has the Unfair Commercial Practices Directive affected the enforcement of consumer protection law in the Netherlands?

1. About the ACM in general

The ACM has around 550 employees. The tasks of the ACM encompass:

- general competition oversight,
- sector-specific regulation of the energy, telecommunication, postal services and transport markets,
- and consumer protection.

The legal objectives behind those activities are to ensure

- that markets function well,
- that market processes are orderly and transparent,
- and that consumers are treated with due care.

To that end, the ACM shall monitor, promote and protect effective competition and a level playing field, and remove any impediment to the realization of these goals.

Creating this new authority gave us the opportunity to find a common denominator on which we could focus our market oversight, and not surprisingly, we came up with the consumer. In fact we wish to place the consumer at the center of every action we take at the ACM. Increasing consumer welfare is the ACM's primary goal.

In its oversight style the ACM focuses on the impact and instruments follow. Enforcement is one of the ACM's core tasks. However, the ACM does not wish to enforce just for the sake of enforcement. The impact of our actions is central. Therefore, the ACM looks at the broader context when carrying out its statutory

tasks. For example, we explore the question whether a violation detected is an isolated incident or a symptom of a larger, underlying market problem. The objective is to solve market and consumer problems. Based on its assessment, the ACM selects the instrument, or a range of instruments that offers the highest probability of producing a structural solution to the problem. Imposing sanctions is an important instrument, and the ACM will not hesitate to use it in case of violations. In addition, the ACM uses, amongst other instruments, norm-transmitting discussions, commitment decisions, informal opinions, monitoring, market scans and strategic communication. The goal is to find tailor-made solutions based on sound problem analyses.

Being a multi-sector regulator, entrusted with both competition and consumer protection, there is a great responsibility on the ACM to find synergies within the organization itself, besides coordinating the actions between the different departments of the ACM. The ACM is ambitious and endeavors to make effective use of the synergies between the different departments. We also face dilemmas, because while the enforcement of consumer law may serve consumers on the short term by ending unfair commercial practices, if enforcement measures are too strict, new market players may withdraw from the markets, which would not serve the long term goal of more competitive markets with a better outcome for consumers. Solving this dilemma is a matter of searching for the right balance.

That's where we are at present with the ACM. I will now continue my speech by describing the consumer protection landscape in the Netherlands.

2. The consumer protection landscape: public and private

The consumer protection system in the Netherlands is based on the principle that consumers know what their rights are. Well-informed consumers are confident in making a choice between the different offers available to them. Businesses compete with each other to gain the consumer's favor. They have to invest and innovate to stand out. This system contributes to the consumer welfare.

If a consumer is not satisfied with the given product or service, he can return to the company where he purchased the product or service. The company is obliged to handle the complaint of the consumer. If no solution is found that is acceptable for both the consumer and the trader, the consumer can ultimately file a law suit. However, we see in practice that individual consumers find this option to be quite cumbersome. Therefore it is very useful to have the *private foundation* in place which is of valuable support to both consumers and traders.

2.1. What is the private foundation?

The private foundation is a collective term for self-regulation, consumer organizations and complaint boards. When trade-organizations take on the responsibility to define, execute or enforce rules, we call that self-regulation. There are different instruments used for that purpose. These are among others, informative tools, such as certifications or quality marks. Parties may lay down rules in a code of conduct or a covenant. This may even include alternative dispute resolution.

A very important player within the private foundation is the Dutch Consumer Organization, *de Consumentenbond*. It is one of the biggest organizations that represents the consumers and serves the consumer interest.

Another important part of the private foundation is the Dutch Foundation for Consumer Complaints Boards. Consumers can formally make a complaint against a trader at one of the complaints boards. There are more than 50 complaints boards for the different sectors. These boards address individual consumer complaints.

2.2. Public Authority

The Netherlands Consumer Authority was created in 2007: it is a public body that enforces consumer protection laws.

During the parliamentary debate on the Consumer Protection Enforcement Act, the legislator explicitly defined as a starting point that the Authority was only to act against infringements in case the market was incapable of effectively resolving the infringement itself. The market in this approach was defined as context of self-regulation, shaped by consumers and the trade and industry, such as the Consumer Complaints Boards.

Why were there calls for strengthening enforcement through a public body? A 2004 report from the Ministry of Economic Affairs showed that at that point the consumer protection system had multiple blind spots. Consumers were simply accepting their losses instead of taking advantage of private remedies. The report concluded that the power of consumers to discipline the market was insufficient.

Another development took place at the European level in 2004. The negotiations regarding the establishment of the European Regulation on Consumer Protection Cooperation made clear that some form of *public* consumer

protection was going to be required in all Member States under European law. At the time there was no general public enforcer for consumer protection laws in The Netherlands.

These developments thus culminated in the creation of The Netherlands Consumer Authority on 1 January 2007 for cross-border cases as well as domestic cases. The Consumer Authority became part of the ACM in 2013. The ACM can publicly enforce consumer protection laws, and it may take actions against companies that do not play by the rules.

But, like I said, the ACM only takes action if consumer problems cannot be resolved by the market itself and only in case of a so called 'collective violation'. Under the Dutch Consumer Protection Enforcement Act ("Whc") a collective violation is a violation of a statutory provision falling under this Act "which causes or may cause damage to collective consumer interests".

3. Responsibilities and competences

Our main responsibilities and competences concerning consumer protection are twofold.

First, it includes the enforcement of general consumer-protection laws, such as the recent Consumers Rights Directive and the Unfair Commercial Practices Act. We cover all economic sectors except the financial sector, which is the responsibility of the Netherlands Authority for Financial Markets (AFM).

Enforcement of consumer protection laws serves the protection of consumers while maintaining a level playing field for businesses.

One major feature of public enforcement is that it provides us with competences that facilitate detection and termination of behavior that causes collective infringements of consumer law. For example: the powers to impose fines up to a maximum of € 450.000 for every infringement, orders subject to penalty payments, power to request documents, enter business premises, seize information in both physical and digital form and to take statements from employees and managers of companies. Fines can be added up in case of multiple violations. In late 2015 the Dutch Parliament passed a bill proposing to raise the ceiling for fines to € 900.000 for every infringement or, up to 10% of the annual turnover if the latter is higher. This new legislation will come into effect on 1 July 2016.

Second is the empowerment of consumers through information and practical tools. Our online consumer information portal, ConsuWijzer aims to *empower* consumers to solve their own problems with suppliers. At the same time indications and questions submitted by consumers *generate valuable information* for the ACM about what the biggest market problems are. We really treat these two tasks of consumer protection – empowerment and enforcement – on an equal footing. The interaction with consumers for empowerment reasons offers the authority a large source of information, which we turn into enforcement intelligence. Furthermore, having strong consumers should also be an objective of the business community. Enabling consumers to distinguish between genuine businesses and the less sincere ones, offers honest businesses better opportunities. Empowered and engaged consumers are the key to effective competition.

https://www.youtube.com/watch?v=g6Vh284yqUg&feature=youtu.be

Competences are a crucial factor behind the success of 85% of the cases in which enforcement is carried out informally. The deterrent effect of a potential fine enhances the rate of spontaneous compliance and cooperation on a voluntarily basis.

Last but not least, the law allows us to publish all formal decisions concerning consumer protection and until now all decisions have been published. The main objectives behind publication are to act as a deterrent for market players who do not comply with the laws, inform consumers and make them aware of certain market situations.

4. Relationships

So far I have pointed out various aspects of our present and past landscape of consumer protection. Naturally, it is important for us to be in touch with the parties of the private foundation. The ACM has bilateral contacts and regularly speaks with parties of the private foundation in a semi-annual national forum (we call it *Maatschappelijk Overleg* in Dutch). The ACM is legally obliged to organize this national forum in order to ensure that its actions are aligned with private initiatives to protect the consumer.

We also collaborate with our fellow authorities on the basis of cooperation protocols, including, for example, the Dutch Central Bank, the Netherlands Authority for Financial Markets, the Netherlands Food and Consumer Product Safety Authority and the Dutch Healthcare Authority.

Our international network covers: competition, consumer protection and regulation. In the area of consumer protection we participate amongst others, like our Hungarian colleagues, in the European Consumer Protection and Cooperation Network (CPC) and the International Consumer Protection and Enforcement Network (ICPEN).

Ladies and gentlemen, I will now turn to the central question of my contribution:

5. How has the Unfair Commercial Practices Act (UCPD) affected the enforcement of consumer protection laws in the Netherlands?

First, I will give you an outline of how the enforcement of the UCPD has been organized in the Netherlands. Next, I will address four key issues in the day-to-day practice of enforcing the UCPD.

On 15 October 2008 the UCPD-act entered into force in the Netherlands. As we all know, this act prohibits unfair commercial practices in relation to the promotion, sale and supply of goods and services to consumers. What these unfair practices have in common is that the consumer unwillingly decides to buy a product or make use of a service. They would not have done this if they had received the correct information or had not felt they had been pressured into doing so.

The UCPD is based on a European Directive and must be enforced in all member states. Cooperation between enforcement agencies within the EU is ensured via the so-called CPC-Regulation 2006/2004 on the cooperation of national enforcement authorities responsible for the enforcement of consumer protection laws. The ACM is responsible for the enforcement of the UCPD in the non-financial sectors.

In 2010 the former Netherlands Consumer Authority indicated in its Annual report: “The added value of the Act is becoming very clear: we are in the position to act more vigorously and can impose much higher fines.” This very positive remark concerning the UCPD continues to hold true.

I will now share with you some of our day-to-day experiences with the enforcement of the UCPD. Looking back at the past years, following its implementation, the UCPD is applied in almost all our enforcement cases. Looking at these cases, the following issues in particular meet the eye:

– definition of misleading and aggressive practices,

– the requirement of professional diligence,
– protecting vulnerable consumers,
– combining sector-specific regulations with the UCPD.

6. Definition of misleading and aggressive practices

The general clause contains a general ban on unfair commercial practices. Two main categories of unfair commercial practices – misleading and aggressive – are described more in detail. This has an enormous added value in the day-to-day practice of enforcement.

Just to give you one example: in the Netherlands, many people have experienced problems with misleading and aggressive telephone-sales practices. One of the points that people were misled about, was the identity of the trader. On the basis of an information requirement set forth under the law, a trader is obliged to state its identity *at the beginning* of the telephone conversation. In the Netherlands, traders did so, but they turned out to be misleading about their identity *during* the conversation. The trade practice was aimed at making people believe that their current phone company offered them a contract renewal and that they would receive extra benefits. In fact, they received a new contract with another company, and subsequently had trouble cancelling that new contract. Only after the introduction of the UCPD, did it become possible to take action on the grounds of misleading and aggressive practices.

7. Professional diligence

Professional diligence is the special skill and care that a trader may reasonably be expected to exercise, commensurate with honest market practices and/or general principle of good faith in the trader's field of activity. If a trade practice is contrary to professional diligence, it may be qualified as unfair on the basis of the UCPD.

One example from our practice: in its approach to the 'housing market chain,' one of the key priorities identified in 2014, the ACM discovered problems with rental agencies.

In the existing economic climate, more consumers choose to rent, and they increasingly do so by hiring a rental agency.

Lessees are legally protected against any conflict of interest the rental agencies may have. If rental agencies act on behalf of both lessors and lessees when brokering apartments and houses for rent, they are only allowed to charge lessors agency costs. The ACM had established that rental agencies often routinely charge lessees agency costs of one month's rent, while sometimes also charging lessors agency costs.

The ACM decided that rental agencies should no longer charge lessees any agency costs when acting as an agent between lessors and lessees. Various trade organizations and interest groups are associated with the rental market supported the ACM's approach.

In part due to the new regulations, this has led to commitments made by some major players in the market, which meant that as of 1 January 2015 they no longer charged lessees any agency costs if they also acted as an agency for the lessors. Commitments are statements made by market participants to the ACM in which they pledge to adjust their procedures.

The ACM also forced a company to change its practices by imposing an order subject to periodic penalty payments.

The ACM had no enforcement powers concerning civil housing rules. But in these cases, it was considered to be in line with professional diligence under the UCPD that civil housing rules be properly applied by traders. This way, the UCPD offered us enforcement competences also in this case.

8. Protecting vulnerable consumers

In principle, the UCPD protects the average consumer. If a commercial practice is directed at a particular group of consumers, then an average member of that group is the benchmark. In its case-law, the Court of Justice of the European Union refers to the average consumer as "reasonably, well-informed and reasonably observant and circumspect" taking into account social, cultural and linguistic factors. Yet, at the same time, the Directive aims to prevent the exploitation of consumers whose characteristics make them particularly vulnerable to unfair practices.

The following case is worth mentioning: in 2014 the ACM issued a public warning to alert consumers about the activities of a Dutch photography company and its owner. Based on public information and on information at the ACM's disposal, the ACM had reason to suspect that this company was acting in violation of the UCPD. They approached young consumers through social

media, giving them the impression that they have been specially selected, and that a photo shoot was the perfect start to a successful modeling career.
The way they operated was misleading, because:

- Consumers were given the impression that they could win a free photo shoot, but this was not true;
- Consumers were also given the impression that they received a discount, but everyone paid the same price;
- Consumers were asked to waive their rights to a cooling-off period, although this is legally impossible;
- Consumers that cancelled their photo shoot were aggressively bombarded with high bills, and were threatened with debt collectors and lawsuits.

These trade practices were particularly aimed at a group of young, mostly female consumers. The public warning issued on the basis of the violation of the UCPD was highly effective.

9. Combining sector specific regulations with the UCPD

The application of sector-specific regulation often goes hand in hand with the UCPD. By combining different sources of legislation, we achieve synergy. I will give you one example from the energy sector.

10. Energy sector

The number of signals from ConsuWijzer sometimes indicates that there may be a specific sector that requires special attention. In that case, the ACM may take action by clarifying the rules to businesses. We did that in the energy sector. The ACM is not only responsible for consumer protection, but also for energy regulation.

Consumer rights follow from generic consumer protection laws, but also from specific energy regulation. Energy companies found it confusing what information requirements they have to comply with. Therefore, the ACM published a document 'Provision of information in the consumer energy market'. This explains exactly what information must be given to consumers, based on

- the Gas Act,

- the Electricity Act,
- the Directive concerning unfair business-to-consumer commercial practices (2005/29/EG),
- the Directive on consumer rights (2011/83/EU and 93/13/EEC),
- the Electronic Commerce Directive (2000/31/EC).

As far as transparency is concerned, companies are legally bound to be open about what products they offer and for what tariff. All offers must be easy-to-understand, and consumers must be able to compare these with other offers. Only then will they be able to choose the offer that best meets their needs. It is now completely clear to providers in the energy industry what information requirements they must comply with. Compliance with the information requirements is enforced by the ACM.

This approach contributes to well-functioning markets, to orderly and transparent market processes and to the fair treatment of consumers.

11. Closing remarks

Ladies and gentlemen, I will conclude my contribution to today's conference. I have spoken about the organization, and about the implementation of the UCPD in the Netherlands. Using several examples, I have demonstrated the added value of the UCPD in the day-to-day practice of enforcement. It is self-evident that the UCPD is of great importance to the protection of consumer rights, and, by extension, to the protection of consumers (be they in the Netherlands or in other parts of Europe). This piece of legislation is much appreciated.

Maintaining effective oversight and international cooperation is essential. Naturally, there is always room for improvement. We are looking forward to the revision and update of the UCPD guidance document. We also eagerly await the announced revision of the cooperation regulation that governs European cooperation in consumer protection cases. A preview will be given next week in Brussels.

Thank you for your attention, and I wish you a productive and successful conference.

THE ITALIAN ENFORCEMENT MODEL TO PROTECT CONSUMERS AGAINST UNFAIR COMMERCIAL PRACTICES – WITH SPECIAL FOCUS ON THE ONLINE MARKET

Antonio Mancini*

1. Consumer protection in Italy. Italian Competition Authority (ICA): powers and competences. Convergence with the enforcement of competition rules

The Italian Competition Authority (in the following: "ICA") was established by Law n. 287 of 1990. It is an independent administrative Authority whose decisions are based on the competition law without interference by the Government. ICA is responsible not only for the enforcement of competition legislation and policy but also for consumer protection issues. In fact, since 1992, ICA has been granted the power to combat misleading advertising spread through any media: TV, newspapers, internet, leaflets, posters, telemarketing. In the beginning the constrained and weightless national and community legislation on consumer protection (not considered to be an effective and specific priority) ICA merely held weak competences and limited powers in the field of consumer protection to step up against misleading advertising and comparative advertising. In particular, the misleading advertising Directive was based on a 'minimum harmonization' regime, while the ensuing fragmentation of the different national regulations created obstacles for cross-border trade and consumer confidence.

The breaking point for a new era in the field of consumer protection arrived in Italy (and other Member States) around the beginning of 2008 with the wide and

* Senior official / Italian Competition Authority Only personal (not institutional) opinions and individual evaluations of the author.

extensive enforcement activities set forth under the unfair commercial practices (UCP) discipline (full harmonization directive) and the highly effective powers of ICA stemming from this new legislation.

Italy was one of the first Member States to implement Directive 29/2005/EC on Unfair Commercial Practices, even before the deadline for its transposition (12th December 2007) had elapsed. This Directive was considered by the European Parliament as a mile stone in the field of consumer protection owing to the huge potential inherent in its enforcement and its new perspective on, and the priority of consumer protection.[1]

The Italian Government adopted two separate decrees, which were transposed into a central Section (Art. 18–27) of the Italian Consumer Code[2]: a codified collection – issued in 2005 – of the most relevant legislation governing consumer protection, representing an instance of best legislative practice at EU level.

Commercial practices are considered unfair if they do not comply with the requirements of professional diligence and materially distort or are likely to materially distort the economic behaviour of the average consumer whom they reach or to whom they are addressed.

The Italian Consumer Code distinguishes between two main categories of unfair commercial practices. One concerns misleading practices (Section 21 of the Consumer Code), actions or omissions which may induce the average consumer to take a transactional decision that he/she would otherwise have not taken. Misleading practices may regard elements relating to the characteristics of the product (including the existence of the product itself, its nature, the risks associated with its use, its suitability for the product's specific purpose), or its price.

Aggressive practices, on the other hand, are those that use harassment, coercion or other forms of undue influence to pressure the average consumer into making commercial decisions he/she would otherwise not have made.[3] The aggressiveness of a commercial practice depends on its nature, duration and means used to carry it out, and any recourse to physical or verbal threats. Sections 23 and 26 of the Consumer Code also identify commercial practices which are considered to be misleading or aggressive under all circumstances (the so called "black list").

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1 See the European Parliament Resolution issued in 2009.

2 Legislative Decree of 6 September 2005, n. 205.

3 See the section of the Italian Consumer Code under artt. 24, 25 and 26.

Decree no. 145/2007 on misleading and unlawful comparative advertising also empowers the Authority to intervene in order to protect firms from misleading advertising and their unfair consequences, and to establish conditions guaranteeing fairness in comparative advertising in all forms of media. Comparative advertising is a type of advertising used by businesses to promote their goods and services by comparing them with the products of their competitors. It is lawful when it is not misleading, it compares goods or services that serve the same needs or are meant for the same purposes, making objective comparisons without generating confusion between different undertakings, or discrediting the competitor.

ICA is entitled to investigate compliance with the most important, broad consumer protection EU Directives governing Unfair commercial practices (hereinafter referred to as "UCPD"); Unfair Contract Terms (hereinafter referred to as "UCTD"); and Consumer Rights (hereinafter referred to as "CRD") to try and stop infringements not only upon reception of consumers' complaints, but also of its own initiative (the so-called "*Ex Officio"* investigation powers).

The full harmonization approach followed by these recent, broad and very important Directives in the field of consumer protection was based on the aim: a) of avoiding the fragmentation of national law; b) defining the rules for cross border trade; c) and dismantling national frameworks protecting certain categories of traders.

ICA's powers correspond to its competences in the field of competition. For example, we could mention the following very effective and efficient enforcement instruments: a) interim measures for grave infringements; b) cease and desist powers (without taking recourse to the court and relying on long, complex and at times divergent court decisions); c) adoption of formal ICA final decisions "all published" in the Official Bulletin and on the institutional web site (www.agcm.it) and which can be appealed[4]; d) imposition of high fines (up to € 5 million Euros for each unfair commercial practice and CRD infringement; e) inspections (in cooperation with the Financial Police); f) possibility to accept commitments; etc.

Furthermore, as far as Unfair Contract Terms (UCTD) are concerned, Italy represents a unique instance of "fully administrative competence" without having to take recourse to the Court and rely on lengthy and complex judicial

[4] Italian administrative tribunals in two steps: specialized section "TAR" of Lazio and finally, "Consiglio di Stato".

measures of the various Tribunals involved. More recently, new legislation in Poland established a similar administrative enforcement system.

There are important elements of convergence between the enforcement of competition rules and those of consumer protection, since unfair commercial practices are often used as an important 'competition tool'. Indeed, advertising can be considered as a powerful means for newcomers on the market and a way to orient consumers to choose the best options available to them, in terms of price and quality, by facilitating more conscious, rational and informed decisions.

Competition policy exerts effects primarily on the supply side of the market by contributing to an open and efficient system promoting consumer welfare, innovation, economic equilibrium, adequate prices, quality, quantity, offers, etc. Consumer Protection Policy exerts effects mainly on the demand side of the market in terms of transparency of information for more rational consumer choices, fairness of commercial behavior (improving economic meritocracy), consumer confidence, etc.

Competition and consumer protection may be considered the two faces of the same medal intended to promote the fundamental rights of economic freedom, economic democracy and collective sovereignty)[5]. Finally, investigations pursuing unfair commercial practices (UCPs), especially in the field of e-commerce (and more generally in the online sector (the economic pillar of the complex internet economy) may be considered not only as instruments of consumer protection, but also as the market tools of efficiency and fair Competition.

2. Enforcement activity and consumers criticality of the online sector (case studies)

The most common problems arising from complaints or ex officio investigations or sweeps of websites selling various goods may be summed in the following relevant topics: a) availability of products that have actually never been delivered; b) product delivery status; c) expected date of delivery; d) characteristics / price / complex economic conditions; e) trader's identity and contact for complaints;

[5] See on this point the ICA Annual Report of 2015 and the judgment of the Italian Administrative Tribunal Consiglio di Stato n. 2479/2015.

f) reimbursement rights for undelivered products; g) contract termination rights; h) consumer rights in respect of guarantees; etc.

Consumer complaints relating to websites selling services (insurance, banking, air transport, travel, etc) generally cover the following areas: a) illegal credit card surcharges (disclosed only at the end of the reservation process); b) mandatory opting-out (instead of opting-in) for ancillary services; c) misleading information on services' characteristics (total price, interest rates, timing, etc.); d) unilateral price variations (the so called "jus variandi"); e) consumer rights, particularly in the post-contractual stage; etc.

3. Low-cost airline companies

The ICA imposed for example a 170.000,00 Euros penalty on the airline company Easyjet headquartered in the United Kingdom and specializing in low-cost flights, due to unfair trade practices[6]. At the end of the proceedings, the Antitrust ascertained that the operator was advertising a promotional offer with particularly advantageous prices through its website, "without appropriately making clear the actual conditions and supply constraints to the consumer"[7].

In particular, the terms offered on the website of the airline for a single flight would only be available for a trip for two people or for a round-trip. In case of a single reservation, however, the final cost would be higher than the one advertised. Finally, according to the Italian competition authority, the information provided by Easyjet at the time of booking – as stated in the text of the measure – "would be insufficient to make passengers aware of the limitations to which the offer is subject". In determining the penalty, ICA took account of Easyjet's conduct which, during the proceedings, removed the profiles containing misleading claims and adopted measures to increase transparency for consumers.

The ICA imposed an administrative penalty totaling EUR 550,000 on Ryanair, the Irish low-cost airline, for unfair business practices. Under investigation, in particular, were the methods of assistance provided to passengers through a call center service accessible only through expensive 'premium rate' phone numbers.

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6 The ICA Decision against Easyjet for UCPs is published (like all the Agcm official decisions) on the institutional web site:" www.agcm.it" (only Italian full text available).

7 See the ICA Decision adopted in 2014 and published on the web site: www.agcm.it.

The fine was imposed in 2014 by the ICA in a procedure for malpractice following numerous reports made by passengers and consumer groups complaining about the extreme difficulty and burden connected with attempting to contact the operator in order to exercise specific contractual rights. These included requesting assistance for boarding people with reduced mobility; the choice of a replacement flight in the event of changes to the flight plan arranged by the carrier; changes to the reservation before the flight; requests for refunding amounts erroneously charged at the time of booking and issuing the commercial invoice for the flight purchased in addition to the use of bonus credit granted by the carrier.

The ICA has given Ryanair 90 days to communicate the initiatives taken to remove profiles of impropriety established, within which the company has started to intervene yet it had failed to completely eliminate the impugned measures. The measures already taken by the companies concerned, in particular, the abolition of the premium rate telephone number dedicated to priority assistance, the reduction of tariffs for telephone support and the introduction of a service via chat, accessible from the website of the carrier allowing the passenger to speak with a customer service representative. In determining the sanction, the ICA took the company's conduct into account.

The decision forms part of other investigations adopted by the ICA regarding assistance to air passengers and, in particular, the use of premium telephone lines to exercise legitimate contractual rights.[8]

4. Travel insurance policies offered during the online purchase of air-tickets and limits to the right of refund

Fines were imposed in a total amount of € 1,050,000 (€ 850,000 on Ryanair and € 200,000 on EasyJet) for lack of transparency regarding travel insurance policies offered during the on-line purchase of air-tickets and for obstacles created in the case of refunds[9]. These fines have been established by the Antitrust Authority as a conclusion of two distinct procedures for unfair commercial practices. The Authority gave Ryanair 30 days to communicate initiatives abolishing this unfair practice.

[8] See, for example, ICA decision number 25181 of 12 November 2014, on Meridiana Fly – Refunds and Call Centre fee, published in the Official Bulletin number 47/2014 and on the web site: "www.agcm.it".

[9] See the ICA Decision published, like all formal decisions, on the web site: "www.agcm.it"

In the case of EasyJet, the Authority took into account changes made during the administrative procedure both in respect of the information provided to consumers in the on-line booking process and the refund procedure: consequently, a lower fine was applied. The unfair commercial practices were due to the lack of transparency in the sale of the insurance policy.

The Authority established that Ryanair and EasyJet had both infringed the Consumer Code by not supplying adequate information or by giving misleading information essential for making an informed choice when consumers acquire the insurance policy which covers the risk of travel cancellation.

In particular, during the on line reservation process, the effective risks covered by the insurance policy are not clearly indicated, these are only discernible after reading the full conditions of the contract through a link; the sum of deductibles, that are very high in proportion to the cost of the ticket, is not immediately clear; it is not explained that refund does not cover taxes and airport charges.

These omissions can mislead consumers on the same kind of insured risks, thereby causing them harm by taking a transactional decision that they would not have taken otherwise.

In the case of Ryanair, the Authority also considered the unfair, cumbersome and misleading, so-called 'opt-out' mechanism illegally imposed on consumers by putting the burden of selecting the no-purchase option of the travel insurance policy 'pre-selected' on them. In particular, in the Ryanair booking process one had to scroll and proceed through the window of "country of residence" and select the option "*refuse insurance*" (opt-out) positioned – in the Italian website – between Netherlands and Norway.

In some proceedings the Authority considered the fee requested by air companies to issue the certificate declaring that the consumer has not made use of the transport service necessary for obtaining a refund for the expenses encountered to be unfair commercial practice. This is information that the companies already possess and may easily be transmitted to the insurance company without burdening consumers.

By contrast, the consumer is requested to pay a fee that can be higher than the related insurance cost (20 euros for Ryanair, 12 euros for EasyJet) and are obliged to call a chargeable number: in this way, consumers who purchased the travel insurance policy are dissuaded from beginning any refund procedure which also involves serious expenses. The data collected by the Authority's offices in the course of the investigations show that the percentage of travelers who have actually activated the procedures for refunds is extremely low.

5. Actual availability of products ordered online

The Antitrust Authority (ICA) concluded a number of investigations related to the actual availability of products ordered following proceedings initiated upon complaints made by several consumers.

For example, ICA imposed an administrative fine of 500,000 euros on S.G.M. Distribuzione. On its MarcopoloShop.it website (now Unieuro.it), the company offered consumers products marked as 'in stock' when actually they were not, and making confirmation of the transaction subject to a subsequent additional check regarding the availability of the products purchased by consumers on the website. This method of managing orders, dictated by specific organizational choices on the part of Marcopolo Shop, caused consumers considerable inconvenience, such as the frequent cancellation of purchase orders and significant delays in the delivery of the products concerned.

The Authority ruled that the company's unfair commercial practices also extended to its management of the after-sales stages. Marcopolo Shop's customer care service did not inform consumers promptly and correctly about the actual status of their order and the concrete chances of receiving the products purchased within the time promised by the company. This resulted in significant obstacles for the consumers in exercising their contractual rights, denying them the opportunity to make a prompt, informed choice regarding whether to wait for the order to be fulfilled or use another supplier.

In addition, during the after-sales stage, insufficient information was combined with a conduct designed to delay the return or release of the sums paid: instead of returning sums paid by consumers at the time of purchase, Marcopolo Shop offered them a product different from the one not in stock. This way, consumers were unduly influenced to purchase an alternative product rather than be refunded, especially as Marcopolo Shop was still in possession of the sums paid by the consumers for the cancelled transaction.

In the view of the Competition Authority, the online sales methods implemented by the website failed to comply with the rules of diligence required of a major operator (Unieuro trade mark) in the framework of specialized large-scale retail and the new e-commerce market.

6. Pyramid online schemes and the financial sector

The ICA endeavored to stop the spreading of systems not aimed at the marketing of goods or services, but securing unfair economic benefits through the mere recruitment of other individuals into a pyramid system.

The ICA, on the basis of a report received by the Italian Regulatory for Financial Services (namely "Consob"), ascertained that the advertisements released by Mr Daniele Verzari Boaglio, through his website "www.vdproject.info", were meant to promote investment schemes whose economic benefit for members was primarily related to the gradual expansion of the base of the subjects recruited and not dependent upon performing any actual business of selling goods or services, in line with the general system of pyramid schemes.

In this context, the authority also verified the misleading message that contained the enticing prospect of easy money, omitting to inform consumers of the fact that the gains envisaged could be achieved only if a large number of subjects had joined the system, and that by contrast, there was a high risk that the 'chain' would be interrupted and that, therefore, new members could not achieve a real economic benefit.

The ICA imposed a fine amounting to 100.000,00 euros on Mr Verzari Boaglio, warning him not to continue this conduct[10].

The authority will continue to carefully monitor the spreading of promotional communication through the internet which, through the deceitful prospect of easy and immediate profits, in reality exclusively aims to bring more consumers within a pyramid system.

7. The Tripadvisor case and the liability of online platforms

On 19 December 2014, the ICA concluded an investigation concerning Tripadvisor and the Italian version of its travel review website. The spot check focused on the claim that consumers could find many *"true and authentic reviews, which you can trust"* and the *"most sincere opinions"* on the website published by millions of travelers regarding hotels, bed & breakfasts, restaurants, etc. According to the claim, when organizing a trip, consumers could rely on the reviews contained in the website to find useful suggestions and to choose where to stay. In fact,

[10] The ICA Decision is published as usual on the italian web site www.agcm.it.

from the complaints by hoteliers and a consumer association as well as through the investigation it emerged that fake reviews can be easily introduced on the website for example by hoteliers who want to discredit competitors or try to unduly praise their own business. Tripadvisor uses a filtering system to check the reviews, but this cannot eliminate all fake reviews.

The AGCM assessed that fake reviews remaining on the website could be sufficient to influence Tripadvisor's classifying systems which ranks hotels and restaurants according to visitor reviews, and can significantly influence consumer choice. Consequently, the allegations of *"true and authentic reviews"* and reliable visitor opinions hosted on the website must be assessed as misleading information that can deceive the average consumer and is likely to cause him to take a transactional decision that he would otherwise not have taken, thereby infringing articles 5, 6 and 7 of the EU Directive 2005/29 on UCPs, as transposed into articles 20, 21, and 22 of the Italian Consumer Code.

Under Article 27 of the Italian Consumer Code, Tripadvisor was fined to pay 500,000 Euros and was given 90 days to comply with the ruling[11].

8. Web comparison tools

On 8 April 2015 the ICA concluded a formal investigation and made the commitments presented by traders managing two comparison websites, Facile. It and 6Sicuro.it legally binding, allowing consumers to compare car insurance policies and to buy them through their web sites.

These proceedings were opened in October 2014, in order to investigate possible unfair commercial practices, concerning:

a) the lack of transparency of information included in comparison tools (websites) with respect to: their business model, with specific reference to their source of income, since they act as brokers for insurance companies and, as a consequence, there is a potential partiality in the comparison mechanism;
b) the lack of information about the coverage of the comparison (name and/or , total market share of the insurance firms included in the comparison) and the ranking criteria;
c) possible misleading claims concerning savings advertised by the comparison tool: it was not clear whether those savings could be obtained

[11] See the ICA Decision published on the web site: "www.agcm.it"

simply through the use of the comparison websites or were in fact already offered by the insurance companies, sometimes under specific conditions;

d) the 'opt-out' mechanism for optional covers: the comparison results – sometimes and for some insurance companies only – included covers such as third party liability, fire and car theft insurance, even when the consumer asked for car insurance only (mandatory by law). Sometimes, the results even included optional covers different from those requested by the consumer.

The authority opened these proceedings because the conduct described could qualify as misleading information and omission and allegedly infringed Articles 6 and 7 of the EU Unfair Commercial Practices Directive (UCPD), as transposed into Articles 21 and 22 of the Italian Consumer Code. In fact, the lack of transparency surrounding the characteristics of the service, the real source of the savings advertised on comparison tools, and the lack of information on the actual insurance firms included in the comparison could deceive the average consumer, and cause him to take a transactional decision that he would not have taken otherwise.

Moreover, the lack of transparency concerning the economic incentives of the traders that receive, for each policy sold, a fee – differing from company to company and also depending on the additional covers sold – is likely to deceive consumers about the impartiality of the comparison tool.

Finally, the 'opt out' provisions on additional covers and the inclusion in the comparison results of policies which have not been requested by the consumer, may alter the ranking, thereby inducing consumers to choose those companies and policies which ensure more profits for the comparison tool itself, distorting the consumers' economic choices.

To address the concerns stated by the authority when it launched the proceedings, parties offered commitments which included the following proposals to provide detailed information on the website: 1) about the business model of the comparison tool, also disclosing the names of the insurance companies that have commercial agreements with the website; 2) the companies which are included in the comparison and their total market share; 3) the fees gained from each insurance company; 4) to provide more transparent information on the website on how savings are calculated (either when they derive from a mere comparison between competitors and when they stem from specific tariffs applied by the comparison website); 5) to offer additional and optional covers only through an opt in mechanism.

The ICA accepted the commitments proposed by the parties and, as set forth under the procedural rules, rendered them mandatory without further assessing whether the initial conduct infringed the Consumer Code. Comparison tool traders were also required to publish for 90 days the full text of the commitments on their websites.

The final decision stressed the important role that car insurance comparison tools may play in the competitive dynamics of this sector, since their transparency and impartiality can be particularly beneficial for consumers.

9. 'Free' online services

Penalties totaling € 735,000 were imposed on seven companies that advertised a seemingly 'free' evaluation service of cars on the web, and subsequently asked for the payment of a bill amounting to ca. € 60, set to exceed over € 250 in case of delays in payment by the consumers. This was decided by the ICA in conclusion of complex investigations. The practice involved thousands of citizens who between January and July of 2013 have used the Internet to find an estimate of the value of their car, by typing the keywords 'free' or 'free' along with 'evaluation' and 'car'. The evidence collected by the Authority, which has received more than 2000 reports, shows that the seven companies (Pronto Value LLC, Atlantic Car Value LLC and United Auto Corporation LLC, based in Delaware, Meedium Marketing OÜ, based in Estonia, Pascutti Invest & Factoring Spa, Pascutti Invest & Factoring Inc and Media Solution Service of Ballariano Antonino headquartered in Patti-Me) have put in place a complex misleading mechanism to attract consumers to the websites www.auto-prezzo.net and www.auto-valutazione.com, offering a seemingly free service that concluded with a fee instead. Consumers were given just 20 minutes to exercise, however, exclusively on-line, the right of withdrawal. After this short period, during which it was still very difficult to send the notice of withdrawal, the citizens were sent a confirmation email with an attached invoice (in the first phase amounting to € 59.60, and subsequently increased to € 69.50) and a warning that, in case of delay in payment, a higher penalty would be applied. In fact, at the first reminder the bill "rose" to € 101 increasing to € 259.50, with a letter of formal notice sent by the Credit Recovery Department of an Estonian law firm.

According to the ICA, the companies have violated the provisions of the Consumer Code through two distinct practices: the first consists in having put in place the misleading mechanism to induce consumers to engage the

car evaluation services, based on the false assumption of their gratuity; the second practice, characterized by aggression, relates to obstacles to the right of withdrawal and the undue influence over the freedom of consumer choice, exercised through the unjustified claim for payment for a service which had not been requested and by the threat, in the case of non-payment, of recourse to legal action, resulting in additional expenses[12].

10. Web surfing and premium services for mobile phones (cramming)

In 2015 the ICA concluded four investigations on commercial practices in the mobile phone business. These practices, often referred to as "cramming", mean conduct consisting in charging mobile phone users for unsolicited services, usually provided by third parties. With its decisions, the Authority fined Italy's four major mobile phone operators (Telecom Italia – TIM, Vodafone, Wind, H3G) and three content service providers (Vetrya, Emcube, Acotel) in a total amount of 5.5 million euros.

The value-added services (or premium services) consist of services of various nature and content, provided by operators (content service providers – CSPs) through mobile phones, especially smartphones. They are advertised through pop-ups, banners, links, landing pages that users encounter while surfing on the web and can be activated through a simple click: they will be then automatically charged on the user's telephone credit. Mobile phone operators act as platforms for these services, by connecting CSPs' services with users and by charging them for the services used. By surfing through smartphones, the consumer is identified by the mobile phone operator that can disclose the identity to the CSP through a system of crypting and de-crypting called "*enrichment*", and based on a commercial agreement between the mobile phone operator and the CSP.

According to complaints made also by consumer associations, many consumers were billed for premium services they never agreed to activate, or had been made aware of.

The authority identified an unfair commercial practice carried out by mobile phone operators, consisting in multiple conducts: a) omitting relevant information to the consumer about the fact that in the mobile phone contract the user by default gave authorization for receiving premium services through

[12] See the two ICA decisions against Facile.it and 6Sicuro.it on the web site: www.agcm.it.

banners and links and for being charged for them; nor was the consumer clearly informed that he could deactivate the service through a blocking option, as the information given in the T&C on the website were insufficient; b) adopting an automatic system of user's data transfer ("*enrichment*") that cannot stop unwanted service activations by consumers (users can unwillingly activate the services just by touching the screen lightly during a web search). The Authority also assessed another infringement by Telecom Italia and H3G, besides the CSPs, consisting in omitting to publish in the landing pages and other ads of premium services, relevant information concerning the trader's identity and the geographical address, the methods of payment and the existence of the right of withdrawal. For these reasons, the practice was considered to be misleading and aggressive and contrary to professional diligence, infringing Articles 5, 7, 8 and 9 of the Unfair Commercial Practice Directive (2005/29), as transposed into Articles 20, 22, 24 and 25 of the Italian Consumer Code. Moreover, the same practice was considered an infringement of Article 26 (f) of the Consumer Code (practice Nr. 29 in Annex I of the UCPD) due to charging consumers for an unsolicited service. The liability for mobile phone operators was determined on the fact that they earn a large share of the revenue generated by premium services, by passing on to CSPs only a part of it; moreover, they were found to be fully conscious of the activation and the charging of unsolicited services for consumers. Telecom Italia and H3G were also found liable for omitting relevant information on the CSP's ads, due to the fact that both mobile phone operators reviewed and approved the content of those ads.

Taking into account the severity and the duration of the practice (lasting between 3 to 9 months, sometimes still ongoing) and each trader's specific liability, the Authority fined Telecom Italia and H3G in the amount of 1,750,000 € each, Vodafone and Wind in the amount of 800,000 € each, while the companies Vetrya, Emcube and Acotel incurred a fine of 150,000 €, 125,000 € and 100,000 € respectively**.** Traders were given 60 days to inform the Authority about the measures taken to comply with the decision. To inform its customers, H3G was also ordered to publish on its homepage a summary of the Authority's decision for 30 days[13].

[13] The ICA full text decision (in Italian) is available on the web site: www.agcm.it.

11. Collective buying and e-couponing (Groupon/Groupalia cases)

The ICA accepted commitments undertaken by companies forming part of the international group Groupon S.r.l. and concluded the preliminary investigation initiated following various reports of alleged unfair trading practices to the detriment of consumers in online sales of coupons used for the purchase of products or services at very favorable prices[14].

The investigation focused on the circulation through the internet site *www.groupon.it* of misleading commercial information on prices and essential aspects regarding offers that were advertised, as well as an inadequate client assistance service. On the strength of commitments that have since become binding, consumers will find clear and complete information on the site *www.groupon.it* regarding the commercial offers advertised: those who buy coupons will be given full information about their rights with particular attention to the submission of complaints, requests for refunds and client assistance service. But this is not all. Percentage discounts will only be indicated in respect of items where an objective comparison is feasible and the advertised price has to include all additional compulsory charges.

Groupon also undertook to increase its monitoring operations towards its partners, with greater controls both at the stage prior to the announcement of commercial offers as well as following the issuing of these offers. With regard to parties that are found to be unreliable, the mechanism to insert these parties on the black list will become stricter, with their consequent exclusion from future promotional campaigns. Finally, two alternative assistance channels will be set up (an e-mail service and a call center) through which it will be possible to forward complaints and requests for assistance that will be followed up and managed according to clear procedures and timeframes determined in advance.

Within a period of sixty days of the communication of the decision, the companies that form part of the group must declare that the commitments have been implemented. Antitrust Authority monitors, as usual, the implementation of the agreed measures while reserving the right to re-open proceedings *ex ufficio* if these companies fail to comply with their commitments.

[14] See the ICA Decision published on "www.agcm.it"

12. Counterfeit products and ICA interventions against commercial piracy: take down of online sites

Counterfeiting is a commercial practice which strikes the correct functioning of the market at the heart. It depresses the incentives to make improvements, disorientates consumers and prevents competitors from producing their own benefits. During the last two years, with the support of the Financial Police, the Authority has sought to react to a 'gap' in the protection afforded to consumers rightfully entitled to make safe and conscious purchases, by exercising a role of repression through the sanctioning instrument, which also has a deterrent function. "New instruments are needed to strengthen the possibility of a prompt intervention against infringements to the detriment of consumers carried out through the use of the Internet".

At a hearing before the Italian Parliamentary Investigation Commission on counterfeiting and commercial piracy, the President of the Italian Antitrust Authority (ICA) sounded the alarm on the widespread nature and growth of the phenomenon in the last years, especially among the new generation: "Based on the 2014 Censis Report on this issue, 75% of the young subjects interviewed in the course of the investigation confirmed that they consciously buy counterfeit products, out of an intentional and reiterated choice". Hence, according to the authority, there is a need for "further interventions, in particular those with an educational and informative purpose seeking not only to disseminate a broader culture of legality, but also to make clear the damage caused to the long term economic context by short term, illusory savings".

Acting upon feedback received from various consumer associations, the ICA obscured 20 online sites belonging to a physical person residing in China marketing seemingly original products with various brands. Later, two proceedings were initiated against other 33 sites selling counterfeit shoes, likewise traceable to other Chinese operators. In some wholesale stores and factories in Toscana, Lazio, Lombardia and Puglia, 1.700.000 shoes, valued at around 20 million euros, were confiscated, since they contained a cancerous substance (hexavalent chromium) in alarming proportions.

In 2012, moreover, the ICA intervened against two sites offering online drugs without medical prescription, in respect of which prescription had instead been requested. Overall, in the course of 2013 the Authority obscured 165 sites relating to brand products traceable to persons residing in China or Malaysia. The activity continued in 2014, with the initiation and finalization of 3 proceedings which led to 50 sites being obscured.

As for the extent of the phenomenon, in the course of the parliamentary hearing the authority's president reminded that, according to the Censis study conducted on behalf of the Ministry of Economic Development, in 2012 the business volume of counterfeit products in Italy amounted to a 6.5 billion turnover. The phenomenon has produced a decrease in opportunities on the labor market estimated around 100.000 units, with a concomitant lower tax revenue of some 1.6 billion for direct taxes and 3.6 billion for indirect taxes. Lastly, at the European level, 40 million products, valued at approximately 1 billion Euros, have been blocked at customs in 2012.

In March 2016, the ICA issued orders to block access from the Italian territory to 174 websites selling counterfeit products**.** The investigation was started after a consumer association and a trader association representing famous brand companies filed complaints showing that the products sold on a high number of websites were not original. The products concerned were: a) famous brand sunglasses, some of them not meeting the health security standards concerning the filtering of UV rays; b) shoes_branded Nike, Timberland, Fendi, Gucci, Michael Kors, also for children, whose samples imported from China showed the presence of a cancer-causing substance (hexavalent chrome); c) clothing items of famous brands for which highly health damaging dye chemicals were used; d) costume jewelry and high fashion watches (Tiffany, Gucci, Fendi, Michael Kors), presented alleged to be made of silver while they were actually made of a copper/zinc alloy covered by nickel, a mixture that can cause allergies and burns[15].

Consumers were misled by the structure of the sites which mimicked the original ones with logos and images, pretending to be authorized sellers of those brand products and offering big discounts from official prices. At the same time, those websites did not provide to consumers any information about their rights on guarantees and withdrawal.

The ICA then opened 6 proceedings against the owners and registrants of websites; all traders are located outside the European Union. The alleged unfair commercial practices concerned misleading information on the characteristics of the product, the identity of the trader, displaying a trust mark without being authorized to do so and promoting a product similar to the product of other manufacturers so as to mislead the consumer, allegedly infringing Article 5, 6,7 and provisions 3 and 13 of Annex I of the UCPD, as well as breaching Article 6 of the CRD for omitting to publish the trader's identity and its geographical

[15] The various and wide ICA decisions and interventions against commercial piracy can be consulted on the web site: www.agcm.it.

address and provide information on consumers' rights. Since parties did not reply to allegations and given the high and immediate risk for consumers who shopped on those websites, the Italian Competition Authority issued interim measures, by ordering traders to suspend within two days all activities on the websites. Since traders did not comply with the order, the AGCM, being the competent administrative authority under Articles 14(3), 15(2) and 16(3) of the E-commerce Directive 2000/31/EC as transposed into Italian law, instructed Italian internet service providers through the Italian Finance Police ('Guardia di Finanza') to suspend the infringement by blocking access to those websites from the territory of Italy. Italian consumers are now redirected to other webpages informing them of AGCM's order mandating the takedown of these web sites.

13. The Amazon case and "business" platform liability (marketplace and online sellers)

In March 2016 the ICA concluded an investigation of two companies belonging to the Amazon_group: Amazon EU Sàrl and Amazon Services Europe Sàrl. Evidence related to Amazon's conduct was collected through: 1) several consumer complaints concerning unclear information on the Italian version of the Amazon website as well as the lack of customer care regarding guarantee, 2) the 2014 CPC sweep, 3) on-premises inspections. The investigation focused on Amazon's double role, as an online direct seller and as a platform for other online sellers (marketplace)[16].

Evidence showed that Amazon constantly monitors all transactions on its platform, also when goods are sold by third parties: a Seller Performance Team monitors possible infringements of the agreements that sellers must sign. On the website, potential buyers are presented with claims such as "*welcome to our shop*" or "*here you can find our products*" upon their first contact, without any clear information as to the fact that some products are actually sold by independent sellers. If the consumer uses the search device, he is presented with a choice between many products sold by Amazon itself or by other sellers, without any clarification on who the actual seller of those products was. In the case of direct sales you can only find the information "*sold by Amazon"* on the page of a specific product, and in very small letters; no information on the right

[16] For more details see the full text of the ICA Decision in Italian issued in March 2016 and published on the web site: www.agcm.it.

of withdrawal or guarantees is given. The same applies for independent sellers' offers: information on the identity of the seller is given in very small letters while Amazon's role in the transaction and buyers' rights are not mentioned – these can be read only in the section entitled "terms of use". It also emerged that Amazon asks sellers who want to use its marketplace to give their details (name of the firm, VAT number, address, phone number) when they register on the platform, but registration is not blocked if those details are not given; other information on the seller (trader's activity, guarantee, delivery details, privacy, FAQ, etc.) is only optional. Internal documents showed that Amazon was aware that the information on its website was insufficient and of the need to inform consumers better. Moreover, when sellers on the marketplace refused to recognize the consumers' right to guarantee, Amazon did not check the sellers' compliance with consumer law and denied any liability, claiming it was not involved at all in the transaction between the seller and the consumer. However, documents seized on Amazon's premises showed that the company was well aware of this problem because of the many consumer complaints.

In its legal analysis, AGCM established that:

a) as a seller, Amazon did not provide the pre-contractual information on legal guarantee and the right of withdrawal and its limitations as required by the CRD, since those pieces of information were available only in the T&C's section and not directly before the consumer places his order. No clear distinction was made between the company's return policy and the statutory right of withdrawal;
b) as a marketplace, Amazon has specific obligations (see recital 20 of the CRD and the CRD guidance Nr. 4.3.2.4) to check whether all relevant information on sellers and on sales is displayed;
c) Amazon does not clarify to consumers when the seller is a third party and identity details that Amazon requires from sellers registering on its platforms are not easily accessible to buyers;
d) although internal documents show that Amazon was aware of consumers complaining about misleading the information on sellers' identity, it did not take any steps to resolve the situation;
e) in compliance with the case law of the CJEU (*L'Oréal*), Amazon cannot be considered as a hosting provider under Article 14 of the e-commerce Directive and be granted the liability exemption, since it has not a neutral role due to the fact that: i) Amazon receives a percentage of the price for every transaction on its platform; ii) it processes the data of sellers; iii) Amazon arranges the display of the sale; iv) it intervenes in the seller-buyer

relationship by sometimes arranging the delivery of the good and even when the customer exercises his right of withdrawal or legal guarantee; v) transactions are cleared through Amazon's payment platform; vi) Amazon monitors sellers' performance; viii) it filters contacts between the seller and the buyer; viii) if requested, Amazon provides expertise to optimize or promote certain sale offers;

f) the conduct qualifies as a serious infringement, since consumers became aware of the true identity of the seller only after having complained for lack of conformity or the poor performance of the good/service bought, but Amazon nonetheless claimed to have to no liability in respect of the transaction.

For the above reason, the authority established that Amazon infringed Articles 6 and 8 of the CRD, as transposed into Articles 49 and 51 of the Italian Consumer Code.

Amazon, starting from 11 March 2016, introduced changes to its website, by making clearer the name and the details of the seller, by giving clearer information on the issue of guarantee and on the right of withdrawal before the placement of the purchase order, and by clarifying the difference between the product return option and the right of withdrawal. However, the Authority assessed that those changes, even if significantly improving the information provided to the consumer, were insufficient to remedy the infringements.

Taking into account all the above, the ICA imposed a € 220,000 fine on Amazon EU sàrl (the company which concludes contracts for Amazon's direct sales) and a € 80,000 fine on Amazon Services Europe sàrl (the company running the marketplace platform). Both companies were required to provide a compliance report within 30 days from the notification of the decision.

14. Conclusions

The enforcement of consumer protection legislation (especially the extensive rules under the «maximum harmonization» Directives on Unfair Commercial Practices – UCPD – and Consumer Rights – CRD –) is crucial in the internet economy, for achieving an effective and efficient «Single» Digital Market («DSM» as an absolute priority of the EU Commission).

New enforcement challenges come from the growth of online and mobile commerce, including new platforms, the app economy, the sharing economy,

web advertising, intermediation, comparison tools, social media (with related problems of consumer and personal data protection).

In particular, the most relevant challenges of the emerging EU Legislation (new e-commerce package project) can be summed up with the following objectives: a) the need to develop the untapped potential of e-commerce; b) to remove barriers, «unjustified discrimination» (such as «geo-blocking») and obstacles (particularly those affecting EU cross-border online shopping); c) to create complete consumer confidence in enjoying consumer protection tools and rules similar to those applicable at national level; d) to provide adequate evidence that e-commerce constitutes a huge opportunity both for EU citizens and business (especially the small and medium-sized).

For example, more recently the EU paid special attention to delivery services which should be affordable and transparent taking into consideration the point that a high quality cross-border parcel delivery services constitute a basic building block of an effective DSM (EU digital «single» market).

But, of course, legislation without an adequate system of enforcement appears only on paper, reflecting an 'ideal world' without an effective and real framework for a concrete consumer protection environment.

During its wide and extensive enforcement activity under UCPD, the ICA anticipated the evaluation of several practices considered specifically and namely illegal under the more recent CRD legislation for example about: a) opt-out systems for optional/ancillary services; b) credit surcharges; c) aggressive practices and obstacles to consumers' rights; d) unsolicited supplies, etc.

In order to attain a good enforcement model which gives teeth to consumer protection legislation, it is very important to define 'benchmarks' of 'professional diligence' in the different economic sectors by regularly publishing specific enforcement decisions and judicial assessment of cases in order to set consumer protection standards and rules for traders (especially in the emerging Internet economy).

In this respect, moral persuasion and other informal procedures which seem to be very popular in other Member States should be limited, in my opinion, to less relevant and simple cases. Both educational activities (targeting consumers and traders alike) and the pro-active participation and role of consumer associations in promoting consumer protection are crucial.

Competition and consumer protection can be considered as two faces of the same coin promoting the fundamental rights of economic freedom, economic democracy and collective sovereignty[17].

In my opinion, the consumer protection legislation should be enforced more broadly and effectively especially in countries where competition authorities are competent also in consumer protection matters (I have mentioned this beneficial "synergic" approach several times).

For example, this model works well in some Member States such as Hungary, Italy, U.K., Poland, Malta, Czech Republic, etc., while outside the EU, for example, the long standing practice of the Federal Trade Commission in the U.S. seems overall to be positive.

In conclusion, investigations against unfair commercial pracices, especially in the e-commerce sector and more generally the online sector (the economic pillar of the complex Internet Economy) may be considered not only as instruments of consumer protection but also as market tools promoting efficiency and fair competition.

[17] See the ICA Annual Report 2015 and the sentence of the Italian Administrative Tribunal "Consiglio di Stato" n. 2479/2015.

ACTIVITIES OF THE SELF-REGULATORY BOARD ENSURING COMPLIANCE

Erika Finszter*

1. What is advertising self-regulation?

Compliance is both a state of being in accordance with established guidelines or specifications, and the process of becoming compliant. The definition of compliance can also encompass efforts to ensure that organizations abide by both industry (self)regulations and government legislation. Compliance in the advertising industry involves aligning practices with EU and national legislation, codes of conduct and the principles and practices of competent authorities. Furthermore, certain consumer, and other non-governmental organisations may have expectations relating to consumer interests, moral-ethical standards and social responsibility, which specifically concern advertisements.

Self-regulation – especially in the advertising industry – is a well-designed system. The advertising industry (advertisers, agencies and the media) is ready to create and publish commercials, which comply with a set of ethical rules set forth in the Ethical Code, and it is also committed to setting up and maintaining (financing) an independent body, which aims to guarantee a fast and impartial decision making process in respect of consumer complaints. Moreover, self-regulation goes further than merely handling complaints. It plays an important role in ensuring higher compliance rates through affording copy advice, pre-clearance, monitoring, and training related to best practice recommendations and help notes.

Can self-regulation help in complying with the law? Yes, it can! The most important basic principle of the code is that advertising should be lawful, decent, honest, truthful and created with a sense of social responsibility towards

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the consumer as well as to society and as a whole compiled with due respect to the rules of fair competition.[1] Companies are expected to compete vigorously and effectively, but never unlawfully. For this reason, they have to be truthful in all of their sales and commercial (marketing) communications. Companies must only make truthful statements about their products and services. All marketing claims must be substantiated and businesses must live up to their promises.

Therefore, persons responsible for a company's compliance should be familiar with the laws, regulations, sales and marketing review procedures that apply to their work. As laws and regulations change frequently in this area, it is critical that they know the latest requirements. When markets operate freely, the consumers benefit from high-quality goods and services at fair prices. Failure to comply with these laws can have serious and far-reaching consequences for both companies and the individuals involved. Compliance is highly prioritised within companies. Companies are driven to achieve higher compliance rates and to establish better designed internal procedures for the pre-vetting of their ads, not only because they seek to avoid unfavourable decisions by the authorities and/or SROs, but also because of the importance of the trust vested in their brand.

2. Recognition of self-regulation

The system and importance of advertising self-regulation was recognised in 2015 by the Organisation for Economic Co-operation and Development (OECD) report ("Industry self-regulation – role and use in supporting consumer interest")[2], and by the Asia-Pacific Economic Cooperation (APEC) in 2014[3], as well as by the EU through, among others, the Community of Practice for better self-and co-regulations meetings.[4]

Self-regulatory Organisations (SROs) operate within the legal framework as non-governmental organisations. The Hungarian SRO (for advertisement) is called Önszabályozó Reklám Testület (ÖRT) and has a decades-long history in assisting companies and consumers in meeting their needs and obligations. The ÖRT is a member of a worldwide association of SROs called the European

1 http://www.easa-alliance.org

2 https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/dae-library/industry_self-regulation_-_role_and_use_in_supporting_consumer_interests.pdf

3 http://publications.apec.org/publication-detail.php?pub_id=1523

4 https://ec.europa.eu/digital-agenda/en/community-practice-better-self-and-co-regulation-0

Advertising Standards Alliance (EASA, www.easa-alliance.org). The EASA's members include 38 self-regulatory bodies responsible for advertising standards in 36 countries (11 being non-European, including SROs from Canada, Mexico, India and Australia) and 16 organisations which represent the advertising eco-system. It should be noted that SROs in the APEC economies also have good geographical coverage, as 16 of the 21 markets have independent bodies. The EASA is currently the only international association of SROs, and they identify themselves as "the single authoritative voice for advertising self-regulation." They emphasize that effective advertising self-regulation promotes responsible advertising and ensures that customer demands for honesty and transparency, social demands for responsibility and engagement, and business demands for the freedom to operate responsibly are met. The EASA and its members have developed a robust and coherent system of advertising self-regulation that can respond effectively to new challenges."[5]

According to the EASA's website: „For the advertising industry having effective self-regulation in place means that the advertising industry pro-actively makes sure its advertising messages are honest, decent, truthful and legal. This will allow the advertising industry to build up a strong trust relationship with the consumer, thus promoting further consumption of the products and services advertised. Self-regulation is also an alternative to detailed legislation, but not to all legislation. It is now widely accepted that self-regulation works best within a legislative framework. The two complement each other, like the frame and strings of a tennis racquet, to produce a result which neither could achieve on its own. The law lays down broad principles, e.g. that advertising should not be misleading, while self-regulatory codes, because of their greater flexibility and the fact that they are interpreted in spirit as well as the letter, can deal quickly and efficiently with the details of individual advertisements. Framework legislation therefore creates a legal 'backstop' which self-regulation will need to invoke when dealing with fraudulent and/or illegal practices (like for example pornography) as well as rogue traders – those operators who repeatedly refuse to abide by any laws."[6]

5 http://www.easa-alliance.org

6 http://www.easa-alliance.org

3. How can self-regulation relate to a company's compliance?

One of the key roles of self-regulation is to prevent problems before they happen by providing advice to advertising practitioners. There are several ways in which an SRO can help fulfil the advertising industry's commitments to responsible advertising. Advice and information is one of the key elements of the EASA's Best Practice Model, which is the basic document of the well-designed non-regulatory (self-regulatory) model.

The advice provided by an SRO takes several forms. Firstly, it can be copy advice, i.e. confidential, non-binding advice about a specific advertisement or campaign, supplied on request before publication. Secondly, the SRO offers general advice on code interpretation; this advice will also draws on 'case law', i.e. precedents established in previous legal disputes. General advice of this kind can also be made available in the form of published guidance notes, which supplement the code and indicate best practice, for example in high-profile or problem areas. Like the code itself, guidance notes can be updated when necessary.

3.1. Pre-checking

A typical question of advertisers is whether their ad complies with the rules. Many companies have created a procedure for approving ads in advance. With the right methods they can reduce the risks of non-compliant ads, which could otherwise cause serious problems for the company, such as:

- marketing problems, – losing the consumers' trust in advertising;
- financial problems , – paying fines or the cost of re-editing the ads; and
- PR problems, – they get negative publicity.

That is why it is becoming more and more important to ensure compliance.

3.2. Copy advice

Copy advice is the provision by an SRO of an opinion as to whether or not an advertisement complies with advertising rules. It is provided on a confidential basis and may be accompanied by advice on the amendments necessary to bring

a non-compliant advertisement in line with the rules. Copy advice is provided upon the request of advertisers, agencies or the media. It was a high priority for the EASA to create the Best Practice Recommendation on copy advice.

ÖRT is among those SROs, who offer the service of copy advice. The aim of the service is for companies to ensure that the ad is in full compliance with the rules and the practice of lawful, decent and truthful advertising. It is open not only to the advertiser or advertising agency but also to the media. According to the Hungarian practice it is mainly the advertiser (or the agency on behalf of the advertisers) that submits the ad (prior to publication) to the ÖRT for copy advice. Media companies may have company policies requiring all ads they publish to be in line with ethical advertising rules as well, however the numbers show that they are only the third most frequent users of the service by category. All requests are handled expediently and professionally. The advice itself consists of a written decision on whether the ad complies with ethical codes on advertising and the law. Confidentiality is of utmost importance to the users and, as such, the service is dependent on the trust that users place in the SRO. When deciding on whether an ad is in full compliance with all government regulations and the code of ethics, the ÖRT considers the relevant laws, the authority's practice (earlier decisions and statements) and its own principles as set out in its earlier decisions.

The ÖRT has a special body for adopting these decisions, the so-called Ad Hoc Committee. Despite its name, in practice it is a standing committee with two permanent members and three other members selected specifically for the cases submitted. The permanent members of the Ad Hoc Committee are the chairman or the secretary general of the ÖRT and the in-house lawyer of the ÖRT. The other three members are representatives of the industry: one advertiser, one from an agency and one representing the media. These three members are selected carefully to have competence and a deep knowledge of consumer behaviour, and the knowledge and sensitivity of the average consumer, while having no conflict of interest regarding the ad submitted. The Ad Hoc Committee meetings are held weekly to ensure speedy decision-making and the service is free of charge for all members of the ÖRT. Non-members are welcome to submit advertisements but are charged a fee. Some members have a company policy requiring them to submit every advertisement prior to publication while others submit only ads they consider to be arguable or sensitive.

The copy advice (the decision of the Ad Hoc Committee) includes a detailed explanation and reasoning with reference to all issues and concerns discussed at the committee meeting and may even call some issues into the advertiser's

mind. But the decision will not include lines, scripts, any modification of the ad or other suggestions to the advertiser. An advertisement amended after copy advice had been given can be submitted again for new copy advice. Even if the script of an advertisement had been accepted by the Ad Hoc Committee without raising any issues, the advertiser may submit the ad at a later stage of its preparation (e.g. the storyboard, the rough cutting or the final version of the ad) or for final copy advice.

3.3. International copy advice

The EASA is committed to help develop the co-operation and services of the SROs. Since November 2009 there is an online one-stop shop, which enables advertising professionals to acquire advice on whether an ad is compliant with the local advertising code in one or several of the 22 countries participating in the facility. This International Copy Advice / Pre-Clearance Facility can be accessed on www.ad-advice.org. Once registered for the online facility, advertisers and agencies can submit requests for copy advice to one or more advertising self-regulatory organisations of the 22 countries taking part in the project for one or more media. All requests are voluntary in nature and are treated confidential. The facility can also be used to submit pre-clearance requests; either the site directly submits your request to the organisation responsible for pre-clearance, or it will direct you to the relevant on-line resource. Any special requirements or fees that apply are flagged, as some countries require payment for this service.

The following countries have national advertising self-regulatory bodies that currently participate in the online facility: Austria, Belgium, Canada, Czech Republic, France, Germany (misleading advertising), Germany (taste and decency), Greece, Hungary, India, Ireland, Italy, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom.

Sanctioning[7]

Although copy advice is non-binding, advertisers and agencies are likely to rely on it when spending large amounts of money for the ads to be created and published. By becoming a member of the ÖRT they also prove their commitment

[7] http://www.easa-alliance.org/Complaints-compliance/Sanctions/page.aspx/347

to ethical advertising. Self-regulation has the support of the advertising industry, so advertisers will usually respect the decision of the ÖRT even if they do not agree with it. In case of copy advice, ÖRT does not follow up on its decisions. But in case of a complaint it informs the complaint jury about its decision. The jury is totally independent from the pre-vetting procedure, however, it takes the information and arguments written in the decision into consideration.

As far as complaints are concerned, self-regulation cannot depend on voluntary compliance with decisions and SROs must be able to enforce them in cases where an advertiser is uncooperative. SROs in general have at their disposal a variety of sanctions; these include instructing the media to refuse the advertisement, creating adverse publicity through the publication of decisions, encouraging the withdrawal of trading privileges and expulsion from trade associations.

On those rare occasions where all else fails, the SRO may refer the case to statutory authorities, who have the power to prosecute the advertiser. This sanction of last resort is usually necessary only in the case of 'rogue traders' who have no intention of complying voluntarily with any form of regulation. It is sometimes accompanied by the issuing of a so-called 'ad-alert', warning the media, consumer organisations and other interested parties of the advertiser's activities. Although the decisions reached by an SRO do not have legal force, in the event of a subsequent court case the opinion of an SRO is likely to be taken into account by the court in reaching its judgment.

Point 57 of the Hungarian Competition Authority (GVH) guidelines[8] on the method of sanctioning in consumer cases refers to two actual cases as examples when compliance measurements of the defendant company had been considered an extenuating circumstance, both references[9] are to the ÖRT. However copy advice and other decisions of the ÖRT are still non-binding and their acceptance is based on the support of the industry and the recognition of the high quality of the advice given. It is clear that the provision of copy advice is a service to the industry to help them comply with all government legislation and ethics rules and this gives power to the ÖRT to have its decisions enforced, particularly because the GVH publishes its position based on previous cases, but insists

[8] http://www.gvh.hu//data/cms1032195/jogi_hatter_fogyasztos_birsagkozlemeny_2015_10_01.pdf

[9] Vj/022/2013. and Vj/077/2012.

on not giving any kind of pre-clearance or advice for ads or commercial communications itself.[10]

3.4. Pre-clearance

Pre-clearance is normally applied in circumstances where advertising is subject to statutory or co-regulation. It is the compulsory examination of an advertisement before broadcasting or publishing to ensure compliance with legal, statutory or self-regulatory rules. Like copy advice, pre-clearance greatly reduces the risk of complaints, but if a complaint is received, the preliminary decision to grant clearance will be reviewed by the adjudication committee and if necessary, overruled.

Although in Hungary there is no pre-clearance, it exists in the following European countries.

- Ireland for alcohol advertising;
- Italy for non-prescription medicine advertising (all media except TV);
- France for all television advertisements;
- Netherlands for alcohol advertising (on TV and radio), medicines, treatments and health products;
- UK for all television and radio advertisements.[11]

3.5. Monitoring

The monitoring activity of the SROs as members of the EASA encompasses the review of all advertisements of a product category or media type published in a given period with a focus on whether the advertisements are in compliance with the requirements of the Code of Advertising Ethics.[12] Monitoring can help raise the compliance level of the industry by identifying non-compliant ads, detecting the problems, (symbols, words, behaviour in non-compliant ads) and calling the industry's attention to the potential problems by sharing the top line results.

10 Vj/27/2015. Point 39. footnote 24.

11 http://www.easa-alliance.org/About-SR/Pre-clearance/page.aspx/27

12 http://www.ort.hu/en/self-regulation/monitoring

Monitoring is closely related to compliance because through monitoring independent SROs measure the scale of compliance. A statistical number of advertisements are reviewed to decide if they are in line with requirements of the advertising code and government legislation. In Hungary all collected advertisements are reviewed by the secretary general, the in-house-lawyer of ÖRT and a committee of experts who decide whether advertisements considered problematic infringe the Code of Advertising Ethics.

The ÖRT carries out the monitoring exercise for three reasons:

– own initiative monitoring
  If there is problem with, for example, a product category, or any other sensitive issue arises, it is important to get a picture of how the industry is in managing the problem. This type of monitoring is very rare as the other two reasons for monitoring typically give enough feedback about the different issues.
– European monitoring
  The EASA and its local self-regulatory organisations are the bodies responsible for monitoring the industry's commitments – e.g. EU-Pledge (food industry does not advertise to children under 12) and the alcohol industry's so called Responsible Marketing Pact (they do not advertise to minors). The latest example of European monitoring involved the cosmetic industry when the SROs in 6 countries (including Hungary) checked compliance with the new Cosmetic regulation, as well as with the Cosmetic Europe Guiding Principles and the Hungarian Code of Ethics.
– monitoring as co-regulatory partner of the Hungarian Media Authority (NMHH)
  According to the co-regulatory agreement between the ÖRT and the NMHH, the ÖRT conducts monitoring exercises twice a year with a focus on compliance with the Code of Conduct.

Monitoring is independent of the advertisers. The ÖRT, as a subscriber to the Kantar Media AdexNet program[13] has access to all Hungarian advertisements in the database of Kantar. In case of the aforementioned program, the ÖRT reviews advertisements included in the database of an international media monitoring company. However, monitoring results are shared and discussed

[13] This is a market service collecting and organizing published ads by and following the request of the customer.

with the companies working in the specified areas from which the ads were selected. Information obtained in international programs is forwarded to the international organisation of producers of the branch of industry concerned through EASA.

Monitoring is a sensitive issue with the advertisers and the advertising industry since it points to the ads already published that are in breach of applicable regulations. For this reason some of the monitoring results are confidential and only the key learning and statistical data of the TOP line report is shared with the public via the publication of results and reports towards the stakeholders.

The results are shared with interested parties via the publication of the Top Line report and also via the workshop, which is held under the Chatham House Rules[14]. Participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.[15] The main objective of the workshop is to learn from the key findings of the monitoring exercise. If there were any problems with the ads those concerned are requested to correct the erroneous elements and repeated monitoring provides scope for renewed reviews.

The EASA organizes a yearly Europe-wide monitoring of food and non-alcoholic beverages ads and there are other monitoring projects from time to time, for example the monitoring of beer ads in 2010 and that of cosmetic products ads in 2015. The results are always surprising because contrary to widespread negative beliefs about advertising the results are generally positive.

In the 2015 project relating to cosmetic products a total of 1,861 advertisements, including 577 television and 1,284 print advertisements of cosmetic products were analysed by SROs in six participating countries. 3% of the advertisements could not be assessed[16], as the experts did not receive the information necessary to assess the compliance of the claims made in the advertisements, so altogether the compliance rate was 91%.

The compliance rates of the ÖRT monitoring projects gave been the following:

– 2013. I. gender (9902 ads monitored – 99.9% compliance rate);

[14] This means in this case companies are free to use the iformation, but not for competition purposes.

[15] https://www.chathamhouse.org/about/chatham-house-rule#sthash.rWcKtMi5.dpuf

[16] It should be noted that in cases where the advertiser did not provide sufficient data, the ad was considered to be in breach of the regulation. The rate in Hungary was higher where the brand was represented by the distributor and not the brand owner. Not all of the distributors are aware of the importance of the monitoring project.

– 2013. II. children in dangerous situation (3,700 ads monitored 100% compliance rate);
– 2014. I. direct exhortation to children to buy(2,239 ads, 99.9% compliance rate);
– 2014. II. alcohol regulation (56 ads - 100% compliance rate);
– 2015. I. religious offense (1,392 ads – 100% compliance rate);
– 2015. II. unhealthy, dangerous behaviour and environmental danger (675 ads – 100% compliance rate.

3.6. Information and training

SROs are very keen on helping the advertising industry to achieve a good compliance rate. 'Information and even more information' – this is at the heart of their mission.

Help notes
Advertising means creating a message in a creative way, so that the consumer can discern and also identify the brand. This means that the ads must differ from each other. From this point of view it is very difficult to give a detailed guideline. In the meantime, the SROs have detailed information about sensitive social issues and also have practice in giving copy advice (eg.800 cases/year in Hungary), so they have all the information to summarize this knowledge and advice in publishing "Help notes" or "Guidelines". The ÖRT has published sixteen guidelines ranging from those relating to the content of ads for alcohol products to the digital marketing communication of medicines as well as advertisements related to the Olympic Games. It helps the brand managers, the copywriters, creative people and account executives – more than the lawyers – to stay aware of the importance of compliance and responsible advertising.

Newsletters
The ÖRT publishes a monthly newsletter to its members, sharing information about new legislation, the publication of studies about sensitive issues, and the decisions of the authorities concerning ads in Hungary. It helps raise awareness regarding the different aspects of responsible advertising among the members of the industry.

Training

Training has become more and more important for advertisers. Some SROs provide online video training programs. Clearcast – the British self-regulatory body for pre-clearing television ads in the UK – has created a series of video presentations from several countries of the world. The International Ad Compliance Training Program has eight topics:

– Misleading ads;
– Harm and Offense;
– Automotive ads;
– Environmental claims;
– Advertising to children;
– Food and drink;
– Gambling;
– Alcohol.

Access to the training videos can be bought for countries and/or issues, and can be used for seven days. It helps create ads for regional campaigns, or helps the international headquarters of the advertisers to comply with national regulations.

The SROs provide personal training sessions to the industry. The training sessions are personalized for the companies and have information, Q&A and interactive blocks. The ÖRT generally recommends that advertisers invite their agencies to the ÖRT training, to acquire detailed knowledge about all the rules and sensitive issues which effect communication. There are typically ten training sessions per year, with 10-40 participants.

4. Summary

The ÖRT makes efforts to keep up with legislation and the practice of the Hungarian authorities to provide the best service to its members. Members of the ÖRT can rely on its activity in seeking to comply with the relevant regulations and practices governing commercial communication. Whether a member of the industry is applying for pre-clearance requiring utmost secrecy in respect of an ad or is attending training sessions regarding certain issues with the experts on the panel and its competitors in the audience, every member can be sure that all cases will be handled with utmost care and competency. The information gathered by the ÖRT is available for the use of its members, whether presented

case-by-case in the form of copy advice, or as monitoring reports, general newsletters or training sessions. Whatever the form, the information is there to help members create advertisements that are ethical and in compliance with the rules.

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