Unfair commercial practices

The long road to harmonized law enforcement

A PÁZMÁNY PÉTER KATOLIKUS EGYETEM
JOG- ÉS ÁLLAMTUDOMÁNYI KARÁNAK
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UNFAIR COMMERCIAL PRACTICES

The long road to harmonized law enforcement

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CONTENT

Preface 7

Avishalom Tor
Some Challenges Facing a Behaviorally-Informed Approach to the Directive on Unfair Commercial Practices 9

Katalin J. Cseres
Enforcing the Unfair Commercial Practices Directive.................................19

András Tóth – Szabolcs Szentléleky
Hungarian experiences concerning unfair consumer practices cases......... 37

Marina Catallozzi
Recent enforcement actions in Italy 45

Michel Cannarsa
Unfair Commercial Practices in France:
New Trends after the 2013 Consumer Protection Act 55

Monika Namysłowska
Fair B2C Advertising in the Telecommunications and Banking Sector in Poland – Mission: Impossible? 65

Spencer Weber Waller – Jillian G. Brady – R. J. Acosta – Jennifer Fair
Consumer Protection in the United States: An Overview........................... 83

Márk Erdélyi
UCP – Hungarian Practice in the Telecom Sector......................................113

Áron Somogyi
Consumers Protected or is the application of the UCP
Directive helping consumers?.. 123

Tihamér Tóth
Are Fines Fine? Sanctioning Infringements of the Directive
on Unfair Commercial Practices in Hungary...147

Erika Finszter
Advertising self-regulation. Promoting self-regulation
for legal, decent, honest and truthful advertising.......................................167

PREFACE

The Pázmány Péter Catholic University's Competition Law Research Center organized an international conference on May 10, 2013. The aim is to set up an annual gathering bringing 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 Directive prohibiting Unfair Commercial Practices. We hope that not only officials of public authorities and judges but also business will benefit from this dialogue. The cross-border nature of the coverage of marketing campaigns makes an international approach inevitable. 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 book builds on the presentations of this first UCP conference covering behavioral economics, sector specific problems of financial and telecom services and institutional design issues. It includes additional chapters giving an overview of the U.S. consumer protection system and the role of self-regulation.

We are grateful to the supporters of the event, the Hungarian Competition Authority, Fundamenta Lakáskassza, Magyar Telekom, Telenor and the Hungarian Brands Association.

Tihamér Tóth
Pázmány Péter Catholic University
and Réczica White & Case LLP

SOME CHALLENGES FACING A BEHAVIORALLY-INFORMED APPROACH TO THE DIRECTIVE ON UNFAIR COMMERCIAL PRACTICES

Avishalom Tor*

The Directive on Unfair Commercial Practices seeks to protect consumers by prohibiting, inter alia, misleading practices, which are defined as practices that are likely to mislead the average consumer and thereby likely to cause him to take a transactional decision he would not have taken otherwise (Directive 2005/29/EC of the European Parliament and of the Council). While determinations of what constitutes average consumer behavior, what misleads consumers, or how consumers make transactional decisions all can be made as a matter of law, based on anecdotal observations, intuitions or theoretical assumptions, an empirical behavioral foundation can put consumer law on firmer ground and increase its efficacy. The Commission in its 2009 Guidance explicitly noted, in fact, that the Directive sought to take into account knowledge of how consumers actually make decisions in the market, including behavioral economic insights (Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices). Nevertheless, a closer evaluation of the behavioral literature shows that the task of incorporating behavioral findings in the application of the directive is more complex than it may initially appear.

Consumer law should not ignore relevant research findings – empirical and theoretical – on consumer behavior, particularly those regarding people's systematic and predictable deviations from normative models of strict rationality that scholars have identified. At least at first blush, such findings suggest concerns for consumer law in some situations where the behavior of perfectly rational actors would not have been distorted, say, because relevant product information is readily available. Nonetheless, to apply these findings correctly,

* Professor of Law and Director, Research Program on Law and Market Behavior, Notre Dame Law School. This paper benefited from the comments of participants at the *First Unfair Commercial Practices Conference*, Pázmány Péter Catholic University and the Hungarian Competition Law Research Centre, Budapest, Hungary. Christopher Lapp and Christina Sindoni provided excellent research assistance.

consumer law and policy must overcome a number of significant challenges. After offering some background on relevant behavioral findings, these remarks thus focus on two key challenges to a behaviorally-informed approach to the Directive: (1) the *material distortion challenge* of determining which deviations from strict rationality indeed are errors that legitimately concern consumer law; and (2) the *average consumer challenge* of accounting for the complex effects of consumer laws on a behaviorally-heterogeneous population with a differential susceptibility to different commercial practices.

1. Boundedly Rational Consumer Behavior

Behavioral decision research shows that humans possess limited cognitive resources and are affected by motivation and emotion – that is, they are "boundedly rational". At times they engage in formal, effortful, and time-consuming judgment and decision making. More commonly, however, to function effectively in a complex world, individuals use mental and emotional heuristics (or shortcuts) when making judgments under uncertainty to form their beliefs; they also rely extensively on situational cues to guide their decisions when constructing and manifesting their preferences.[1] Though highly adaptive and often useful, heuristic judgments and cue-dependent decisions also generate behavioral patterns that systematically and predictably deviate from traditional models of strictly rational behavior.

Individuals' beliefs are colored by their preferences, and they tend to be overoptimistic, overestimating their own positive traits, abilities, and skills, as well as the likelihood of their experiencing positive events.[2] For example, ninety percent of drivers describe themselves as better than average.[3] At the same time, people underestimate the degree to which they are vulnerable to risks. Thus almost all couples believe there is a very small likelihood that their marriage will end in divorce when asked near the time of their wedding.[4]

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[1] Avishalom Tor: The methodology of the behavioral analysis of law. *Haifa Law Review,* 12, 2008. 237–327.

[2] See generally James A. Shepperd – William M. P. Klein – Erika A. Waters – Neil D. Weinstein: Taking Stock of Unrealistic Optimism. *Perspective on Psychological Science,* 8, 2013. 395–411.

[3] Ola Svenson: Are we all less risky and more skillful than our fellow drivers? *Acta Psychologica*, 47, 1981. 143–148.

[4] Heather Mahar: Why are there so few prenuptial agreements? *John M. Olin Center for Law, Economics and Business, Harvard Law School.* Discussion Paper No. 436. (2003) http://www.

Besides such judgment biases, consumer choices also exhibit some systematic deviations from models of rational choice. One class of such phenomena is known as "framing effects", which manifest when people's choices over similar prospects vary dramatically depending on how these prospects are presented to them ("framed"). To illustrate, in a famous early experiment one group of participants read:

> Imagine that the U.S. is preparing for the outbreak of an unusual Asian disease, which is expected to kill 600 people. Two alternative programs to combat the disease have been proposed. Assume that the exact scientific estimates of the consequences of the programs are as follows:
>
> – If Program A is adopted, 200 people will be saved.
> – If Program B is adopted, there is a one-third probability that 600 people will be saved and a two-thirds probability that no people will be saved.
> – Which of the two programs would you choose?

When faced with this question, 72% of the participants chose Program A, with the remaining 28% choosing Program B. Note that the actuarial value of the two programs is identical, although they differ markedly in the distribution of outcomes they offer. The majority's choice of Program A therefore represents a risk-averse preference, which appears to value the certain saving of 200 of lives over the risky alternative that may save more lives but is more likely to save none.

Another group of participants were asked the same question, but with a different framing of the prospects associated with the two programs:

> – If Program C is adopted, 400 people will die.
> – If Program D is adopted, there is a one-third probability that nobody will die and a two-thirds probability that 600 people will die.

The problem given to this second group thus involved identical prospects to that presented to the first group, but used a different frame. In striking contrast to the choices made by the first group, however, 78% of the participants in this group chose the risky Program D – whose prospects are identical to those of less-favored Program B. Only 22% opted for the certain prospects of Program C, which is identical to Program A favored by the first group.[5]

law.harvard.edu/programs/olin_center/papers/pdf/436.pdf

[5] Daniel Kahneman – Amos Tversky: Prospect theory: An analysis of decision under risk. *Econometrica,* 47, 1979. 263–267.

Kahneman and Tversky used this and other studies to illustrate some common characteristics of actual human decision making that differ systematically from the theoretical models of rational choice in their "Prospect Theory". These characteristics included *reference-dependence*, where outcomes are evaluated as positive ("gains") or negative ("losses") changes from a reference point rather than in absolute terms; *loss aversion*, so that a given loss is psychologically more painful than a gain of the same amount is attractive; and more.[6]

In the consumer context, systematic deviations from strict rationality in either judgment or choice can take myriad forms, affecting different aspects of consumer behavior in the market. Judgment biases, for instance, can impact consumers' perceptions of themselves or the surrounding environment, so that they reach erroneous evaluations of their present or anticipated needs and desires.[7] Such errors can also lead consumers to misjudge the price or quality attributes of the goods and services they consider purchasing. Similarly, deviations from rational choice can lead consumers to under or-over consumption, to avoiding beneficial switching among goods or services, and so on.

To illustrate, overoptimistic consumers may not take sufficient precautions when engaging in risky activities, like driving, or when using risky products such as cigarettes.[8] Even beyond risky activities and products, consumer overconfidence can have undesirable consequences. In the case of credit card use, when they first apply for a credit card consumers may overestimate their ability to resist the temptation to borrow.[9] Such optimism can lead them in turn to underestimate future borrowing[10] with its accompanying high borrowing costs that are built into credit card agreements to exploit consumer overconfidence. Moreover, overoptimism regarding one's health and employment prospects can further increase the gap between consumers' predictions and their actual credit card usage, since research shows that contingencies such as medical problems or job loss – which overoptimistic consumers underestimate – account for a substantial proportion of ultimate credit card use.[11]

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6 Kahneman–Tversky (1979) op. cit.

7 Tor (2008) op. cit.

8 A. J. Dillard – K. D. McCaul – W. M. P. Klein: Unrealistic optimism in smokers: Implications for smoking myth endorsement and self-protective motivation. *Journal of Health Communication,* 11, 2006. 93–102.

9 David S. Evans – Richard Schmalensee: *Paying with plastic: the digital revolution in buying and borrowing.* Cambridge, Massacusetts Institute of Technology Press, 2004.

10 Stephan Meier – Charles Sprenger: Present-biased preferences and credit card borrowing. *American Economics Journal: Applied Economics*, 2, 2010. 193–210.

11 The plastic safety net: The reality behind debt in America. *Demos* 2005. http://www.

Similarly, consumers may inaccurately estimate their future cellular phone use when they select a service plan. Some customers underestimate how often they will use their phone and incur overage fees for exceeding their talking or data limits. Others overestimate their future use and purchase plans with more minutes and higher monthly charges than necessary.[12] When they sign service contracts that include large early termination fees, some consumers also underestimate the potential benefit of switching phone carriers in the future.[13] The short-term benefit of a free or subsidized new phone that accompanies a new contract attracts consumers even when this benefit may be outweighed by the higher long-run costs of cellular service. Consumers become locked-in to the contract because of the reduced cost of the phone and the large penalties for early termination.

In the same vein, where consumer decision making is concerned, experiments concerning reveal the effect of framing and loss aversion on consumer decisions. The mere imagining of owning a given item increases consumers' willingness to buy it, for example. Consequently, consumers have a harder time deciding not to buy the item when they learn of additional charges for a good, so they sometimes complete a purchase despite disappointment at the increased cost. Consumers further exhibit loss aversion when they go to a shop expecting a deal and find that the good costs more than advertised. Because they anticipated making a purchase, they experience the prospect of not buying the item as a loss and therefore are more likely than they would have been otherwise to purchase the "deal" good. In fact, the mere statement that that a good is on sale increases the propensity of consumers to make a purchase, as the previous, higher price serves as a reference point that makes the sale price more attractive than it would be in isolation.[14]

Importantly, consumers do not make their judgments and decisions in a vacuum, but instead operate in a market environment, where they generate the demand for producers' goods and services. When markets offer good information, consumers' judgments and decisions may be more accurate and better aligned with their preferences than in non-market settings. The available

accessproject.org/adobe/the_plastic_safety_net.pdf.

[12] Oren Bar-Gill: *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets*. Oxford, Oxford University Press, 2102.

[13] Bar-Gill (2012) op. cit.

[14] Office of Fair Trading: *The impact of price frames on consumer decision making.* London, 2010.

evidence, however, paints a complex picture.[15] For one, the products and services that consumers must choose among do not always justify a commitment of significant time, cognitive, or financial resources to make optimal judgments and decisions, so consumers rationally ignore some relevant information.[16] Producers who expect to benefit from consumers' educated choices may respond by providing this information to consumers via advertising campaigns, marketing, and similar efforts. Such responses not only tap the superior information that producers already possess about their products and services, but also offer significant economies of scale, given the low cost of offering similar information to many consumers.[17] Nevertheless, insofar as numerous competing producers offer such information, consumers still must determine which products and services best match their preferences.

Moreover, despite the increasing abundance of information – and occasionally because of it – many consumers still make suboptimal product and service choices. Even when competition is present, producers in some markets prefer to offer only partial or opaque information to limit the ability of consumers to evaluate their products. For example, producers can benefit by designing products that lead more naive consumers to make inferior, costly decisions – as in the case of some credit card plans – that both increase producers' profits and subsidize the superior products chosen by more sophisticated consumers, helping attract the latter as well.[18] In other instances, firms develop products that are more complex than necessary – such as where certain cellular service plans are concerned – making it exceedingly difficult to compare their competing offerings to one another.[19]

Markets thus often provide consumers abundant information that can facilitate better judgments and decisions, but consumers still face significant challenges. Because the interests of producers and consumers are not fully aligned, the latter frequently are at a fundamental disadvantage vis a vis the former – who have the experience, opportunity, and resources needed to exploit

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[15] Avishalom Tor: Understanding Behavioral Antitrust. *Texas Law Review,* 92, 2013. (forthcoming).

[16] Bar-Gill (2012) op. cit.

[17] George J. Stigler: The economics of information. *Journal of Political Economy,* 69, 1961. 213–225.

[18] Xavier Gabaix – David Laibson: Shrouded attributes, consumer myopia, and information suppression in competitive markets. *The Quarterly Journal of Economics,* 121, 2006. 505–540.

[19] Adi Ayal: Harmful freedom of choice: Lessons from the cellphone market. *Law and Contemporary Problems,* 74, 2011. 91–131.; Bar-Gill (2012) op. cit.

at least some consumers.[20] When such exploitation is significant and unlikely to be remedied by competition in the market or more specific bodies of regulation, an application of the more general consumer law under the Directive may be called for.

2. The Material Distortion Challenge

Its potential benefits notwithstanding, the enterprise of developing a behaviorally-informed approach to consumer law must overcome first the *material distortion challenge* of determining which deviations from strict rationality indeed are errors that legitimately concern consumer law. According to the Directive, a material distortion takes place when a practice is used "to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise" (Article 2(e) Directive 2005/29/EC). Taken literally, this clause could be interpreted as prohibiting any commercial practice that is likely to impact consumer behavior to the benefit of producers beyond the pure provision of information necessary for an "informed decision". If this were the case, numerous common and often beneficial marketing, advertising, or sales practices that shape real consumer behavior – even if they would have no effect on hypothetical rational consumers – would be deemed unfair and prohibited under the Directive.

A more limited and reasonable interpretation would instead seek to distinguish among different deviations from rationality to separate those that truly amount to a material distortion of consumer transactional behavior from those that do not. Where systematic judgment biases are generated by producers' practices there is a real possibility of distortion in consumers' behavior. For example, boundedly rational consumers who are led to underestimate the risks involved in using a given product may underprice and excessively consume it, arguably manifesting a material distortion in their transactional behavior. After all, if these consumers were accurately informed about the product's risks, they would have priced it differently and consumed less of it.

The situation may be different in cases of boundedly rational decision making, where consumers' preferences (e.g. their willingness to pay) for certain products or services are shaped by producers' commercial practices. In such cases, it is harder categorically to conclude that consumers' ability to make an informed

[20] Tor (2013) op.cit.

decision had been impaired, since at times the consumer will be manifesting a real preference, albeit one that is partly constructed by the producers' practice. To illustrate, a consumer may select a particular sound system over other systems available in the store, at a given price and with a specific set of features. At times the consumer may know precisely which system she wishes to purchase, but often she will compare the prices and features of different systems before making her decision. Behavioral research shows, however, that a given sound system can be made more appealing to consumers when presented next to other, less attractive systems, which consumers rarely choose. Products appear more attractive, for instance, when compared to other products that are significantly more expensive but have only slightly better features or products that are slightly cheaper but with significantly worse features.[21]

In this example, was the consumer's transactional decision distorted? If she were asked, the consumer might have responded that, after considering the various alternatives, she truly prefers the one she chose. Yet we know she might have made a different choice among those more attractive systems had they been accompanied by a different set of unattractive systems. At the same time, the information provided by the seller regarding the products in this case was clear and accurate.

As this illustration reveals, a behaviorally-informed approach to consumer law must consider carefully the material distortion challenge before branding a given commercial practice unfair. Some practices may more clearly be error-inducing and thus potentially merit condemnation. Other practices that significantly impact consumer choice should not be prohibited under the Directive, because their effects do not amount to clear distortion. The distinction between the two sets of practices may often be difficult, however, and requires further analysis.

3. The Average Consumer Challenge

In addition to the material distortion challenge, a behavioral approach to the Directive must also grapple with the average consumer challenge, in light of the empirical evidence regarding the dramatic heterogeneity of human judgment and decision behavior.[22] Different consumers will manifest different deviations

[21] Joel HUBER – John W. PAYNE – Christopher PUTO: Adding asymmetrically dominated alternatives: Violations of regularity and the similarity hypothesis. *Journal of Consumer Research,* 9, 1982. 90–98.

[22] TOR (2013) op. cit.

from strict rationality, depending on factors such as their cognitive ability, thinking style, risk-taking propensity, personality traits, and more. Hence, what is likely to distort one consumer's transactional decisions will not have the same effect on all others.

More troublingly for present purposes, however, the correlation among different judgment and decision errors for the same individuals is small.[23] Consequently, a given consumer may manifest one type of mistake – say, overoptimistic judgments – but not another, such as a framing effect. Furthermore, people may even exhibit a particular behavioral phenomenon to different degrees at different times in different contexts, variously showing for instance greater or lesser overoptimism.

This heterogeneity of behavioral deviations from rationality poses a significant challenge for consumer law. The determination of which misleading practices materially distort the transactional behavior of the average consumer would have been relatively straightforward if consumers were all (or at least mostly) prone to the same judgment and decision errors in the same circumstances. But in a world of heterogeneous consumers it is more difficult to decide, with respect to any given practice that may exploit or facilitate their bounded rationality, how average consumers are likely to behave. After all, the Commission noted that the average consumer is not simply a statistical concept – in which case even significant heterogeneity would have mattered little so long as one could calculate an average – but rather an allusion to the *typical* reaction of consumers (Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices). Yet with the type of heterogeneity we find for many behavioral deviations from strictly rational judgment and decision making, typical consumer reactions may be quite difficult to ascertain, requiring good empirical evidence in the context of the specific case.

Another, related challenge that behavioral heterogeneity creates, when the material distortion and average consumer concepts are considered together, concerns the tradeoffs involved in prohibiting potentially misleading commercial practices. The challenge may be less significant when a commercial practice benefits sophisticated consumers at the expense of their unsophisticated counterparts,[24] as in the credit card case mentioned above. Myopic consumers focus, for instance, on attractive short-term balance rates and underestimate their

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[23] Kristin C. Appelt – Kerry F. Milch – Michel J.J. Handgraaf – Elke U. Weber: The Decision Making Individual Differences Inventory and guidelines for the study of individual differences in judgment and decision making. *Judgment and Decision Making,* 6, 2011. 252–262.

[24] Gabaix–Laibson (2006) op. cit.

future usage and exposure to various high penalties, while their sophisticated counterparts enjoy the attractive rates without suffering longer-term penalties. The latter therefore benefit from the presence of myopic consumers, without whom issuers would not have the incentive or the resources to offer exceedingly low rates upfront. Issuers have little reason to educate myopic consumers, who will become less profitable once sophisticated. Yet any consumer law intervention to help myopic consumers – say, a prohibition of teaser rates – would inevitably also hurt those sophisticated consumers who benefit from the prohibited practice. And while the harm to these consumers may be justified, it diminishes the attractiveness of using consumer law to address this type of exploitation of consumer bounded rationality.

In other circumstances, the prohibition of practices that mislead some consumers may impose harm on their more rational peers even when the latter do not benefit in any way from the bounded rationality of the former. For instance, when consumer law requires sellers to offer free returns of their products within a certain period, sellers demand higher prices to cover the costs associated with the fraction of returned products. Therefore, the free return requirement benefits consumers who mispredict their need for the product while harming those among their counterparts who make more rational predictions of their future needs.

More generally, therefore, in the shadow of behavioral heterogeneity, consumer law faces difficult tradeoffs. Beyond the need to determine, first, which practices generate a truly material distortion of consumer transactional behavior and, second, who is the average consumer, the benefits of many consumer law interventions for less rational consumers may need to be weighed against the harm they impose on more rational consumers. All in all, while consumer law cannot ignore the behavioral processes that shape real consumer behavior, it also must take great care when drawing on behavioral insights to interpret and develop the law in this important area.

ENFORCING THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE

The enforcement model of the Netherlands

Katalin J. CSERES*

Introduction

The EU Directive on Unfair Commercial Practices (UCPD) has brought radical changes in the Member States' consumer law regimes. Accordingly, it has been extensively discussed with regard to substantive law issues such as the fairness notion, the substantive test of material distortion as well as the concept of the average consumer. However, its impact on the Member States' traditional enforcement models of consumer law is equally crucial.

The adoption of the UCPD has raised fundamental questions about the enforcement of EU law. First, the adoption of the UCPD has indicated that cross-border enforcement of consumer law had to be improved in the EU. In fact, it has prepared the ground for Regulation 2006/2004, which obliged Member States to set up administrative authorities to enforce consumer laws cross-border.

This paper analyzes the local implementation of the UCPD by mapping the Member States' enforcement models with regard to sanctions, remedies and the administrative or judicial bodies who enforce the respective unfair trading rules. It examines whether effective and uniform enforcement of EU law can be guaranteed in a multi-level enforcement system composed of diverging national remedies, sanctions and enforcement institutions. This is a challenge in the multi-level governance system of EU law enforcement, where similar substantive rules have to be implemented through different procedures, remedies and different, sometimes multiple, enforcement bodies. How do these national enforcement systems influence the application of EU rules? And more

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importantly, is the Europeanization of national unfair commercial practices laws and enforcement effective and legitimate?

This paper presents a case-study on the implementation of EU Directive on unfair commercial practices in Dutch law. It examines how Europeanization of unfair commercial practices has changed the traditional Dutch model of consumer law enforcement and institutional design. The paper finds that the implementation of the UCPD together with the implementation of Regulation 2004/2006 made the Netherlands break with its legacies of traditional consumer law enforcement with regard to both remedies and enforcement institutions.

This paper is organized as follows: First, it maps the enforcement of consumer laws in the various EU Member States. The second section discusses the relevance of the UCPD and the third section analyzes the provisions of the EU Directive on Unfair Commercial Practices with regard to law enforcement. While the Directive was aimed at maximum harmonization, its provisions on law enforcement leave a wide margin of discretion to the Member States on issues of sanctions, remedies and the allocation of enforcement powers to institutions. The fourth section analyzes the Dutch legislative and institutional framework as it has been changed in the course of implementing the UCPD. Finally, the paper closes with conclusions.

1. The enforcement of EU consumer law in the Member States

Across the EU Member States there is a wide diversity of models for enforcing consumer laws: some Member States have predominantly private enforcement, others rely mostly on public bodies. In accordance with the principles of national procedural and institutional autonomy, the Member States are free to entrust public agencies or private organizations with the enforcement of consumer laws as well as to decide on the internal organization, regulatory competences, and powers of public agencies. However, Regulation 2006/2004 on trans-border cooperation between consumer authorities indirectly intervened with the national enforcement models by imposing conditions under which national authorities responsible for enforcing consumer rules must cooperate with each other. The Regulation in fact obliged Member States to designate administrative authorities to enforce consumer laws.[1] Similarly, in the course

[1] See Article 3c on the definition of a competent authority: "'competent authority' means any public authority established either at national, regional or local level with specific responsibilities to enforce the laws that protect consumers' interests;" See also Antonina

of the liberalization of numerous network industries the European Commission gradually extended the EU principles of *effective, dissuasive* and *proportionate sanctions* as formulated in the European courts' case-law to a broader set of obligations and criteria for the Member States' national supervision of EU legislation. This process of Europeanization of supervision[2] obliged Member States to establish independent national regulatory agencies with core responsibilities for monitoring markets and safeguarding consumers' interests[3] through ensuring effective law enforcement and complaints processes.[4] Accordingly, many Member States have strengthened the role of regulatory agencies and have empowered them with a growing number and diversity of regulatory competences. Liberalization was, thus, characterized by a noticeable shift from judicial enforcement to more administrative enforcement.[5]

However, the mushrooming of regulatory agencies is now being replaced by a public policy of reducing their numbers in order to address the problem of control over regulatory agencies. This also signals a new legal and political framework for regulatory agencies which builds on accountability as its central tenet instead of the initial concept of independence that justified the creation of regulatory agencies. [6] In the following the implementation of the UCPD in the EU Member States will be analysed by focusing on questions of enforcement.

Bakardjieva-Engelbrekt: Public and private enforcement of Consumer Law in Central and Eastern Europe: Institutional choice in the shadow of EU enlargement. In: F. Cafaggi – H-W. Micklitz (Eds.): *New Frontiers of Consumer Protection. The Interplay Between Private and Public Enforcement.* Antwerp, Intersentia, 2009. 91–138.

2 Annetje Ottow: Europeanization of the Supervision of Competitive Markets. *European Public Law*, 18, 2012/1. 191–221.

3 Hans Micklitz: Universal Services: Nucleus for a Social European Private Law. *EUI Working Paper Law,* No. 2009/12.

4 Jim Davies – Erika Szyszczak, ADR: Effective Protection of Consumer Rights? *European Law Review*, 35, 2010. 695–706.

5 Katalin Cseres – Annette Schrauwen: Empowering Consumer-citizens: changing rights or merely discourse? In: D. Schiek: *The EU Social and Economic Model After the Global Crisis: Interdisciplinary Perspectives*. Farnham, Ashgate, 2013.

6 Julia Black: Calling Regulators to Account: Challenges, Capacities and Prospects (October 11, 2012). *LSE Legal Studies Working Paper No. 15/2012*. Available at SSRN: http://ssrn.com/abstract=2160220 or http://dx.doi.org/10.2139/ssrn.2160220.

2. Unfair Commercial Practices Directive

Even though problems of unfair trade practices formed one of the driving factors behind the establishment of consumer authorities in the 1970s[7] , it was the Directive on Unfair Commercial Practices in 2005 that signalled the need to strengthen trans-border enforcement in consumer law.[8] It also prepared the ground for Regulation 2006/2004, which obliged Member States to set up administrative authorities to enforce consumer laws cross-border.

The aim of the UCPD was to achieve a high level of convergence by fully harmonizing national laws of unfair commercial practices in business-to-consumer relations and thus to give Member States little room for variations of implementation. The Directive is a legislation of maximum harmonization and accordingly, the Member States cannot implement stricter rules and raise the level of protection for consumers.[9] The Directive provides comprehensive rules on unfair trading practices and strives hard to provide precise guidance to national enforcement agencies and courts about the scope of its provisions as well as general rules and standards to determine its scope of application and formulate precise requirements to national legislators and courts.[10]

In 2010 the EU Parliament prepared a paper in order to analyse the effects of UCPD-implementation in the Member States.[11] The most important problems identified were legal uncertainty as to the general clauses introduced by UCPD, e.g. the concept of unfairness, problems concerning the burden of proof,

[7] Colin SCOTT: Enforcing consumer protection laws. In: G. HOWELLS – I. RAMSAY – T. WILHELMSSON (eds.): *Handbook of International Consumer Law and Policy.* Cheltenham, Edward Elgar, 2010. 537–562.

[8] Fabrizio CAFAGGI – Hans MICKLITZ: Introduction. In: Fabrizio CAFAGGI – Hans MICKLITZ (Eds.): *New Frontiers of Consumer Protection. The Interplay Between Private and Public Enforcement.* Antwerpen, Intersentia, 2009. 1–46.

[9] Rafal SIKORSKI: Implementation of the unfair commercial practices Directive in Polish law. *Medien und Recht – International Edition,* 2009. 51.

[10] Hugh COLLINS: Harmonisation by Example: European Laws against Unfair Commercial Practices. *The Modern Law Review,* 73: 89–118. See Commission Staff Working Document: *Guidance on the implementation/application of Directive 2005/29 on Unfair Commercial Practices Directive SEC(2009)* 1666 and the EU Commission's legal database on the application of the Directive: https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show&CFID=2038007&CFTOKEN=be86637c85ffc0e3-2B17DAE0-04CB-3131-A7CA11FC09D62EFC&jsessionid=a503451fa5d062393f3b4d34601c345287e4TR

[11] Directorate General for Internal Policies, Policy department A: economic and scientific policy, State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation, prepared by the (IP/A/IMCO/ST/2010-04), available at http://www.europarl.europa.eu/document/activities/cont/201007/20100713ATT78792/20100713ATT78792EN.pdf.

especially in connection with certain provisions of the black list, the obligation for full harmonisation or the compliance of national legal frameworks with the provisions of UCPD, the effects of UCPD on B2B relations and contract law, and the problems arising from the transposition of UCPD into different national enforcement regimes.[12] In March 2013 the EU Commission has published its first report on the functioning of the UCPD. [13] The Report established that the UCPD made it possible to address a broad range of unfair business practices, such as providing untruthful information to consumers or using aggressive marketing techniques to influence their choices. The legal framework of the UCPD proved effective to assess the fairness of the new on-line practices that are developing in parallel with the evolution of advertising sales techniques.

However, the Commission's investigation has revealed significant consumer detriment and lost opportunities for consumers in sectors such as travel and transport, digital and on-line, financial services and immovable property. Accordingly, enforcement was advised to be improved both in a national context but particularly at cross-border level.[14] These reports emphasized the relevance of local enforcement strategies, which will be analyzed in the next section.

3. Enforcement of the UCPD

3.1. Sanctions and remedies

With regard to enforcement Article 11 of the UCPD leaves much discretion to the Member States in accordance with the principle of national procedural autonomy. Furthermore, Article 13 UCPD leaves the Member States free to decide what type of penalties should be applied, as long as these are 'effective,

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[12] Directorate General for Internal Policies, Policy department A: economic and scientific policy, State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation, prepared by the (IP/A/IMCO/ST/2010-04), available at http://www.europarl.europa.eu/document/activities/cont/201007/20100713ATT78792/20100713ATT78792EN.pdf.

[13] First Report on the application of Directive 2005/29/EC concerning Unfair Commercial Practices (COM(2013)139) Commission Communication_on the application of Directive 2005/29/EC on Unfair Commercial Practices (COM(2013)138) has been adopted on 14 March 2013.

[14] First Report on the application of Directive 2005/29/EC concerning Unfair Commercial Practices (COM(2013)139) Commission Communication_on the application of Directive 2005/29/EC on Unfair Commercial Practices (COM(2013)138) has been adopted on 14 March 2013.

proportionate and dissuasive'. Similarly, Article 11 UCPD requires that Member States ensure adequate and effective means to combat unfair commercial practices. These provisions, however, do not specify the exact character of enforcement tools. Three main enforcement systems can be identified in the Member States. First, the administrative enforcement carried out by public authorities, second, the judicial enforcement and finally systems combining both elements. Member States may choose from civil, administrative and criminal remedies. For example, the Polish Unfair Commercial Practices Act introduced both civil and criminal remedies[15]. Some jurisdictions combine elements of private and public enforcement. Sanctions vary between injunction orders, damages, administrative fines and criminal sanctions and many Member States combine all these sanctions in their enforcement system.[16]

With regard to standing, Member States can choose to give individual consumers (and/or competitors) a right to redress but are not bound to do so. The Directive does not oblige Member States to grant remedies to individual consumers. Article 11 of the Directive merely provides that remedies should be granted either to persons or national organizations regarded under national law as having interest in combating unfair commercial practices. Granting remedies directly to consumers was, however, a novelty in Polish unfair competition law and has recently been proposed in the United Kingdom.[17]

While individual remedies exist in most of the Member States, in some Member States these remedies do not extend beyond injunctions and in others it consists of making a complaint to the competent authority which will then take up the case. A few Member States do not grant individual consumers individual remedies, not even in the form of tort laws.[18] However, consumers do have individual remedies on the basis of EU, national contract, or tort law.[19]

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[15] Sikorski op. cit. 54.

[16] First Report on the application of Directive 2005/29/EC concerning Unfair Commercial Practices (COM(2013)139) p. 26; see also Commission Communication on the application of Directive 2005/29/EC on Unfair Commercial Practices (COM(2013)138) has been adopted on 14 March 2013.

[17] See the discussion in the UK on individual right of action: The Law Commission and The Scottish Law Commission (LAW COM No 332) (SCOT LAW COM No 226) Consumer redress for misleading and aggressive practices, March 2012.

[18] For example Austria and Germany do not grant individual consumers individual remedies. Civic Consulting: *Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU.* Final report. 2011. 33–34.

[19] For example, misleading information may lead to the non-conformity of goods with the contract on the basis of Article 2(2)(d) of the Consumer Sales and Guarantees Directive 1999/44/EC. Misleading actions and omissions may also be regarded, under national law, as a breach of a

The possibility of collective consumer actions have been recently introduced in some Member States like Denmark, Sweden, Spain and Portugal. While in these Member States collective actions can be brought by groups of individual consumers, in other Member States specific types of collective action have been introduced in order to strengthen the enforcement of unfair commercial practices law in a way that extends beyond the use of injunctions.[20] Furthermore, a breach of unfair commercial practices law may qualify as a criminal offence that can be enforced either by public authorities or by the public prosecutor and the criminal courts. This is the case in Latvia, France, the UK, the Nordic countries and Belgium. In other Member States, only the most severe unfair commercial practices can be sanctioned by means of criminal law, in particular when they amount to fraud in the terms of criminal law.[21]

Finally, the role of alternative dispute resolution varies significantly across the Member States. While ADR plays a central role in the enforcement model of many countries such as the United Kingdom, the Nordic countries, the Netherlands and Spain, its role is more limited in other countries. Moreover, in a number of Member States, specific ADR schemes have been set up that address financial services.[22] Some Member States have an even more specific

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pre-contractual relationship (*culpa in contrahendo*) or give the right to avoid the contract, if the respective preconditions are met. Civic Consulting: *Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU.* Final report. 2011. 34.

[20] The Finnish consumer ombudsman can bring a class action representing individual consumers, which extends to damage claims under unfair commercial practices law. In France, consumer organisations can claim damages for damage to the collective interests of consumers. Germany has introduced a 'skimming-off' procedure that allows consumer organisations to claim the unlawful profits that a trader has made by using unfair commercial practices; although, the funds recovered go to the public purse and not to the consumer organisations. Civic Consulting: *Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU.* Final report. 2011. 35; In the UK a limited reform has been proposed targeting the most serious cases of consumer detriment due to unfair trade practices. These are already criminal offences, but now it is recommended that a new right of redress for consumers, which would give them the right to a refund or a discount on the price. Also, damages may be recoverable where consumers have suffered additional loss. The Law Commission and The Scottish Law Commission (LAW COM No 332) (SCOT LAW COM No 226) Consumer redress for misleading and aggressive practices, March 2012.

[21] Civic Consulting: *Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU.* Final report. 2011. 35–36.

[22] For example, in the UK the Financial Ombudsman Service, in France the *Autorité des Marchés Financiers* offers an ombudsman service and is Germany the Banking Ombudsman and the Insurance Ombudsman have gained some importance.

scope, such as the Portuguese banks, which have established a self-regulatory scheme regarding the switching of bank accounts.[23]

The variety of national enforcement tools is striking in light of the far-reaching harmonization goal of the Directive. Moreover, the broader institutional framework comprising of locally developed enforcement strategies may further differentiate the Member States' enforcement models.

3.2. Institutional bodies enforcing the UCPD

While the Commission has been closely monitoring the Member States' legislations, procedures and remedies and maintains a database on recent cases, Member States' choices with regard to institutional arrangements between enforcement bodies are less scrutinized. This is surprising as the Member States' institutional design of enforcement agencies demonstrate a strikingly diverse picture on the allocation of regulatory powers. Table I. below illustrates the allocation of regulatory powers in the Member States.

Table I. Administrative enforcement bodies

UCPD	Administrative enforcement body
Denmark	Consumer Ombudsman
Finland	Regional Administrative Offices
Sweden	The Swedish Consumer Agency and the Consumer Ombudsman
Ireland	National Consumer Agency (NCA)
United Kingdom	Office of Fair Trading (OFT)[24], local weights and measures authorities in Great Britain (Authority" or "Authorities"), and the Department of Enterprise Trade and Investment in Northern Ireland (DETI)
Belgium	Directorate General Control and Mediation (ADCB)
Germany	Twofold system: The Federal Office of Consumer Protection and Food Safety (BVL) and regional Chambers of Trade and Commerce
The Netherlands	Authority for Consumer s and Markets

[23] CIVIC CONSULTING: *Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU.* Final report. 2011. 36.

[24] The OFT will be abolished, and the United Kingdom will merge its competition and national enforcement functions with the also abolished Competition Commission to form a new Competition and Markets Authority (CMA).

Luxembourg	"Ministry responsible for consumer protection", i.e. currently the Ministry of the Economics[25]
France	Departmental directorate for population protection (DDPP)[26]
Italy	Italian Antitrust Authority - General Division for user's and consumer's rights (AGCM-GDPC)
Malta	Director of Consumer Affairs
Portugal	ASAE, Food and Economic Safety Authority (ASAE), and the Regulatory Entity
Spain	Local Consumer Information Offices (OMIC)
Greece	Secretariat General for Consumers of the Ministry of Economy, Competitiveness and Maritime Affairs
Cyprus	Consumer Protection Service of the Ministry of Commerce, Industry and Tourism, and any officer of that Service authorized in writing by the Director to act on his behalf
Austria	Regional Administrative Authority
Bulgaria	Consumers Protection Commission with the Ministry of the Economy, Energy and Tourism
Croatia	Consumer Protection Department, Ministry of Economy, Labour and Entrepreneurship
Czech Republic	Czech Trade Inspection Authority (CTIA)
Estonia	Consumer Protection Board
Hungary	Hungarian Authority for Consumer Protection, Hungarian Competition Authority (GVH), Hungarian Financial Supervisory Authority (FSA)
Latvia	Health Inspectorate (human medicinal products), State Food and Veterinary Service (veterinary medicinal products), Consumer Rights Protection Centre (for all other services and products)
Lithuania	State Consumer Protection Authority, Competition Council of the Republic of Lithuania
Romania	National Authority for Consumer Protection
Slovakia	Supervisory Bodies: either special bodies to whom a special field of consumer protection is assigned[27] or the Slovak Commercial Inspectorate ("SCI").[28]
Slovenia	Market Inspectorate, a body within the Ministry of Economy

[25] In Luxembourg, administrative authorities cannot impose fines or order injunctions.

[26] They are under the authority of each department's Prefect ("Préfet", the State representative in each county "département"). There is also a regional directorate which implements the missions that require supra-departmental actions. However, the regional directorates have no direct enforcement authority.

[27] (e.g. the Slovak Postal Regulation Office supervises the protection of consumers in postal services)

[28] The SCI is a budgetary organisation of the Slovak Ministry of Economy. It is responsible for controlling the sale of products and provision of services to the consumers and handles the complaints of the consumers.

The legal regime of the UCPD builds on enforcement through administrative authorities and courts. However, the allocation of the enforcement powers to public authorities is complex because many Member States have maintained regulatory trading laws that directly or indirectly relate to unfair commercial practices in the areas of financial services and immovable property. These trading laws are also enforced by public authorities by means of public law or criminal law.[29] Especially in the area of financial services Member States have established special authorities. Administrative models vary significantly between Member States concerning the supervision of financial markets, the activity of banks and insurance companies. There are Member States like the Netherlands, where the enforcement of unfair commercial practices law is divided between a special financial markets supervisory authority being responsible for the enforcement of the prohibition of unfair commercial practices in that area of financial services and a consumer authority (now merged into the Authority for Consumers and Markets, ACM) is competent in all other areas. In other Member States, there are overlapping responsibilities that have created the risk of either duplicated activities or redundancy where both enforcement bodies rely on the other to take action.

In this aspect the UCPD follows the approach of EU consumer law in earlier directives, and it has allowed the Member States to establish or maintain their own specific enforcement systems. Most Member States have entrusted public authorities with the enforcement of the national implementation of the UCPD, such as the Nordic countries, the UK and Ireland and most of the Central and Eastern European Member States. However, in some Member States, public authorities and consumer organisations operate alongside each other; the consumer organisations obviously are only able to bring law-suits in court, while the public authority can also issue desist orders and fines. Bulgaria, Cyprus, Romania, and the Netherlands are examples here.[30]

The Commission published a guidance[31] in 2009 to ease the problems of interpreting the provisions of UCPD. However, the guidance did not touch upon problems that the enforcement agencies face. For example, BEUC reported that

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[29] Civic Consulting: *Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU.* Final report. 2011. 36.

[30] Civic Consulting: *Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU.* Final report. 2011. 33.

[31] *Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices.* Commission staff working document. available at: http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf.

several public enforcement agencies and private organizations claimed a lack of resources and consequently an inability to monitor all relevant commercial practices and to ensure an effective enforcement of the Directive. This has led to a limited number of cases being brought and/or a focus on the cases that are most likely to succeed. This includes cases that are normally clear cut, rather than those having greatest precedent value and/or cases that are likely to have the greatest impact on the market and trader behaviour as a whole.

The next section discusses how the UCPD was implemented in Dutch law and it will analyze how Dutch legislation and institutional setting changed and how these changes influenced the interpretation and eventual enforcement of the UCPD in the Netherlands.

4. The enforcement of the UCPD in the Netherlands: institutional changes and enforcement challenges

The Dutch Unfair Commercial Practices Act (*Wet oneerlijke handelspraktijken*) came into force in 2008. The Act implemented the UCPD by amending the 1992 Dutch Civil Code (*Burgerlijk Wetboek*) and the Consumer Protection Enforcement Act of 2007 (*Wet Handhaving Consumentenbescherming*). The UCPD has been implemented through general private law and administrative law and not through sectoral regulations. In the Netherlands consumer law traditionally was an issue of private law enforcement and the emergence of administrative enforcement of consumer law is a clear example of Europeanization. The Netherlands did not have a tradition of either regulating, legislating or even criminalizing commercial practices. This is why the implementation of the UCPD did not result in a significant change of the legal system of commercial practices. In fact, the former legislation on marketing was revoked in the course of deregulation in 1980s-90s, the introduction in 1992 of the New Dutch Civil Code accommodated the development of comprehensive consumer protection standards in civil law.[32] However, it did considerably change the enforcement model the Netherlands had maintained so far.

Before the implementation of the UCPD, neither an extensive general law on unfair commercial practices nor specific rules for financial services existed. Unfair commercial practices in Dutch consumer law had been governed by a

[32] Civic Consulting: *Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU.* Final report. Country Reports, The Netherlands, 2011. 7.1.–7.2.

tradition of self-regulation through negotiations involving the government, who provides the framework for negotiating informal Codes of Conduct. This form of self-regulation entails a dialogue between business and consumer organizations that gives rise to bipartisan general terms and conditions (GTC). The Dutch government has set up a coordination group, the Dutch Social and Economic Council, which provides for procedural rules and expertise during negotiating. However, the government is itself not a party to the agreement.

4.1. Private enforcement

Following previous legislative techniques with regard to implementation of the EU Directives on Misleading and Comparative Advertising in the Dutch Civil Code, as wrongful extra contractual acts (tortious liability), the Dutch legislator also implemented the UCPD in the Civil Code. The legal framework for all this is based on the insertion of the substantive rules on unfair commercial practices in section 6.3.3A of Book 6 (on obligations) of the Civil Code, the core Article is 6:193b (1). Accordingly, unfair commercial practices were qualified as private law torts rather than breaches of public law. The enforcement of consumer law in the Netherlands used to be based on private law remedies in case of violating the law. Dutch consumer law enforcement relied on private litigation, self-regulatory and ADR schemes, and collective and representative action by private associations and foundations. Private individuals may seek prohibitory and mandatory injunctions and pursue claims for damages. Representative associations and foundations may also seek prohibitory and mandatory injunctions in a the course of collective action proceedings on the basis of 3:305a Dutch Civil Code.[33]

4.2. Public enforcement

As far as public law enforcement of the Unfair Commercial Practices Act 2008 is concerned, either the Consumer Authority (now ACM) or the the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*; AFM) is the competent authority.

[33] Ibid. 7.2.1.1.

In 2007 the Dutch Consumer Authority was established with the task of promoting fair trade between businesses and consumers focusing on the economic interests of consumers. One of the reasons for the new authority was the implementation of EC Regulation 2006/2004 on consumer protection cooperation. The Dutch Consumer Authority (*Consumentenautoriteit*) was established by the Consumer Protection Enforcement Act of 2007 as an agency under the Ministry of Economic Affairs, Agriculture. Since 2007 it developed a comprehensive public law framework for the enforcement of consumer law. The enforcement of unfair commercial practices has been one of Consumer Authority's core activities and priorities throughout the last years. In the new ACM the consumer is claimed to play a central role and accordingly, unfair trading practices is among its key areas for enforcement.

The public law remedies for breaching UCPD are laid down in Article 8.8 of the Consumer Protection Enforcement Act 2007. Violating the provisions is an administrative offence. The Act lists various available sanctions. The competent authority may, subject to judicial review, impose a fine of maximum 450,000 Euro per committed offense, may issue a stopping order, a compliance order (an administrative order holding a positive mandatory duty to comply, issued either after commission of the offense or, by way of anticipatory remedy, where the offense is imminent), and it may publish its order or a voluntary compliance by the trader.[34]

Since the implementation of the UCPD in the Netherlands there has been a notable shift to public law enforcement. The Netherlands thus shifted enforcement powers from private agents to administrative authorities due to the requirements of Regulation 2006/2004 on trans-border consumer law enforcement.

As a result of the joint requirements of the UCPD and Regulation 2004/2006 the Netherlands has shifted from a dominantly private enforcement model to a public enforcement model. This shift was clear example of the external influence of EU legislation.

4.3. Interplay between private and public enforcement

The Unfair Commercial Practices Act 2008 thus rendered unfair commercial practices into both wrongful acts in private law and administrative offenses in

[34] Consumer Protection Enforcement Act 2007, Arts. 2.9, 2.10, 2.15, 2.23.

public law. The interplay or even an optimal combination between private and public enforcement is not an either-or option but the most effective allocation of enforcement depending on economic resources, legal tools, expertise, and incentives. Distribution of responsibilities between private and public actors depends on regulatory policy comprising market-conforming, market complementary or market correcting tools.

Though the complementary self-regulation in the form of bilateral sets of GTC[35] has increased over the years, this development cannot be directly be linked to the enforcement of the UCPD.[36] Moreover, some of the self-regulatory codes have been replaced by public law regulation while others have been embedded in the regulatory framework. The result has been an increasing overlapping and cross-referencing between private law, administrative law regulation and self-regulation.

The Dutch public enforcement bodies have clearly stated that decisions by private enforcers, so codes of conduct are in no way determinative as to the fairness of a commercial practice.[37]

4.4. Institutional changes in the public enforcement

In 2011 the Dutch Minister of Economic Affairs decided to merge the Netherlands Competition Authority (NMa) with the Dutch Consumer Authority (CA) and the Netherlands Independent Post and Telecommunications Authority (OPTA) into a new administrative authority called the Netherlands Authority for Consumers and Markets (ACM).[38] The Dutch Ministry argued that this

[35] The bilateral GTC steer business' commercial conduct and describe many commercial practices, public enforcers consider them as codes of conduct. They lack a number of commitments that characterize codes of conduct such as standards of service and advertising guidelines. The Consumer Authority (now the ACM) did not explicitly ascertain how the code itself relates to the legal standard of professional diligence and the notion of fairness in the Directive.

[36] C. M. D. S. Pavillon: The interplay between the unfair commercial practices Directive and Codes of conduct. *Erasmus Law Review*, 2012/5. 277.

[37] CFI Rotterdam 19 April 2012, LJN BW3358, at § 23.3.; Pavillon op. cit. 23.
Celldorado (case 510, 17 June 2010) and Smart Media Services (case 220, 26 January 2009) were fined for breaching the SMS-Code of Conduct. Garant-o-Matic (a mail-order firm) got collared for breaching the Promotional Lottery Code (case 544, 21 September 2010). Greenchoice (case 661, 27 May 2011) and the Nederlandse Energie Maatschappij (case 527, 6 September 2010) were fined for not complying with the Consumer and Energy Supplier-Code.

[38] The consolidation of these three existing authorities will be realized through two separate bills: the 'bill on ACM Establishment Act was submitted to the Dutch Parliament and the

institutional change will increase the efficiency and effectiveness of competition oversight and market regulation, as a consolidated authority is able to anticipate market developments in a flexible and integrated manner, and make better use of its consolidated knowledge and expertise. Another anticipated benefit of the merger is cost savings.[39]

This is a remarkable development in the light of the fact that in 2007 when the Dutch Consumer Authority was established, the Dutch government opted for a separate new agency. The Dutch government argued that even though the Netherlands Competition Authority (NMa) was a general supervisory authority, it was unfit to enforce consumer protection laws as the NMa pursues a different perspective, namely to maintain well-functioning markets which makes workable competition possible and which guarantees an optimal allocation of resources.[40]

Still, the compound organizational model of the ACM might prove more effective in overseeing markets against unfair commercial practices than separate agencies. This institutional arrangement may demonstrate better institutional performance norms such as expertise, administrative efficiency but also in terms of independence and accountability. It has been argued that the consolidated authority is capable of anticipating market developments in a flexible and integrated manner, and making better use of its consolidated knowledge and expertise.

In many sectors a growing number of market wide problems emerged where complex market failures are present and taking a compound form of, for example, abuse of a dominant position and unfair trade practices. Regulatory agencies have to investigate cases where a mix of complex issues arise, such as imperfect information-based market power, which may harm consumers by

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Second Chamber has accepted it by 2 October, the First Chamber has finally accepted it in February 2013. The substantive bill planned to be passed before 2014.
Kamerstukken II, 2011-2012, 31 490, nr. 69. Kamerstukken 2011-2012, 33 186 nr. 2 Regels omtrent de instelling van de Autoriteit Consument en Markt (Instellingswet Autoriteit Consument en Markt); Wetsvoorstel stroomlijning markttoezicht ACM, juni 2012.

[39] The ACM's three departments which focus on consumers, regulation and competition will be complemented by a central legal department, an office of the chief economist, and the corporate affairs department which will be responsible for (inter)national strategy and communication and support staff. The new authority will be run by a collegial board, consisting of three members. It will focus on three main themes: consumer protection, industry-specific regulation, and competition oversight. With a collegial board, the coherence between these three themes will be safeguarded. The substantive bill will amend legislation, simplify procedures, and streamline powers.

[40] Memorie van Toelichting, *Wet handhaving consumentenbescherming*, Kamerstukken II 2005/06, 30 411, nr. 1, aangeboden aan de Tweede Kamer op 19 december 2005.

imposing excessive (unfair) prices or other unfair trading conditions and thus distort consumers' otherwise welfare maximising choice. This is especially so in markets of non-homogeneous, complex products such as financial services, where thus consumer behaviour can often create significant barriers to entry. Sellers may exploit consumers' lack of knowledge about their rights or their inability to understand standard contract terms, complex goods, to conduct direct comparisons and to monitor service delivery. The potential role of bundling as a strategic response to consumers' imperfect rationality has already been recognized in two important articles by Thaler and Craswell[41] and more recently, Bar-Gill studied firms' bundling practices as a strategic response to consumer misperception.[42]

Combatting these kind of practices requires considerable resources, expertise and ability to bear financial risk as it might involve large multinational companies violating both consumer laws and competition law through abuse of a dominant position.[43] The complex market failures necessitated a more integrated approach merging both legal and economic knowledge from competition law and consumer protection. It brought together competition law and consumer protection experts and administrative authorities in order to initiate more coordination.[44]

Sharing staff's expertise in consumer law and other regulatory areas (for example, competition law and sector regulation) can also improve the agency's effectiveness in dealing with complex regulatory issues as mentioned above. For

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[41] Thaler's seminal article shows how mental accounting (by consumers), and specifically the framing and coding of multiple gains and losses, can lead sellers to adopt a bundling strategy. R. Thaler: Mental Accounting and Consumer Choice. *Marketing Science, 4*, 1985. 199–214, Craswell, working at the intersection of competition law and consumer protection law, identifies the viability of misperception-driven bundling in competitive markets. Richard Craswell: Tying Requirements in Competitive Markets: The Consumer Protection Issues. *BU. L. Rev.*, 62, 1982. 661., 681–687.

[42] In contrast to the bundling and tying in the competition law literature - strategies used by a seller with market power in market A trying to leverage its market power into market B - bundling in response to consumer misperception may occur in intensely competitive markets. His analysis demonstrates that such competitive bundling can be either welfare enhancing or welfare reducing. When bundling exacerbates the adverse effects of consumer misperception, regulation designed to discourage bundling may be desirable. Bar-Gill suggests several "unbundling policies" that can protect consumers and increase welfare in markets where bundling is undesirable. Oren Bar-Gill: Bundling and Consumer Misperception. *University of Chicago Law Review*, 2006.; NYU, Law and Economics Research Paper No. 06-02. Available at SSRN: http://ssrn.com/abstract=876944.

[43] Office Of Fair Trading: *Empowering and Protecting Consumers: Consultation on institutional changes for the provision of consumer information, advice, education, advocacy and enforcement.* OFT Response, September 2011. OFT 1367.

[44] Office Of Fair Trading: *Joining up competition and consumer policy. The OFT' approach to building an integrated agency.* December 2009. 10.

example, the assessment of restrictive practices curing moral hazard problems or the assessment of possible changes of market structure of proposed mergers. Joint teamwork in an integrated management may also provide opportunities for professional development in both supply and demand side issues.

The impact of alternative allocation of regulatory competences on law enforcement is relevant. Earlier literature has emphasized the relevance of internal structure of regulatory authorities ("intra-agency" structure) as well as the issue of shifting enforcement powers between regulatory agencies ("inter-agency" structure) for actual law enforcement.[45] For example, the Dutch AFM prefers using its powers under the Financial Supervision Act 2006 wherever possible over those vested in the Unfair Commercial Practices Act 2008. One reason for this may be that the enforcement instruments contained in the Financial Supervision Act (such as withdrawal of license) may be more efficient than those under the Unfair Commercial Practices Act. Moreover, the Financial Supervision Act 2006 is far more precise and detailed than the UCPD. The AFM has limited experience with law enforcement against aggressive practices within financial services.[46]

5. Conclusions

Unfair business practices have been one of the key priority areas of the Dutch Consumer Authority (now the ACM) since 2008, when the legislation entered into force. Telemarketing and unfair online practices are still leading areas where the agency's action is very much needed.[47] The enforcement of unfair business practices in the Netherlands has gone through a radical change in the last five years. The traditionally private enforcement based model of consumer law enforcement has been transformed into a public enforcement regime with the enforcement of unfair business practices as its core activity.

[45] Eric Biber: Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies. *Harv. Envtl. L. Rev.*, *33*, 2009/1.

[46] Civic Consulting, Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU, Final report, Country Reports, The Netherlands 2011, 7.2.1.1. However, it did use the UCP rules for combatting unfair commercial practices aimed at encouraging consumers to invest large sums in otherwise unregulated investment firms and funds. In its decisions, the AFM has ordered the disclosure of vital information in annual reports of investment firms for the benefit of these consumers – not merely at the start of the contractual relationship but also during the course of the execution.

[47] See Annual reports 2009-2012 Netherlands Consumer Authority available at https://www.acm.nl/en/download/publication last visited 12 November 2013.

The very recent merger with the Netherlands Competition Authority and the Netherlands Telecommunications Authority might even further strengthen this public enforcement model and prove effective in particular in the area of unfair commercial practices. This is because these kind of practices often present complex market failures where not only consumer law, but sector regulatory rules or even competition law tools have to be applied.

The Dutch enforcement that emerged as a result of the UCPD is a clear example of how EU law enters and radically changes endogenously developed national law and enforcement models. This remarable Europeanization process raises important questions with regard to the effectiveness and legitimacy of such externally imposed legal rules on domestic legal systems that internally developed interacting with and adapting to the domestic economic, political and social system. At the same time, the Dutch implementation also proves that even in case of maximum harmonization, the EU principles of procedural and institutional autonomy provide the framework for Member States to develop their own local enforcement strategies taking account of the local economic, social and political needs. Ultimately, this case-study shows that looking at enforcement provides a deeper understanding of local enforcement strategies and it offers new insights for future Europeanization strategies.

HUNGARIAN EXPERIENCES CONCERNING UNFAIR CONSUMER PRACTICES CASES

András Tóth – Szabolcs Szentléleky*

1. Overview

The Hungarian Competition Authority (GVH) is one of the few competition agencies that is not only dealing with antitrust issues and mergers, but also with consumer protection cases. The GVH has twenty-two years' worth of experience in the application of the unfair commercial practices (UCP) provisions. Hungary was one of the first countries in the EU to apply provisions that were identical to the latter introduced UCP Directive[1], the EU-level regulation. For example, in 2008[2] the GVH required that an advertisement concerning the price of flight tickets shall contain all the fees charged, before the EU stipulated such requirements in its relevant regulation.[3]

To increase the effective application of the UCP provisions, the GVH established the Consumer Protection Unit (CPU) in 2004. One third of all the case handlers are working at the CPU. This large number shows the importance of the consumer protection cases in the GVH's practice.

In the last ten years the GVH has fined 454 companies to a total value of approximately 27,9 million euros, with 63 percent of all the cases being related to UCP practices.[4]

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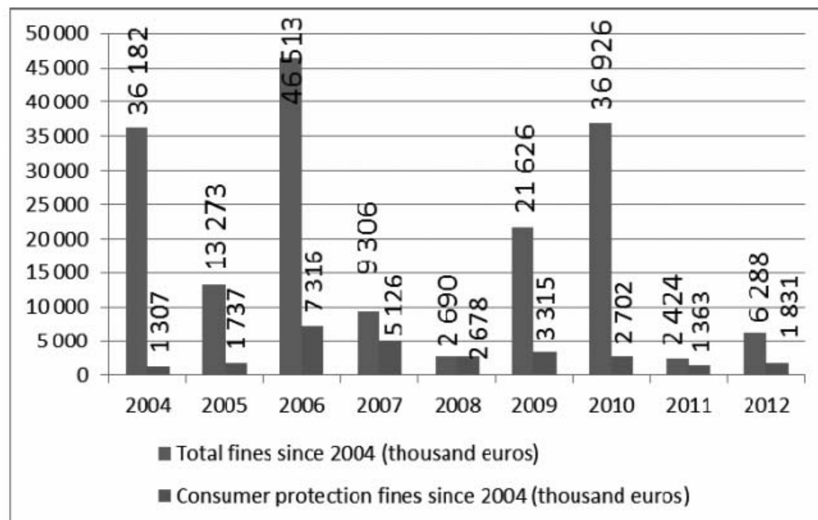
1 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (OJ L 149).

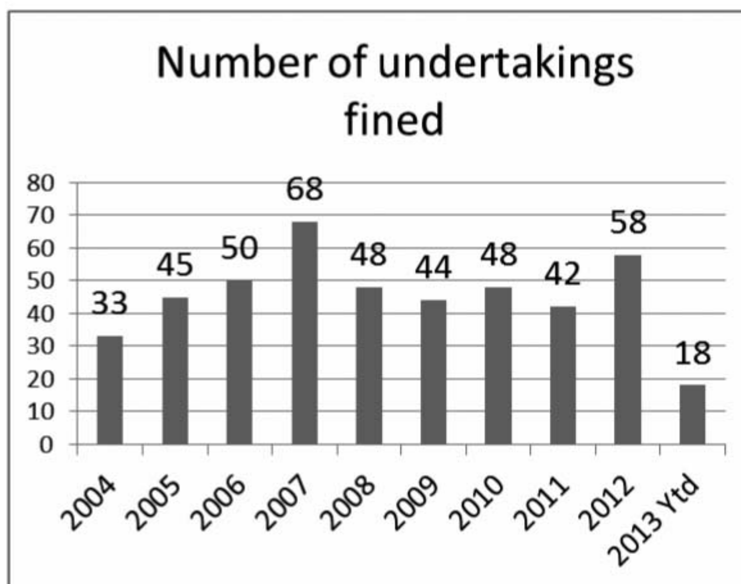
2 E.g.: Vj/178/2007., Vj/35/2008.

3 Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 (OJ L 293).

4 Until the presentation on the First Annual Conference on Unfair Commercial Practices at Pázmány Péter Catholic University, Budapest on May 10, 2013.



1.fig.: Fines imposed by the GVH since 2004



2.fig.: Number of undertakings fined by the GVH since 2004

2. Implementation of the UCP Directive in Hungary

The legislator created a three pillar jurisdictional system. The GVH proceeds in those UCP cases which are affecting competition. There is a non-rebuttable presumption that if the undertakings' advertisement covers more than three counties of Hungary or the advertisements were broadcasted countrywide, the competition is affected.[5] The Hungarian Financial Supervisory Authority (HFSA) proceeds in those cases that do not affect competition but which concern financial institutions, while the National Consumer Protection Authority has overall jurisdiction in all remaining cases, for example in cases concerning infringements committed through labels or instructions for use.

3. fig.: The three pillar jurisdictional system in Hungary

There have been some slight changes in the practice of the GVH since the implementation of the UCP Directive. For example, before the UCP Directive came into force, some kinds of stocking practices and bait advertisements had been treated as *per se* illegal. After the implementation, this kind of commercial practice is unfair only if the trader has reasonable ground to believe that it will not be able to offer the advertised goods.[6]

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[5] Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against Consumers 10–11. §.

[6] Annex to Act XLVII of 2008 point 6.

3. Recent focus

In the recent years, the GVH observed in many cases, that products are labelled and advertised as "Hungarian product". For a period of time the legislator did not define what qualified as such product, therefore the GVH had to shape this concept.[7] Finally the decree[8] by the Ministry of Rural Developments (Decree) stated that a good can only be labelled as a "Hungarian product" if it is produced in Hungary from Hungarian ingredients. The Decree also defines the "domestic" product. The product can be labeled "domestic" if at least 50% of the ingredients produced in Hungary and every stage of the production happened in Hungary. The GVH's Competition Council in its relevant decisions stated that expressions such as "Hungarian" or "domestic" have extra value in a consumer's mind in relation to produced goods. Consumers might prefer to buy those products which are labelled as "Hungarian" or "domestic" because they believe that by buying such products they are helping the Hungarian economy and Hungarian workers. Before the Decree, the GVH's Competition Council had decided that the expressions "Hungarian" and "domestic" both had the same meaning and this is why the GVH had not initiated separate investigations on commercial communications which used the expression "domestic" in line with the Decree in order to guarantee legal certainty.

Recently the GVH is paying more attention to the actual consumer behaviour during its investigations, for example, regarding mobile phone loyalty discounts, where the mobile network operators offer lower prices for longer loyalty periods. As this technique is well known by consumers it is not *per se* an infringement if operators advertise mobile devices with low price without any explicit reference to the fact that the lower price is available for longer loyalty period only.[9]

4. Predictability

Further improvements have also been achieved in the practice of the GVH. First, a notice[10] has been issued on the method of setting fines in UCP cases. When

7 E.g.: Vj/88/2010., Vj/8/2011., Vj/17/2011., Vj/21/2011., Vj/18/2012.

8 Decree No. 74 of 2012 (VII. 25.) VM of the Ministry of Rural Development on the use of certain voluntary distinctive signs on food. 2–3.§.

9 E.g.: Vj/9/2010., Vj/78/2012.

10 Notice Nr. 1/2007. by the Chair of the Competition Council and the President of the Hungarian Competition Authority.

calculating the fine, the basic amount is defined, that is the amount spent on the advertisements by the undertaking. After the basic amount, the GVH takes into account the aggravating and mitigating circumstances. Aggravating factors include, for example, if the commercial practices aim particularly vulnerable consumers (e.g. facing health or financial issues) or if the infringement took place for a long period of time. Mitigating factors include, for example, if more information was made available afterwards for the consumers. Finally, there are other correcting factors that can be taken into account in the method of setting fines such as recidivism or deterrence.

4. fig.: The method of setting fines

A second novelty is the notice[11] on commitments in UCP cases. When deciding whether the proposed commitment should be accepted, there are factors that are in favor of acceptance, for example, if the proposal arrives during the investigation stage and the undertaking has not committed an infringement in the last five years, the communication has been changed on a voluntary basis and the undertaking has compensated its consumers. However, failure of the undertaking to act upon previous commitments is a factor that is against accepting the commitment. If the undertaking has used black listed practices or if the consumers are more vulnerable than usual, the commitment cannot be accepted by the GVH.

In the last few years the compliance of SMEs has come into the GVH's focus because 81,1% of all UCP cases have been related to SMEs[12]. Unfortunately, a large percentage of SMEs are not aware of the UCP Act and its relevant provisions. As seen in the market survey, 30% of SMEs have never heard about the UCP Act, 30% of SMEs think that the UCP Act is related to cultural events, and finally, 25% of SMEs believe that the UCP Act aims to protect SMEs. As a result of the above, the GVH initiated an educational campaign through the internet (compliance website), through accountants, and through chambers in order to disseminate valid information about the UCP Act.

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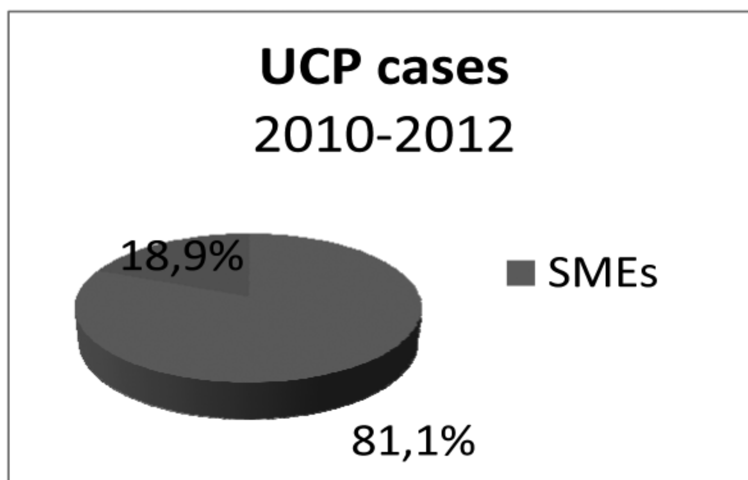
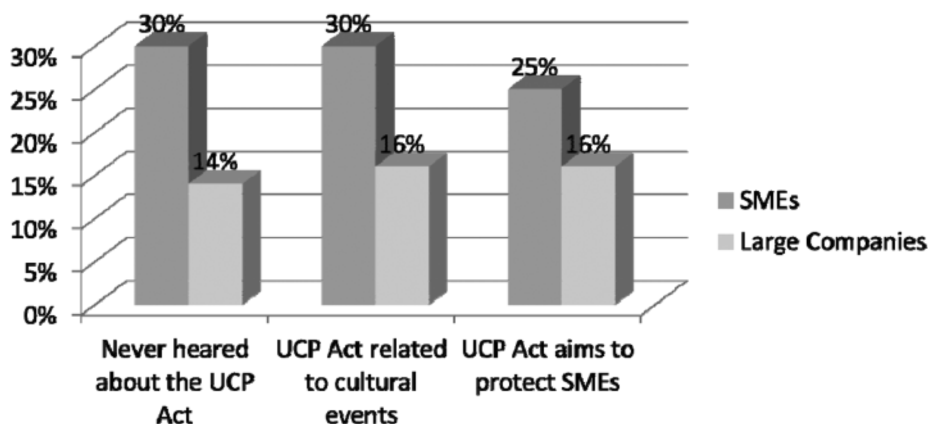
[11] Notice Nr. 3/2012. by the Chair of the Competition Council and the President of the Hungarian Competition Authority.

[12] *Komplex versenykultúra felmérés a vállalkozások vezetőinek körében.* TNS Hoffmann, 2012. http://www.gvh.hu/domain2/files/modules/module25/222379D4185EAD11C.pdf



5.fig. UCP cases between 2010 and 2012[13]



6.fig. Competition awareness between companies[14]

5. Extensive enforcement in fraud cases

The GVH's extensive enforcement in fraud cases must also be mentioned. Fraud cases exist when entire businesses are built on unfair consumer practices. For example, group purchase scheme organisers who – based on their

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[13] *Komplex versenykultúra felmérés a vállalkozások vezetőinek körében.* TNS Hoffmann, 2012. http://www.gvh.hu/domain2/files/modules/module25/222379D4185EAD11C.pdf

[14] *Komplex versenykultúra felmérés a vállalkozások vezetőinek körében.* TNS Hoffmann, 2012. http://www.gvh.hu/domain2/files/modules/module25/222379D4185EAD11C.pdf

advertisements – seem to be offering loans, but intentionally fail to make it sufficiently clear in their advertisements that they do carry out such service. Another example for fraudulent businesses are undertakings issuing mock-invoices of yellow pages advertisements, however ads have never been demanded or supplied. There are also criminal law aspects in the field of consumer protection. If someone, in respect of any essential feature of a product, publicly states false facts, or true facts in a deceptive way, or provides deceptive information on any essential feature of the product for the purpose of rendering it more desirable, commits a misdemeanor offence.[15] In such cases the GVH immediately takes the necessary steps and prosecutes the undertaking at the competent police department.

Finally, if the undertaking cannot be reached at its premises, the GVH contacts the Court of Registration to deregister the company.

As can be seen from the above, the GVH has always tried to implement and apply innovative solutions in the field of consumer protection and will continue to keep up to date with the newest trends in order to serve consumer welfare in Hungary.

[15] Act IV of 1978 on the Criminal Code, Section 296/A.

RECENT ENFORCEMENT ACTIONS IN ITALY

Marina Catallozzi[*]

1.The AGCM

The Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority, hereinafter also referred to as "AGCM") is the Competent Authority (CA) for the enforcement of both the EU Unfair Commercial Practices Directive (UCPD) No. 29/2005, transposed in Italy by Legislative Decree No. 146/2007 (that amended the Consumer Code, Legislative Decree No. 206/2005) and the EU Misleading and Comparative Advertising Directive (MCAD) No. 114/2006, transposed in Italy by Legislative Decree No. 145/2007.

The AGCM is an administrative independent Authority established in 1990 by law No. 287/90; the relevant procedures for the enforcement of the above mentioned Directives are laid down by the "Regulation on investigative procedures concerning misleading and comparative advertising, unfair business practices, unfair terms" (adopted by the AGCM with a resolution of August 2012).

The AGCM has the power to investigate unfair commercial practices, acting *ex officio* as well as upon request by any concerned individual or organizations. To this end, the AGCM:

- has the right to access any relevant document related to the infringement and the power to request any individual, as well as (private or public) entity, to provide any relevant information;
- can carry out inspections, in cooperation with Financial Police, at the Italian premises of companies investigated;
- in particularly urgent cases, may issue *interim* measures requesting the trader to stop a commercial practice that has been deemed – *prima facie* – unfair;

[*] AGCM official.

– can prohibit the current or future dissemination of commercial practices / which have been found to be unfair and also impose administrative fines taking into account the seriousness and duration of the infringement [from 5.000 € up to 5.000.000,00 € in case of B2C (business to consumer) transactions and from 5.000 € up to 500.000 € in case of B2B (business to business) transactions];
– can declare the unfairness of terms included in contracts between traders and consumers drawn up by adhering to general terms and conditions or by signing forms or templates;
– can order the trader to publish its resolution, an extract of it, or a specific corrective statement, in order to prevent the unfair commercial practices at issue to cause further harm.

The Consumers associations (recorded in a register kept by the Italian Ministry of Economic Development which updates the list) can be allowed, upon request, to take part into the proceedings before the AGCM: consequently, they can have access to the documents of the proceedings and can submit written conclusions.

Unless the commercial practice is manifestly unfair and of a serious nature, the trader can submit written commitments aimed at eliminating the unlawful aspects of his conduct. Where the commitments submitted by the trader are deemed adequate, the AGCM may make them binding on the trader and close the case without ascertaining any infringement.

If the trader fails to comply with the *interim* measures, injunctions, commitments undertaken, or instructions to remove the unlawful effects of an unfair commercial practice, the AGCM may impose an administrative fine (ranging between 10.000 € and 5.000.000,00 €). In case of repeated non-compliance, the Authority can order the trader to stop its commercial activity for a maximum of thirty days.

In case of not serious infringement the AGCM can request in writing that the trader concerned cease the infringement (so called Moral Suasion) in order to avoid the initiation of a formal proceeding.

Since 2012, the UCP Directive has been extended to "micro-imprese", namely small companies that have less than ten employees and a turnover or annual balance sheet total not exceeding two million euro, in accordance with art. 2, para. 3 of the Annex to Recommendation No. 2003/361/EC (art. 7 Decree No. 1/2012).

Besides, according to the aforesaid Decree No. 1/2012, the AGCM is also competent for the enforcement of the Directive No. 93/1993 on unfair terms in consumers contracts (transposed in Italy by Legislative Decree No. 52/1996).

The AGCM can declare the unfairness of terms included in contracts between traders and consumers drawn up by adhering to general terms and conditions or by signing forms or templates, with a decision published on AGCM's website and on trader's website. In case of non-compliance with that decision, AGCM may impose an administrative fine ranging between 5.000 € to 50.000 €. Moreover, traders can ask AGCM a preventive assessment on terms and conditions they intend to adopt in business transactions.

2. Challenges and some B2C enforcement actions

New technologies have developed new business models and more sophisticated marketing techniques: in fact, the internet has fundamentally changed the way consumers shop and businesses advertise and sell their goods and services. It has created innovative ways of accessing, sharing and evaluating information, for example on prices, technical product characteristics and quality reviews. 2012).

Despite the UCPD offers a robust framework ensuring to the consumers safety, information, education, rights, means of redress and enforcement, several unfair practices, such as the lack of essential information at the advertising stage and misleading description of products, have been reported in different fields.

As pointed out by Mrs. Viviane Reding (Vice-President of the European Commission) at the Consumer Summit held in 19 March 2013 in Brussels, the travel and transport, digital and on-line, financial services and immovable property markets are major sectors where consumers continue to lose out.

Recently, in order to detect promptly new trends increasing consumers' confidence in internal market and especially in e-commerce, which is a potential tool for development and revitalization of the production system, the AGCM ordered rogue trader to take their websites off-line pursuant to article 27, para. 3, of the Consumer Code and to articles 14, para. 3, 15, para. 2, and 16, para. 3, of Legislative Decree No. 70/2003, that transposed the Directive No. 31/2000.

In detail, in some recent cases, in the Energy and Manufacturing Sector, the AGCM invited the domain name holder to interrupt contents transmission and to disable any access to the website from web consumers based in Italy. For instance, the AGCM ordered a trader to stop all activities aimed to advertise, on Google Adwords or on other websites, the use of free software that can be downloaded from a specific web address (PS7444, *Italia – Programmi.net-abbonamento per software*) because such behavior was a misleading advertising. Likewise, a similar order was issued by the AGCM against a trader

whose website was filled with misleading information concerning both the availability of the goods advertised and the time of delivery (PS7677 *Private outlet – Mancata consegna merce*).

Moreover, in 2013 the INDICAM (Istituto di centromarca per la lotta alla contraffazione), a private body aimed at fighting against counterfeiting of goods, in order to grant protection of Made in Italy, lodged some complaints against rogue traders that sold on line (*guccioutlet-italy.org* and *www.pradaborselinea.com*; *www.discountraybansunglasses.org* and *www.raybanstores.com*; *www.emporioarmaniwatchesuk.uk.com*) counterfeit goods prompting consumers to buy, at a reduced price, goods presented as original and that gave misleading information about the guarantee and the right of withdrawal. The AGCM initiated still pending proceedings (PS8757, PS8758, PS8976, PS8985) and issued an *interim* measures (in cooperation with the Italian Financial Police) ordering to take off line the websites.

A recurring problem is the incorrect or misleading information on legal rights and warranties. For instance, Apple was involved in two proceeding before the AGCM: in the first one (PS7256) the American company was investigated for two unfair commercial practices, namely for: *i)* the refusal to grant the "legal guarantee", also through misleading or omissive information about its contents; *ii)* the offer of the additional assistance services (called AppleCare Protection Plan) that cover the two year legal warranties, also through misleading or omissive information about their contents.

With the ruling No. 23155 of 21 December 2011, the AGCM did not accept the commitment submitted by Apple and imposed fines for overall 900.000 € ordering the company: *i)* to modify the package of the Apple Protection Plan; *ii)* to publish on the website a brief summary of the AGCM decision for 30 days; *iii)* to present in 60 days measure to cease the practices and to comply with the AGCM decision. The second (non-compliance) proceeding (IP151) was started against Apple because the measures adopted up until 10 November 2012 were considered insufficient for both the previous condemned commercial practices. The AGCM fined Apple 200.000 €. Anyway, due to this enforcement action, Apple adopted – from 10 November 2012 – new measures and relevant changes of its commercial policy as the company modified completely the way to convey to consumers the information on the legal warranty, clarifying its existence in every relevant part of the website (as well in the FAQ and in the Terms and conditions). Besides, Apple decided to sell the APP only through the website and modified the package, taking off any reference to duration and coverage.

The AGCM investigated also on the information given by several air carriers or by some travel agencies on their websites, notably the lack of transparency of costs. In fact, often the packages, flights and hotels still advertised on the websites at very special prices turned out to be run out (while traders should keep their offers updated); furthermore, the price consumers were charged for travel services at the end of the on line booking process turned out to be higher than the one they have viewed (and agreed) at the start of the booking process as all applicable, unavoidable and foreseeable taxes, charges, surcharges and fees were not included in the price.

In a case 5 commercial practices were alleged and assessed to an air carrier, namely: *i)* misleading advertising (press/trader's Italian website) concerning flights that the consumers could not find and buy; *ii)* additional costs (i.e.: web check-in fee, credit card surcharge, VAT on domestic flights) that were not shown in the air fare, but were automatically added during the on line booking process; *iii)* lack or not working after-sales consumer care to get the refund of the tickets (or of a part of them) in case of non-use of the flight, both for trader's choice and for passenger's choice; lack of a toll-free phone number to contact the trader; *iv)* the General conditions of carriage on the Italian trader's website were published in English; *v)* additional charges in case of date, time, passengers names and flight segments changes or in case of reissue of the boarding pass at the airport (PS892, *Ryanair* fined for overall 502.500 €; later a non-compliance proceeding was started (IP117) and ended with a ruling that imposed to Ryanair another fine as the air carrier did not submit the compliance report within sixty days from the date of the notification of the previous AGCM decision with regard to two (of the five assessed) commercial practices).

Another commercial practice that was assessed unfair concerned the optional insurance fee (in case of non-use of the flight) offered on an "opt out" basis with the need for the consumer to remove a tick from a box to opt-out (PS583 *Opodo, Agenzie di viaggi on line*).

Recently, the AGCM investigated also collective purchasing website. In particular, the main objections notified to a trader were: *i)* misleading information on the essential characteristics of the goods and services sold, the percentage rebate applied and the final price; *ii)* unfair conditions and terms even concerning trader's liability; missing information on the conditions of payment (e.g. timing of charging); *iii)* prolonged refusals to refund to the consumers the amounts charged or blocked for cancelled purchases or not successfully ended deals; *iv)* inadequate customer service: only a free e-mail contact was available; the traders' answers to consumers' complaints (regarding difficulties in using

the coupons with the traders' partners) were generic, late and confused. The proceeding ended without infringement as the AGCM accepted the commitments set up by the trader during the proceedings. The commitments concerned: some Terms of General terms and Conditions; the implementation of the monitoring activities on partners including control procedures and a black-list of less reliable partners; a clear indication of any restrictions the coupons were subject to; the improving both the procedure for repayment of the amounts paid by the consumers and the procedure for managing complaints and repayments; a clear indication of the way to contact the traders (email, phone numbers) in order to get information about the availability of the products/services and to exercise the after-sale guarantees or to complain. (PS6903, *Groupalia*).

Other relevant enforcement actions involved "green claims" – namely any commercial communication (including logos, symbols and photographs) intended to suggest that the product and/or the service advertised have a reduced environmental impact or is less damaging to the environment than competing goods or services – that need to be drawn up in a clear, truthful, accurate, not misleading or ambiguous way. Green marketing, indeed, is a powerful tool for traders, likely to weight on consumer's choices – as consumers turn to be very sensitive to environmental issues and prefer to buy products that are more "sustainable" to the environment – and it protects traders that make genuine claims from unfair competition from those making unfounded environmental claims.

Even though only single sectorial community laws provide for specific rules on the environmental performance of a category of products or for specific prohibition of misleading use of the claim, logo or label (in absence of a EU legislation specifically harmonizing environmental marketing), significant principles and criteria are established in several international documents, such us the UCPD Guidelines of the European Commission (December 2009), the International Chamber of Commerce (January 2010) and the OECD (Environmental claims, March 2011) and were applied by the AGCM a number of times.

With regard to the following, repeatedly emphasized claims "*the additive ECM makes packaging and plastic products completely biodegradable*" and "*if a plastic product contains at least 1% of additive ECM, in relation to the weight, the entire product will be completely biodegradable*", related to plastic shoppers, the AGCM banned them because they were not supported by scientific evidence so that both plastic manufacturers and consumers were wrongly induced to believe that goods that have been treated with the additive ECM

have a reduced environmental impact (due to the rapidity and completeness of their biodegradation; PB385 *Italcom – ECM Biodegradabili*).

In another case, the AGCM considered misleading the claim, printed on the mineral water bottle, "*0 Impact. Respect the nature. "Ferrarelle offset the CO2 emitted to produce this bottle with the creation of new forests*" because the statement on the total compensation of the negative environmental effects due to the bottle production turned to be overvalued as the trader did not mentioned that the compensation was limited to two months; it concerned a specific number of bottles; and that the effects will occur in the medium-long term (seven years; PS7235, *Ferrarelle impatto zero*). A recent proceedings concerned the claim of biodegradability and compostability of *diapers,* including the spending the label "Compostable CIC" issued by the Italian Composting Association, as well as additional voluntary environmental claims relating to the *alleged* reduction of CO2 emissions and spending by local authorities and families directly related to the production and use of advertised diapers than conventional diapers.

Lastly, it is worth mentioning few proceedings opened on pyramid selling schemes (banned by art. 23, para. 1, lett. p), of the Consumer Code and by the Legislative Decree No. 173 of August 17, 2005). In the first one, a complex marketing and sale system of a fruit juice, called "XanGo Juice", turned out to be an unfair commercial practice in which recruits that registered at the trader's website became an "agent" or a "preferred customer", upon payment of a registration fee and upon purchase of a minimum quantity of fruit juices. The gains were related to the possible establishment of a network up to nine levels, so that the recruits were encouraged to seek out a growing number of other persons to join the scheme. The AGCM issued an interim measure against the trader ordering to stop any recruitment and registration activities (order No. 21917 of December 15, 2010); at the end of the proceedings, the trader was fined 250.000 €. The AGCM pointed out that all the rewards recruits have been promised were not based on product sales, but on some essential subjective requirements related to the recruiting process as the agents were bound to make monthly purchases of the drinks, could not resell the products and did not get any commissions on their purchases, but made every efforts to introduce to the scheme other agents according to a Compensation Plan. (PS6425, *Xango – Prodotti con succo di mangostano*). Afterwards, the AGCM initiated another proceedings bringing against the same rogue trader the indictment of non-compliance with the previous inhibitory ruling and fined him 50.000 € as the new Compensation plan still linked the rewards recruits to the recruiting process (IP120, *Xango – Prodotti con succo di mangostano*).

Also another trader was fined 250.000 € as he had carried out a marketing and sale system of dietary supplements and cosmetics that turned to be, in the light of the findings of the investigatory proceedings, an unfair commercial practice which implied a registration to the company's website, the payment of an entrance fee and the purchase of a kit; besides, the agents could recover the amounts paid only through the sponsorship and the entry of other persons into the scheme (PS4893, *Agel enterprises – integratori*).

3. B2B enforcement actions

As far as B2B transactions, it is worth mentioning that the MCA Directive aims at protecting traders against misleading advertising and the unfair consequences thereof; it should not be perceived as a barrier to the companies' freedom to determine their strategies as its observance promotes economic development through the establishment of virtuous business practices and, ultimately, fair competition.

Misleading advertising include a wide range of situations in which businesses are deceived on the price, quality and/or nature of a particular good or service or situations in which are charged for items they did not agree to purchase.

In the past few years, the AGCM received hundreds of complaints from affected companies, professionals and who had replied to written invitations to update their data (i.e. contact numbers; current position, etc.) and subsequently received requests for payment. These complaints were based on the fact that the advertising of the various directory companies was presented as a free collection of information to create an internet data-base. So, it was not clear that the reply to the form send (with the final signature) was considered as the subscription of a specific contract involving a yearly fee charge (usually of about 1.000,00 €). The targeted traders which replayed to the form received sometimes even executive injunctions in case of non payment. The AGCM carried out many investigations, pursuant to the B2B discipline, against several companies, by way of example: DAD, Deutscher Adressdienst GmbH (based in Germany) fined 4 times for misleading advertising and 3 times for non-compliance with previous AGCM decisions); CD Publisher Construct Data Verlag GmbH (based in Germany), fined twice for misleading advertising and twice for non-compliance with previous AGCM decisions; Nova Channel AG (based in Spain), fined once for misleading advertising and twice for non-compliance with previous AGCM decisions; European City Guide S.L. (based

in Spain), fined twice for misleading advertising and twice for non-compliance with previous AGCM decisions; EU Business Services Limited (based in UK), fined twice for misleading advertising.

Other cases concerned the franchise network: in particular, the AGCM fined traders whose advertising did not mention all the activities the franchisees were required to do. As a consequence, the franchisees were not aware of the fact that the achievement of financial results presented in the advertising (in the form of average annual turnover) was subject to the performance of certain activities (PB686, Sistema Italia 93 S.r.l. was fined 80.000 € in 2012).

4. Few notes on criteria

The criteria applied by the AGCM when imposing fines – identified by art. 11 Law No. 689 of 1981 in virtue of the reference placed by art. 27, para. 13, of Consumer Code – are: the seriousness of the infringement; the activities undertaken by the trader in order to eliminate or mitigate the consequences of the breach; the personality of the agent and its economic conditions.

In detail, as far as the seriousness of the infringement, the AGCM takes into account: the relevance of the trader (the economic dimension expressed by the turnover of the year before the infringement); the nature of the infringement [es. essential elements of the business transaction (i.e.: price); sectors involved that are characterized by asymmetric information (i.e.: high tech goods/services)]; the dissemination and the duration of the advertising; combined use of several media (internet is more offensive than other media); the potential consumer damage.

Moreover, the fine basic amount is founded on the seriousness and duration of the infringement, then the AGCM evaluates any aggravating circumstances (i.e. relapse) or extenuating circumstances (i.e. adoption of concrete measure to remove the consequences of the infringment; ceased conduct) and can apply further reduction for economic conditions (loss of balance). The trader's co-operation during the administrative proceedings is deemed neutral.

	2012		2011		2010		2009	
Sanctions for outcome of proceedings	**Preliminary inquiries**	**Fines (€)**	**Preliminary inquiries**	**Fines (€)**	**Preliminary inquiries**	**Fines (€)**	**Preliminary inquiries**	**Fines (€)**
Unfair commercial practices (B2C)	74	8.485.500	134	14.443.500	177	15.235.500	231	34.925.000
Misleading and unlawful comparative advertising (B2B)	3	1.082.000	6	355.500	15	868.500	6	355.000
Non compliance	22	110.000	15	876.000	5	365.000	7	358.000

(Source: annual Reports – AGCM)

UNFAIR COMMERCIAL PRACTICES IN FRANCE: NEW TRENDS AFTER THE 2013 CONSUMER PROTECTION ACT

Michel CANNARSA*

This paper provides a broad presentation of French law on unfair commercial practices, but with a particular emphasis on more specific issues: the impact of unfair commercial practices rules in the telecom area, in the banking sector and the effectiveness of sanction and remedies. French consumer law is undergoing a major reform[1], with some impact on the law on unfair commercial practices. This paper includes references to the future new provisions of the French Consumer Code.

1. The traditional legislative framework and new trends

A Consumer Code encompasses most of the provisions regulating business-to-consumers legal relations. The Code was enacted in 1993[2] and is about to be modernized once the new Consumer Act will be approved by the French parliament[3]. Implementation 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[4] occurred in France in 2008. The core structure of unfair commercial practices in the Consumer Code draws a distinction between regulated and illegal commercial practices[5]. Then, law 2008-3 of 3 January 2008 for the development of competition for the benefit

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1 See "Projet de loi relatif à la consommation", n° 1015, of 2nd May 2013, further referred to as « Draft Consumer Act 2013 ».

2 Law n° 93-949 of 26th July 1993.

3 On October 1st 2013, the text has not been finally approved yet.

4 Further referred to as « UCPD ».

5 See Book I, Title II, Chapters 1 and 2 of the Consumer Code.

of consumers[6] and law 2008-776 of 4 August 2008 on modernization of the economy[7] introduced and/or amended articles L.120-1 to L.121-7 and L.122-11 to L.122-15 of the Consumer Code. Some of these provisions were further amended in order to bring French law into conformity with EU law (more precisely ECJ decisions[8]) by Law 2011-525 of 17 May 2011 on simplification and improvement of the quality of law[9].

The draft statute addresses different aspects of consumer protection and is aimed at further reducing imbalances between business persons and consumers. The major innovation relies on the introduction, into French law, of a collective redress mechanism (similar to a certain extent to the class action mechanism)[10]. It also reinforces consumer rights, especially the information duties imposed to professionals when dealing with consumers[11]. The legal framework of distance selling and doorstep selling is also reformed[12].

From the enforcement perspective, an important chapter of the Draft Consumer Act 2013 aims at modernizing the monitoring and sanctioning powers of the national agency in charge of consumer affairs[13]. The competences and powers of the national agency are reinforced and the level of administrative and criminal sanctions is also increased. The powers of judges are extended, especially in the field of unfair contractual terms. Concerning specifically unfair commercial practices, the new statute adapts the provisions of the Consumer Code to specific circumstances (limits as to the time and as to the

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6 "Loi pour le développement de la concurrence au service des consommateurs."

7 "Loi de modernisation de l'économie."

8 Specific commercial practices (e.g. sales with gifts) which used to be prohibited can now be prohibited only provided that the general assessment under the general clause of the unfair commercial practice is made: ECJ,23 April 2009, joint cases *VTB-VAB* (C-261/07) and *Galatea* (C-299/07). ECJ, 9 November 2010, case *Media print* (C-540/08). See: Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU. *Civic Consulting Part 2 – Country Reports*. Final Report available at http://ec.europa.eu/justice/consumer-marketing/files/ucpd_study_country_reports.pdf, French Report by Dr. Charlotte PAVILLON and Prof. Elise POILLOT, p. 99–126.

9 "Loi de simplification et d'amélioration de la qualité du droit."

10 See articles 1 and 2 of the Draft Consumer Act 2013, introducing the group action ("*action de groupe*").

11 See articles 3 to 17 of the Draft Consumer Act 2013.

12 In the field of insurance (articles 18 to 22 of the Draft Consumer Act 2013) consumer rights and protection against « multi-insurance » are reinforced. In terms of products presentation, articles 23 and 24 introduce a new geographical indication that will allow producers of French products to be granted a specific protection in France and to promote their industrial products and craftworks.

13 Autorité chargée de la concurrence, de la consommation et de la répression des fraudes.

space) surrounding advertisement made through different medias or electronic tools (on the radio, through the telephone…)[14]. The objective is to implement literally the terms of article 7-3 of Directive 2005/29/EC and more specifically to impose an *in concreto* assessment of a possible unfair commercial practice.

2. The foundations of Consumer Protection in France

In the different areas addressed in this study, French law relies heavily on the duty to inform that is imposed on business persons and on the redress mechanisms in case of breach of such a duty. Article L.113-3 of the Consumer Code imposes to any seller or service provider to inform the consumer about the price, the possible restrictions of liability and the general sales conditions. The duty to inform refers to the pre-contractual stage where the consumer's choice is protected thanks to transparent information. The duty to inform applies generally speaking to contracts for the sale of goods or for the provision of services and concerns their characteristics and quality as well as the description of the business person. A failure by the latter to provide the consumer with the relevant information can generally be considered as a misleading omission, and therefore an unfair commercial practice when the consumer's consent has been altered or could be altered. Beyond the information duties, several provisions of the Consumer Code offer further protection of the weaker contractual party, like the prohibition of abuse of weakness, according to article L 122-8 and L. 122-9 of the Consumer Code, applicable in doorstep or distance selling situations.

However, on the enforcement side, the general conclusion is that rules on consumer information are not sufficiently effective, in part because of a lack of awareness of the legal rights and obligations of businesses and consumers.

3. Insights from the telecom sector

The general provisions on unfair commercial practices are applicable and no relevant specific regulations are applicable to this commercial area. Among the various commercial practices used by telecom operators, the loyalty periods imposed to consumers as a counterpart to benefits (like a free cell phone) are one of the most common commercial practices and possibly the source of unfair

[14] See art. 13 of the Draft Consumer Act 2013 modifying art. L.121-1 of the Consumer Code.

practices (no clear communication about the consumer commitment when offers are made). Misleading advertising, e.g. on tariff, is also a source of consumers' complaints and is likely to fall under the general prohibition of misleading omission. In 2005, a quite important anticompetitive agreement led to a huge sanction[15] by the French antitrust authority imposed on three of the main telecom operators[16]. Among others reasons, the antitrust authority considered that the cartel aimed at privileging subscription instead of pre-paid cards, to the detriment of the consumer. The collective damage for the consumers was quite relevant, even if the single damages suffered by individual consumers were not important enough to initiate individual legal actions.

4. The strongly regulated financial sector

The legal framework is far more detailed and complicated as far as the financial sector is concerned. The amount of information duties and the level of formalism are extremely high. Firstly, consumer credit is strongly regulated, in large part on the basis of Directive 2008/48/EC on credit agreements for consumers. The French legal framework is based on two main approaches, the first one addressing the information dimension and the second one introducing prohibition of different commercial practices.

4.1 The informative approach

In terms of information, several articles of the Consumer Code, but also of the Insurance Code, the latter regulating the activity of Insurance companies, impose extensive information duties to the service provider. Starting with the Consumer Code, article L.311-5 imposes bigger character size on the part of written advertisements relating to the annual percentage rate and its fixed or variable nature. When the advertisement is addressed to the consumer by regular mail or by email, the interest rate or any information relating to the cost of the credit must be enclosed in a frame at the top of the advertisement. It has been submitted that the above mentioned requirements are more precise than the obligations included

[15] Worth more than 534 million euro. The fine has been upheld by the Supreme Court on 30th May 2012.

[16] Orange France, SFR and Bouygues Télécom.

in Directive 2008/48/EC[17]. Last but not least, article L.311-5 of the Consumer Code requires that any advertisement, except in a radio broadcast, includes the following message: "*a credit is binding and must be reimbursed. Check your reimbursement capacity before entering into the contract*".

In addition to article L.311-5 of the Consumer Code, articles L. 311-6 and L.311-8 reinforce the consumer's protection by requesting the financial service provider to advise the consumer according to the specific situation and needs of the latter. This "tailor-made" information introduced by a 2010 statute[18] relates to the relevant information which the consumer needs to make an adequate, informed, decision. The financial service provider has also a duty to warn the consumer against the economic consequences he faces if the contract is concluded. The service provider must therefore inquire specifically about the consumer's situation and needs and his reimbursement capacity[19]. Its employees have to receive a special training on this question which the employer must be able to give evidence of in case of control. Some might wonder if a failure to comply with this obligation would be considered as a misleading omission, and if the average consumer standard of the UCPD would be consistent with this approach focusing on the individual situation of the consumer?[20] Specific provisions regulate the advertising of credit for the purchase of immovable property, and more precisely the mandatory information to be conveyed to the borrower[21].

The Insurance Code heavily regulates the pre-contractual information to be provided to the insured party (likely to be considered as a consumer). Article L. 112-2 specifies the information, which must be provided to the subscriber of the insurance before the contract is concluded. The information regarding the price and the guarantees offered has to appear on a specific record. A draft contract or an information document describing precisely the guarantees, their limitations as well as the insured party's obligations is also provided to the latter. The actual contract cannot be concluded unless these steps have been

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17 See Charlotte Pavillon –Elise Poillot: French Report in Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU. *Civic Consulting Part 2 – Country Reports*, 104.

18 "Loi portant réforme du credit à la consummation" n° 2010-737 of 1st July 2010.

19 See articles L.311-9 of the Consumer Code and L.311-10 according to which the lender must have detailed information about the consumer's reimbursement capacity and the consumer has to fill up a form containing the relevant information which will form the basis of the financial service provider's assessment.

20 See Pavillon–Poillot op. cit. 110.

21 See articles L.312-4 and L.312-5, L.312-8 and L.312-9 of the Consumer Code.

taken. In a distance selling situation, article L.112-2-1-II of the Insurance Code imposes that the insured party is provided with the detailed information mentioned above in a specific format before any contract can be concluded. In the field of life insurance and capitalization contracts, under the influence of directive 2002/83/EC on life insurance, article L.132-5-2 of the Insurance Code submits the actual conclusion of the contract to the performance of information duties by the insurance company (delivery of an information notice or a contract proposal including the listed information and the withdrawal form). Generally speaking[22], the insurer has to gather sufficient financial information from the insured party in order to draft an adequate proposal.

Beyond all these information duties aimed at making sure that the consumer takes an informed decision, several commercial practices are regulated and prohibited outside the specific framework of the provisions implementing the UCPD.

4.2 The prohibition approach

On the prohibition side, both the substantive dimension of specific commercial practices and their formal dimension, i.e. the presentation of the financial products, are addressed.

4.2.1 Combined offers and sales with gifts are banned in the field of financial services on the basis of article L.312-1-2 of the Monetary and Financial Code. Sales with gifts are also prohibited by article L.311-5 of the Consumer Code. Also, it is not possible to tie commercial advantages relating to a credit card to the use of the said credit. The issue of the consistency of these provisions with the UCPD has been raised as they offer more protection than the regime based on the directive and the prohibited practices would not necessarily qualify as unfair commercial practices under articles 5 to 9 of the UCPD[23]. Selling a good at a higher price, when covering the costs is based on a credit operation, is also prohibited according to article 311-28 of the Consumer Code. Article L.312-9 makes it compulsory for the lender to accept an alternative (cheaper) insurance contract covering the credit operation and chosen by the borrower if the said insurance contract offers the same guarantees. In these circumstances, the

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22 See articles L.132-27-1 of the Insurance Code.

23 See PAVILLON–POILLOT op. cit. 103.

lender must not alter the conditions of the credit contract, especially its cost and advantages. A last example comes from article L.312-11 of the Consumer Code according to which until acceptance of the credit offer by the borrower, no anticipatory performance of the contract (payment by one of the contracting parties) can be made.

4.2.2 From a formal perspective, restrictions on advertising are worth noting, e.g. the prohibition of inducements such as bonus payment of any kind or prize. The above mentioned article L.311-5 of the Consumer Code prohibits advertisements indicating that a credit contract can be concluded without prior information about the borrower's financial capacity and that the credit will improve his financial situation. It is also prohibited to advertise a postponement of the reimbursement obligation beyond a period of three months or to link promotional products with the acceptance of the credit offer. Indicating that social benefits payments are included in the calculation of the reimbursement installments is not possible according to article L.312-6 of the Consumer Code.

4.3 Persisting unfair commercial practices in the field of financial services

One of the most unfair commercial practices in the financial sector is the fact of imposing tied sales. Financial products are often proposed in combination with relatively expensive products, the most obvious example being the combination between the credit contract and the insurance contract provided by the bank. Even though the borrower has the right to refuse the bank's insurance and to opt for a cheaper insurance[24], he generally does not have enough time nor awareness to compare the different tariffs and will eventually agree to subscribe to the offer made by the lender. Another frequent example comes from the sale of additional products which are not useful to the consumer (e.g. financial or general information magazines) or which are inadequate considering the financial capacity of the consumer (e.g. a credit card giving access to privileges usually restricted to wealthier persons)[25].

These persisting problems are well known to the French administration and have led to a rethinking of the approach towards prevention and sanctions of

[24] See art. L.312-9 of the Consumer Code.

[25] See Pavillon–Poillot op. cit. 111.

unfair commercial practices. The issue of effectiveness of the legal provisions regulating commercial practices is a cornerstone of the recent process of reforming the Consumer Code.

5. Sanctions and Remedies

The enforcement of consumer law in France, including the provisions implementing the UCPD, is entrusted to criminal and civil courts with the assistance of the national agency in charge of competition and consumer affairs. Criminal law provisions are quite numerous and, formally speaking, are central to consumer protection in France. So far, the agency in charge of consumer affairs has relatively few sanctioning powers (e.g. administrative fines) or settlement[26] competences. It has injunction powers and can request cessation of any unlawful situation[27]. Its main task though is a supervisory and investigative[28] function. When the agency indentifies infringements to the provisions falling into its sphere of competence, it will generally inform the public prosecutor who is competent to decide whether or not to initiate a formal criminal procedure. The reports drafted by the agency constitute evidence of the infringement, unless the business person gives evidence to the contrary. Concerning civil actions, most cases are initiated by or with the help of national consumer associations.

French law still largely relies on the application of the consumer code provisions in courts, leading to a reduced effectiveness as the single consumers generally do not sue professionals into courts and the consumer associations sometimes lack the financial and technical resources to do so. Alternative dispute resolution schemes are quite underdeveloped. The national agency in charge of consumer affairs and the criminal courts also lack the human resources to face the high number of infringements of the Consumer Code. The Draft Consumer Act 2013 tries to solve some of these problems.

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[26] According to art. L.141-2 of the Consumer Code, the agency is allowed to settle the case, under the supervision of the judicial authority. This settlement power covers the area of unfair commercial practices.

[27] See art. L.141-1 of the Consumer Code.

[28] See art. L.121-2 of the Consumer Code, giving investigation powers to the agency in the field of unfair commercial practices. See also art. L.141-1. The investigation powers are exercised under the supervision of the judicial authority.

5.1 Modernization of collective redress mechanisms

To start with, a "group action" will soon be introduced into French law. A sort of collective redress action does actually exist in French law, called "collective representation action"[29], allowing consumer associations to initiate a legal action in the name of at least two consumers. However, because consumer protection associations cannot make any public announcement in order to identify and gather the potential claimants, this legal action has not been effective. French government is relying on a new procedure, more similar to the class action mechanism. This new procedure is probably the most prominent symbol of the recent reform of consumer protection.

The new "group action" will encompass both the areas of consumer law and competition law. It will therefore be possible to initiate such an action when the infringement comes from a breach of competition law, e.g. articles 101 and 102 of the Treaty on the Functioning of the European Union. This will require a previous final decision by the competition authority upholding the breach of competition rules. Once the breach is established, then the way to a group action will be opened. In terms of procedure, the choice made by the French legislator goes to an "opt in" model.

5.2 New tools to face new commercial practices

A new investigation procedure, called the "mysterious consumer" will discharge the members of the agency in charge of consumer affairs from the obligation to disclose their functions. This new tool will be particularly efficient in the e-commerce area in order to have access to relevant information[30]. It will be introduced in article L.141-1 of the Consumer Code. The agency will also then be allowed to request to the judicial authority to impose a ban on a website in case of infringement of the relevant regulations.

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29 Introduced by Law of 18th January 1992. See now articles L. 422-1 and ff. of the Consumer Code.

30 For example, it is generally necessary to complete the order process on an e-commerce website in order to check whether the various obligations imposed to the business person are complied with or not.

5.3 New administrative sanctions

Between 2007 and 2012, a huge decrease in criminal convictions took place (71%) and a correspondent increase of the number of criminal settlements happened (73%)[31], especially in case of failure by the business person to perform its information duty according to article L.113-3 of the Consumer Code. Administrative fines are considered as a more efficient tool, compared to criminal fines, especially in terms of length of procedure. The national agency in charge of consumer affairs will soon have the competence to impose and collect administrative fines, on the basis of an *inter partes* procedure. The said procedure will be subject to a judicial control. These various new trends bring the French legal framework closer to other domestic regulations in EU Member States.

[31] Figures mentioned in the *Report on the Draft Consumer Act 2013.*

FAIR B2C ADVERTISING IN THE TELECOMMUNICATIONS AND BANKING SECTOR IN POLAND – MISSION: IMPOSSIBLE?

Monika Namysłowska

1. Introduction

The popularity of telecommunications and banking products among consumers constitutes one of the few similarities between them. Both categories of products are very sought after in everyday life, as a result of which advertising is extremely widespread in these sectors[1]. At the same time, the products themselves, such as mobile tariffs or consumer credits, are highly similar amongst themselves and broadly offered. Therefore, in order to be efficient an advertisement must be innovative and attractive, which is not at all easy to achieve. The advertisers thus often go for controversial or questionable form and content. Consequently, the increased competition in this field significantly increases the risk of developing into unfair competition – in particular unfair advertising.

The following paper examines the legal instruments in Poland which serve to prevent and combat unfair advertising in the telecommunications and banking sectors. The paper primarily illustrates the impact of Directive 2005/29/EC on unfair commercial practices[2] (hereinafter: the UCP Directive) on the

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[1] For a deeper analysis of the banking and telecommunication products in Poland in the light of consumer law see A. Dąbrowska – M. Janoś-Kresło: *Ochrona konsumentów na rynku usług bankowych i telekomunikacyjnych*. Oficyna Wydawnicza Szkoły Głównej Handlowej, 2012. 11–22., 61–68.

[2] 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') [2005] OJ L149/22.

Polish legal system and the role of the self-regulatory instrument, the Code of Ethics in Advertising, which together constitute the major risks for traders who advertise their products in Poland. Furthermore, the application of these rules as regards telecommunications and banking advertising will be compared in order to answer the question about the extent of similarity in the assessment of commercial practices in these different sectors.

2. Polish regulations on unfair B2C advertising in the telecommunications and banking sector

2.1. Relevant regulations on B2C unfairness

The Act on the Prevention of Unfair Market Practices[3] of 2007 (hereinafter: the Unfair Market Practices Act), which serves to implement the UCP Directive, is the major Polish regulation concerning B2C unfairness[4]. The act can be considered an almost literal implementation of the UCP Directive, adopting its threefold structure as well as the wording of the individual prohibitions, and thus can be easily compared with the UCP Directive itself. The Unfair Market Practices Act is, therefore, also based on a general clause, followed by specific provisions on misleading and aggressive practices and by a black list of market practices which are unfair in all circumstances. The rules of the Polish regulation are applicable, among others, to B2C advertising, which is explicitly mentioned in the Unfair Market Practices Act[5].

Nevertheless, several differences between the UCP Directive and the Unfair Market Practices Act become immediately apparent. The central notion "commercial practices" was replaced by the notion "market practices", already known from Article 76 of the Polish Constitution[6], according to which public authorities shall protect consumers against unfair market practices. The Polish general clause in Article 4 (1) abandons the notion of "professional diligence"

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3 Act on the Prevention of Unfair Market Practices (*Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym*) of 23 August 2007, Dz.U. 2007, Nr 171, poz. 1206.

4 See on the Polish law on unfair competition e.g. I. NESTORUK: Country Reports. Poland. In: F. HENNING-BODEWIG: *International Handbook on Unfair Competition.* C.H. Beck, 2013. 423–455.

5 Article 4 point 4 of the Unfair Market Practices Act.

6 The Constitution of the Republic of Poland (*Konstytucja Rzeczypospolitej Polskiej*) of 2 April 1997, Dz. U. 1997, Nr 78, poz. 483.

used in the European general clause[7] and prohibits unfair market practices that are contrary to *bonos mores* (good practice; in Polish: *dobre obyczaje*, in German: *Gute Sitten*), a term already used in the first Polish Act on Unfair Competition of 1926[8]. Moreover, the black list in Annex I to the UCP Directive was transposed as two provisions of the Unfair Market Practices Act. Thus, after Articles 5 and 6 on misleading market actions and omissions, Article 7 prohibits 23 misleading market practices, which are unfair *per se*. Accordingly, Article 9, following the provision prohibiting aggressive market practices, blacklists 8 specific aggressive market practices. Taking into account the obligation to interpret the national provisions in the light of the UCP Directive[9], the application of the Unfair Market Practices Act must comply with the European solutions irrespective of the slight dissimilarities between them.

Apart from the Unfair Market Practices Act, which is applicable to all sectors of the economy, some sector-specific regulations play a supplementary role in the assessment of unfairness in advertising. As regards banking advertising, it is worthwhile to mention the Act on Consumer Credit[10] or the Banking Law Act[11]. As for the telecommunications sector, note should be taken of the Telecommunication Law Act[12].

Apart from the aforementioned legislation, the standards of fair telecommunications and banking advertising are also protected by means of self-regulation. The most known general rules are these of the Code of Ethics in Advertising (*Kodeks Etyki Reklamy*)[13] laid down by the Advertising Council (*Rada Reklamy*)[14] – a member of the European Advertising Standards Alliance (EASA)[15]. The Code of Ethics in Advertising aims at ensuring legal and honest advertising. Some provisions of the Code reflect the legislative solutions, whereas some prohibitions focus more on ethical standards. Furthermore,

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7 Article 5 of the UCP Directive.

8 The Act on Unfair Competition of 2 August 1926, Dz. U., Nr 59, poz. 559.

9 Case C-428/11 *Purely Creative* (ECJ, 18 October 2012), para 41.

10 Act on Consumer Credit (*Ustawa o kredycie konsumenckim*) of 12 May 2011, Dz. U. 2011, Nr 126, poz. 715.

11 Banking Law Act (*Ustawa Prawo bankowe*) of 29 August 1997, Dz. U. 2012, Nr 1376 consolidated text.

12 Telecommunication Law Act (*Ustawa Prawo telekomunikacyjne*) of 16 July 2004, Dz. U. 2004, Nr 171, poz. 1800.

13 Code of Ethics in Advertising of 16 May 2012, http://www.radareklamy.pl/kodeks-etyki-reklamy.html

14 http://www.radareklamy.pl

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

advertisements should comply with sector-specific self-regulatory instruments, such as the Code of Good Practice in Mobile Advertising[16], the Rules of Advertising of the Banking Products[17], or the Principles of Good Practices for companies united in the Conference of Financial Companies in Poland[18].

2.2. Enforcement and sanctions

Various means are available to enforce compliance with the abovementioned regulations.

As regards the Unfair Market Practices Act, it is the consumer himself who has the right to make a claim against a trader acting unfair[19]. Still, individual claims are rare as the Polish consumer is not interested in time- and money-consuming disputes before the courts. The right to take legal action is also granted to the Ombudsman, the Insurance Ombudsman, the national or regional organisations for consumer protection, and the district (municipal) consumer ombudsman[20] whose usefulness is, however, limited in individual claims. The claimants have the typical action for injunction at their disposal and the consumer may additionally demand the cancellation of the contract.

The competitor of an unfair trader, who is usually harmed by an unfair B2C advertisement, has no right to file a claim under the Unfair Market Practices Act but only on the basis of the Act on Combating Unfair Competition of 1993[21] (hereinafter: the Unfair Competition Act). This regulation, which once served to prohibit both B2C and B2B unfair practices, remained in force after the implementation of the UCP Directive. The scope of the Unfair Competition Act is currently restricted to B2B practices. Additionally, as mentioned before, it provides the possibility for the competitor to take legal action against an unfair B2C advertiser.

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[16] http://www.t-mobile.pl/r/era_pl_repo1/documents/biz/kodeks_dobrych_praktyk_reklamy_mobilnej.pdf

[17] http://www.knf.gov.pl/Images/KNF_reklamy_bankowe_2_10_08_tcm75-9042.pdf

[18] http://kpf.pl/pliki/zdp/principles_of_good_practices_kpf_2013.pdf. See more on self-regulation in the banking sector in Poland E. Rutkowska-Tomaszewska: *Nieuczciwe praktyki na rynku bankowych usług konsumenckich.* Wolters Kluwer Polska, 2011. 37–42.

[19] Article 12 (1) of the Unfair Market Practices Act.

[20] Article 12 (2) of the Unfair Market Practices Act.

[21] Act on Combating Unfair Competition (*Ustawa o zwalczaniu nieuczciwej konkurencji*) of 16 April 1993, Dz.U. 2003, Nr 153, poz. 1503 consolidated text.

The potential penalties for infringements in individual disputes fail to achieve their dissuasive aim. The effectiveness of the substantive rules on advertising may, however, still be achieved by means of the few criminal provisions[22] or a collective consumer claim[23].

The administrative mode of enforcement in the form of proceedings before the President of the Office of Competition and Consumer Protection (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*; hereinafter: President of the UOKiK) is probably the most burdensome one for the traders. The President of the UOKiK assesses whether a given practice constitutes an infringement of the Unfair Market Practices Act or the Unfair Competition Act, whereas any person may report by means of a written notification any use of practices, which is harmful to the collective interests of consumers[24]. Upon finding such an infringement the President of the UOKiK may impose fines of up to 10% of the revenue generated by the contravening entity in the preceding business year, require the cessation of the infringement or modification the advertisement, as well as the publication of the decision[25]. A commitment decision or settlement is also possible[26].

The self-regulatory rules are also enforceable. The Advertising Council decides on the unfairness of an advertisement through the Advertising Ethics Committee (*Komisja Etyki Reklamy*) which handles complaints from both consumers and competitors. As the consumer complaints are free of charge and can be submitted through an on-line form, the complaints are frequent. If only the Advertising Ethics Committee recognises the infringement, the traders voluntarily modify the unfair advertisement. Therefore, the sanctions such as modification or cessation are rarely imposed. Moreover, there are other institutions, such as the Polish Financial Supervision Authority, which may decide on cessation of a banking advertisement[27].

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[22] Article 15 (1) of the Unfair Market Practices Act and e.g. Article 25 of the Unfair Competition Act.

[23] See Act on collective claims (*Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*) of 17 December 2009, Dz. U. 2010, Nr 507, poz. 44.

[24] Article 24 (2) (3) and Article 100 (1) of the Act on the Protection of Competition and Consumers (*Ustawa o ochronie konkurencji i konsumentów*) of 16 February 2007, Dz. U. 2007, Nr 50, poz. 331,

[25] Article 26 and Article 106 of the Act on the Protection of Competition and Consumers.

[26] Articles 28 and Article 102 of the Act on the Protection of Competition and Consumers.

[27] http://www.knf.gov.pl/index.html.

3. Assessment of (un)fairness in B2C telecommunications and banking advertising

3.1. Consumer of telecommunications and banking products

The UCP Directive, which aims at guaranteeing a high level of consumer protection, does not, extend the protection from unfair commercial practices to all consumers. The UCP Directive takes as a benchmark for unfairness an average consumer who is reasonably well-informed as well as reasonably observant and circumspect, taking into account social, cultural and linguistic factors as interpreted by the Court of Justice. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, the impact of the commercial practice is assessed from the perspective of the average member of that group. This means that only these commercial practices, which might affect an average consumer, can be assessed as unfair. A commercial practice remains fair if a consumer below this average was exploited. Unlike the UCP Directive, which presents the standard of the average consumer only in recital 18, the definition of the average consumer is included in the core text of the Unfair Market Practices Act[28].

As national courts and authorities may exercise their own faculty of judgement to determine the typical reaction of the average consumer in a given case[29], inquiries have often been made as regards the characteristics of the Polish average consumer of the telecommunications and banking products. The President of the UOKiK repeatedly stated that neither a specific consumer of telecommunications advertising[30], nor a specific consumer of banking advertising on consumer credit[31] or time deposit[32] can be distinguished. The usage of a mobile phone does not require any special skills or knowledge of new technologies[33]. The same applies to the consumer of a consumer credit, which

[28] Article 2 point 8 of the Unfair Market Practices Act.

[29] Recital 18 of the UCP Directive.

[30] Decision of the President of the UOKiK nr RWA-44/2012 of 27 December 2012, p. 14; nr RWA-20/2011 of 14 December 2011, p. 9–10.

[31] Decision of the President of the UOKiK nr RPZ 46/2012 of 28 December 2012, p. 30.

[32] Decision of the President of the UOKiK nr 33/2008 of 12 December 2008.

[33] Decision of the President of the UOKiK nr RPZ 28/2010 of 9 December 2010, p. 12; nr RWA-44/2012, p. 14.

is a basic financial product and unlike other financial products does not require any specific knowledge of financial mechanisms[34].

Therefore, only the average consumer might be taken into account, not a specific one. In the opinion of the President of the UOKiK, the Polish average consumer understands the information addressed to him. He recognises the language of advertising, recognises the use of metaphor, exaggeration, shortcuts, as well as the conventionality of the advertising language. He also trusts well-known traders. The knowledge of an average consumer is, however, incomplete and not professional. He has the right not to know everything, as he is not a specialist in a certain field. The average consumer is not naïve, and yet he may assume that the information provided by the trader is clear, unequivocal and not misleading[35].

The level of attention of the average consumer, which influences the assessment of (un)fairness, differs depending on the advertised product itself. For example, mobile phones are commonly used, their price and the price of the telecom services is not high. The consumer may, therefore, easily switch to another telecom provider. Therefore, the average consumer can make a decision on such a service without carefully analysing the details of an offer. Hence, the level of attention paid to such an advertisement is not very high[36]. Yet, the consumer of banking products has the right to reliable, true and full information as the decisions have financial consequences and thus should not be made on the basis of an unfair practice[37].

3.2. Misleading actions

In Poland, the commercials in the telecommunications and banking sectors are most often assessed as misleading practices.

The prohibitions of misleading commercial practices play a central role in the UCP Directive, which in Article 6 and Article 7 distinguishes between misleading actions and misleading omissions, respectively. The provisions on

[34] Decision of the President of the UOKiK nr RPZ 46/2012, p. 30.

[35] See e.g. the decisions of the President of the UOKiK: nr DDK 14/2008 of 19 August 2008, p. 12; nr RPZ 28/2010, s. 13; nr RWA-44/2012, p. 15; nr RPZ 2/2013 of 12 March 2013, s. 15.

[36] Decisions of the President of the UOKiK: nr RWA-20/2011, p. 10; nr RWA-44/2012 of 27 December 2012, p. 15.

[37] Decision of the President of the UOKiK nr RWA-44/2012, p. 36.

both misleading actions and omissions are applied in Poland to advertising of telecom and banking products.

On the other hand, the Code of Ethics in Advertising introduces only a general prohibition on misleading practices in Article 10 and several specific bans on misleading practices addressed to children or on advertising with environmental claims. How the actual evaluation of practices as misleading actions or omissions is made is, therefore, not transparent.

3.2.1. Provisions on misleading actions

An advertisement may be assessed as a misleading action on the basis of Article 5 (1) of the Unfair Market Practices Act, according to which a commercial practice shall be regarded as misleading if it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. Article 5 (2) gives examples of misleading actions such as dissemination of false information, or of factually correct but misleading information. A misleading action may concern issues like the existence, nature or availability of the product, the characteristics of the product, such as its quantity, quality, composition or the price, the manner in which the price is calculated, or the existence of a specific price advantage[38]. Article 5 (4) of the Polish act underlines that while assessing whether a market practice constitutes a misleading action, all its features as well as the circumstances accompanying the product launch, including overall presentation, should be taken into account.

3.2.2. Examples of misleading actions in advertising

A) Telecommunications advertisements

One of the advertisements assessed by the President of the UOKiK was based on the slogan „Closeness creates Christmas. Calls for free with your closest ones"[39]. It was presented during Christmas and was specifically referring to Christmas by the use of Christmas symbols; the main service (calling for free), however, was switched off during the holiday season. Since under Article 2 point 7 of the Unfair Market Practices Act the "transactional decision" means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product, or to exercise a contractual right in relation to the product, as well as whether the consumer decides to act or to refrain from acting, the President

[38] See Article 5 (3) of the Unfair Market Practices Act.

[39] Decision of the President of the UOKiK nr DDK 14/2008.

of the UOKiK concluded that it is irrelevant if the consumer decided to act or not. Of importance is only his understanding of the advertising on the basis of all the features of the evaluated advertising which may affect its reception by the average consumer. In the case at hand, every element of the advertisement emphasised the connection to Christmas. The commercial used symbols such as snow, Christmas trees or snowmen. In the opinion of the President of the UOKiK, the advertisement unequivocally suggested that the telecom provider wanted to guarantee the possibility to spend Christmas close to relatives. The commercial was addressed to all, not to a specific group of consumers, and it can be said that everyone in general shares the wish to be close to one's relatives. The President of the UOKiK decided that the advertisement was misleading by action because the essential information regarding the fact that the free of charge calls, which can be considered as the main emphasis of the aforementioned advertising campaign, would not be provided during Christmas time. The fact that a consumer may be informed on the details at a later time, e.g. at the moment of sale, could not have changed the assessment as it suffices that a misleading advertisement raises interest for the offer. The decision had to be published and the fine of 806 400 PLN (0,01% of the revenue generated in the preceding year) was imposed.

The President of the UOKiK also assessed as a misleading action various forms of advertising, which promised a price of 0,29 PLN per minute for all calls, while in reality the cost per minute to one telecom service provider was higher[40]. The information concerning this exception was illegible for the average consumer in the TV advertisement, and thus it was capable of making him take a transactional decision that he would not have taken otherwise. The illegibility of the inscription resulted from the colour and the size of the fonts employed, while the speaker did not mention the existence of this exception. Moreover, the relevant sentence was written vertically. The same advertisement on the billboard did not contain any notice on the exception. The President of the UOKiK underlined that advertisements on billboards are a special case due to the fact that it is often placed in busy locations, close to the road. The consumer does not even have the possibility to look closely at them because of being in motion – in a car, in a bus or going on foot. It is thus important to create the design of the advertisements in a way that guarantees an unproblematic understanding. However, the analogous web advertisement was assessed as non-misleading due to the simplicity of obtaining all the information by clicking

[40] Decision of the President of the UOKiK nr RWA-44/2012.

on the indicated link. Even if it is up to the trader to decide on the elements of the offer presented in commercial, the trader has to take the responsibility for misleading the consumers. In the opinion of the President of the UOKiK the competition in the telecom sector is the reason why marketing practices are often too expansive. Some of the advertising techniques cause an overemphasis on the slogans themselves, and not on explaining the offer. The particular elements of an advertised offer may be selectively shown in a way which does not mislead the consumers. The form of the advertisement determines its capacity to provide the necessary explanations. The advertisers have to take into account that it is the price or the price advantage that will most often influence the decision of a consumer. A fine of 4 493 233 PLN was imposed for the stated infringements. As the revenue in the preceding year was declared to be a trade secret, the fine to revenue ratio was not disclosed.

B) Banking advertisements

In the advertising campaign "Mini little rate"[41] the advertisements claimed to offer a low interest rate for a consumer credit. In reality, the offer was addressed only to consumers who had been clients of the bank for at least 6-months and made regular payments to the account without delays. The President of the UOKiK decided that after taking into account the characteristics of the medium used in the advertisements, they could have been considered unclear for the average consumer – during the 15-, 30- or 45-second long TV commercial the substantive information related to the offer was presented only for 4 seconds, which was deemed too short. In the billboard advertisement the fonts were too small. In both cases the consumer may have assumed that the offer was addressed to everyone. The advertisements might have deceived the average consumer in relation to the availability of the advertised product and an average consumer could have taken the transactional decision that he would not have taken otherwise – the advertisement was therefore misleading. The monetary penalty of unknown amount was imposed on the bank.

An advertisement of a time deposit guaranteeing an interest rate of "6% without asterisk" was also declared misleading[42]. In the opinion of the President of the UOKiK the asterisks are a commonly used solution to indicate some restrictions. The statement "without asterisk" was therefore evaluated as

[41] Decision of the President of the UOKiK nr RPZ 46/2012.

[42] Decision of the President of the UOKiK nr 33/2008.

suggesting the completeness of the presented offer, which in turn could have influenced the choice of the average consumer.

Furthermore, the Advertising Ethics Committee assessed as misleading the advertising promising a "Decision in 5 minutes, up to 50 000 PLN, only on the basis of your ID card, for everything you want, with a smile for free"[43]. According to the consumer filing the claim, only the last characteristic was true. The Committee confirmed that the information was misleading and obliged the bank to modify the advertising in order to clearly inform the consumers on the requirements of the credit.

The advertising of a time deposit with the slogan "11% per night"[44], while in reality it did not even exceed 5.5%, was also considered as misleading; the bank was also requested to make some necessary changes to clarify the advertisement in question.

3.3. Misleading omissions

3.3.1.Provisions on misleading omissions

Article 6 of the Unfair Market Practices Act prohibits misleading omissions in line with the provisions of the UCP Directive. Therefore, a market practice will be regarded as misleading by omission if it omits material information that the average consumer needs to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise[45]. An omission will also be regarded as misleading when e.g. a trader hides or provides in an unclear, ambiguous or untimely manner such material information[46]. When assessing whether a market practice is misleading by omission all its features and circumstances related to the product launch, including its overall presentation, should be taken into account[47]. Where the medium used to communicate the market practice imposes limitations of space or time, these limitations and any measures taken

[43] Adjudication of the Advertising Ethics Committee Nr ZO 10/09 of 18 February 2009.

[44] Adjudication of the Advertising Ethics Committee Nr ZO 14/09 of 11 March 2009.

[45] Article 6 (1) of the Unfair Market Practices Act.

[46] Article 6 (3) 1 of the Unfair Market Practices Act.

[47] Article 6 (5) of the Unfair Market Practices Act.

by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted[48].

The main problem in applying the prohibition of misleading omissions is related to determining whether given information may be regarded as material or not. Article 7 (5) of the UCP Directive indicates that information requirements established by Community law in relation to commercial communication including advertising or marketing, in the form of a non-exhaustive list contained in Annex II to the Directive, shall be regarded as material. The Polish act instead refers to other provisions setting out information requirements[49], which themselves are often the national implementations of the EU rules indicated in Annex II. These regulations are of particular importance for advertising in the banking sector, e.g. for advertisements of the consumer credit[50].

It is worth noting that Article 3 (9) of the UCP Directive allows Member States, to impose requirements which are more restrictive or prescriptive than the UCP Directive in relation to 'financial services', as defined in Directive 2002/65/EC[51]. Nevertheless, the Polish act upholds its general character without imposing specific requirements on financial services and advertising in this sector.

3.3.2. Examples of misleading omissions in advertising

A) Telecommunications advertisements

A telecom provider advertised a service, which allowed to make phone calls at the unified price of 0,29 PLN per minute to everyone[52]. The advertising did not mention that this was in reality an average price per minute after the activation of a supplementary service. The President of the UOKiK stated that price plays the central role for the consumer and it constitutes the first element in advertising the consumer pays attention to. The assessed advertisement contained a clear and logically unequivocal content on a very attractive price. Even if it is obvious that an advertisement may not cover all information due to the medium used for communication and although it focuses on the most important and most attractive information, the information may still not be incomplete or untrue.

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[48] Article 6 (6) of the Unfair Market Practices Act.

[49] Article 6 (2) of the Unfair Market Practices Act.

[50] See Article 4 of the Directive 2008/48/EC on consumer credit; Article 7 and Article 8 of the Act on Consumer Credit.

[51] See P. ROTT: A plea for specific treatment of financial services in unfair commercial practices law. *EUVR* 2013/2. 61–68.

[52] Decision of the President of the UOKiK nr RWA-20/2011.

The omission of any mention, for example in the form of an asterisk, that the indicated price is not a standard offer is to be assessed as an omission of material information. The reference to terms and conditions does not change the assessment, as the consumer does not have to seek material information on the advertised offer. A fine of 1 859 067 PLN was imposed.

The advertising campaign of the service "Family network", whereby a consumer could create a network of 3 phone numbers with reduced call prices, was also considered to be unfair[53]. The President of the UOKiK decided that indicating that the service was available for all customers, while in reality family members using many other tariffs were excluded, was a misleading omission of material information. The potential availability for all members of the family is essential for the average consumer and the advertisement as a whole must be taken into account, including the name of the campaign. The proceedings ended with a commitment decision.

B) Banking advertisements

One part of the already discussed decision concerning an advertisement of consumer credit, in which it was indicated that an interest rate of 6% applies without any asterisk, was declared a misleading omission[54]. The advertisement did not inform that the starting date of the annual percentage yield was a fixed date, not the moment of the signing of the contract, which is the standard solution. In the opinion of the President of the UOKiK, even if the decision regarding the scope of substantive information is up to the trader, the content of an advertisement must be assessed separately in each case as no positive obligations are imposed by the prohibition of misleading omissions. In this case, information on a fixed date could make the offer less profitable and was thus relevant to the average consumer. Taking into account the specific form of the communication, it was possible to easily convey it. For both the misleading action and the omission a fine of 5 712 365 PLN was imposed on the trader, which constituted 0.1% of the revenue generated in the previous year.

[53] Decision of the President of the UOKiK nr RPZ 28/2010.

[54] Decision of the President of the UOKiK nr 33/2008.

3.4. Other forms of unfair advertising

3.4.1.Provisions on unfair advertising

An advertisement of telecom and banking products may be assessed not only as misleading but also as otherwise unfair, on the basis of the general clause in particular. According to the Article 5 (1) and Article 5 (2) of the UCP Directive a commercial practice is unfair if it is contrary to the requirements of professional diligence, and it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers. The Polish general clause makes the unfairness of a commercial practice dependent on its inconsistency with *bonos mores* (*dobre obyczaje*, good practice, *Gute Sitten*), and not with the requirements of professional diligence as the UCP Directive does, which does not, however, preclude reaching the same conclusions in an individual case.

Hence, the general unfairness of advertising in the analysed sectors is predominantly assessed on the basis of the Code of Ethics in Advertising which in its Article 2 (1) requires that market practices be performed in accordance with *bonos mores* and with a due sense of social responsibility.

3.4.2. Examples of unfair advertisements

A) Telecommunications advertisements

An online advertisement presenting dogs in an animal shelter with the slogan "Test Play (MN: Play is a telecom provider) for 1 PLN. You can always get rid of it" was assessed as promoting attitudes calling the rights of animals in question[55]. Due to the fact that the advertising was removed from the web before the adjudication, the Advertising Ethics Committee only stated that the advertisement affected the social attitudes and that the advertiser should take into account the fact that animals are not things.

Another commercial presented a sad woman sitting on the edge of a bed and a half-naked man lying in the bed. The accompanying slogan stated "He established his own company and he always finishes whenever he wants to"[56]. In the opinion of the Advertising Ethics Committee this advertising was contrary

[55] Adjudication of the Advertising Ethics Committee Nr ZO/52/10 of 4 August 2010.

[56] Adjudication of the Advertising Ethics Committee NR ZO 65/12 of 24 May 2012.

to good practices and showed a lack of social responsibility. It also conveys a message which is discriminatory against women.

In a recent decision, the Advertising Ethics Committee judged that commercial of telecom provider using a simplified portrait of Lenin was unfair and displayed a lack of due sense of social responsibility[57]. It thus might threaten the moral development of children and adolescents. The usage of the image of Lenin is contrary to national values, and demonstrates in particular a lack of respect towards people who died due to Communism or were otherwise harmed by it.

B) Banking advertisements

An advertisement of a bank with an attractive lady asking "Have you never ever done THIS at a cash desk?", which was shown at the cash desks in a famous chain of bookstores, was assessed as unfair[58]. According to the Advertising Ethics Committee it was against good practice and contained discriminatory content. Additionally, the Committee asked the advertisers not to use the sexuality of women and men if the character of the product did not justify such a practice.

An advertising with the slogan "A good bank is like a man, both have to earn money" was also assessed as a violation of the Code of Ethics in Advertising[59]. In the opinion of the Advertising Ethics Committee it reinforced the stereotypes, which might in particular have a bad influence on children and adolescents because of presenting the value of men or women only through their ability to earn money.

4.Conclusions

To advertise in a fair and effective way in Poland seems to be a mission: impossible due to the complexity of the regulations, the national mode of application of the European rules and the unpredictability of complaints.

Firstly, since the Unfair Market Practices Act and the Code of Ethics in Advertising apply to all sectors of the economy, the telecommunications and the banking sector face the same challenges as regards unfair B2C advertising. Nevertheless, the sector-specific provisions which exist in both Polish legislative acts and in self-regulatory instruments need to be taken into account. Moreover,

[57] Adjudication of the Advertising Ethics Committee Nr ZO 45/13 of 28 March 2013.

[58] Adjudication of the Advertising Ethics Committee Nr ZO 100/12 of 29 August 2012.

[59] Adjudication of the Advertising Ethics Committee Nr ZO/08 of 2 April 2008.

even if the scheme of assessment is similar irrespective of the sector, the nature of the advertised product does matter. The product itself is of importance for the clarification of the attitude of the average consumer towards a given advertisement. Also, the detriment caused by the decision to make the purchase differs depending on the product. This is particularly important for complex products with high levels of risk to consumers, such as certain financial services products.

Secondly, the Polish legal system is highly influenced by the European solutions regarding the rules on B2C advertising in the telecommunications and banking sectors. Not only is the general Unfair Market Practices Act almost identical with the UCP Directive, but also the sector-specific rules and self-regulation were created on the basis of EU regulations and European initiatives. The application of these approximated rules appears, however, to have a distinct national character as regards e.g. the evaluation of the average consumer and the enforcement rules.

The standard of the average Polish consumer, as established by the relevant authority, is decisive for the assessment of unfairness. The average Polish consumer of telecommunications and banking products was already analysed in detail and the outcome of this evaluation was optimistic, thus comforting both consumers and businesses. As the average Polish consumer is considered to be reasonable, simplified advertising for dummies is not necessary.

The application or even applicability of the rules on B2C unfairness is created by the national enforcement rules. In Poland, the trader may, in general, expect disputes with consumers, competitors and organisations defending the interests of the aforementioned groups taking place before civil or criminal courts, the administrative authorities, or by way of self-regulation. The frequency of the application of these various modes of enforcement differs. In Poland, it is primarily the President of the UOKiK that makes practical use of the Unfair Market Practices Act. Because of the restrictive sanctions, the administrative enforcement may be considered dissuasive. The self-regulatory mechanism constitutes an effective and common way to combat unfair competition as well, due to the short duration of the proceedings and the ease of filing a claim. The Advertising Ethics Committee imposes in its extremely brief adjudications simple but burdensome penalties such as modification or cessation of an unfair advertisement.

Thirdly, the advertisers can never predict what the consumers may actually perceive as misleading. A recent claim with a reference to Hungary may serve as an example. A commercial with Chuck Norris playing himself used the

slogan "In our bank everyone can be like Chuck Norris and take a credit for a pretty large renovation"[60]. A consumer claimed the misleading character of this advertisement suggested that a US-citizen who lives in the US without a fixed income may get a credit in Poland and he – the claimant – despite a Polish citizenship and fixed income may not because he lives in Hungary.

Also the creativity of consumer claims may often surprise the traders. A Polish consumer filed a claim against a TV advertisement of a car insurance offered by a bank, in which a man was talking with a friend using a mobile phone while driving, saying that three suspicious lumberjacks holding axes are sitting next to him[61]. The consumer did not make a reference to the issue of violence but instead pointed out that the commercial showed simultaneous driving and phoning, which was forbidden by Polish law.

Consumer protection is of obvious importance. Nevertheless, the national law may not over-protect the consumer by imposing more and more obligations on the advertisers, thus eventually causing a general reduction of advertising. This is not a claim for limiting the scope of B2C unfairness. Still, the consumer not only needs fair advertising, but also attractive advertising. The line between fair and unfair has to be set rationally at the national level so that the regulations protect from unfair and not from interesting advertising. For that purpose, it is the standard of the average consumer which ensures the protection of both the consumers' and traders' interests. Moreover, a rational attitude towards the problem can be expected from the enforcers themselves. In the abovementioned cases, both the Chuck Norris and the lumberjacks commercials were assessed as fair.

All things considered, fair and, at the same time, efficient advertising of telecommunications and banking products in Poland certainly is a mission: possible.

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[60] Adjudication of the Advertising Ethics Committee Nr ZO 37/13 of 21 March 2013.

[61] Adjudication of the Advertising Ethics Committee Nr ZO 09/10 of 9 February 2010.

CONSUMER PROTECTION IN THE UNITED STATES: AN OVERVIEW

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1. Introduction

The history of consumer protection in the United States is the story of specific formal legal responses to crises and emergencies that generate great public outrage and require a public response. This pattern began against the background of the 19th century common law, which emphasized freedom of contract and caveat emptor (let the buyer beware). Over time, specific crises and political events led to both the creation of government bureaucracies with jurisdiction over specific products and practices affecting consumers and a broad array of private rights of actions where consumers can sue for damages, injunctions, attorney fees, and litigation costs if they can show harm from the illegal practice.

One of the earliest examples was the deplorable conditions in the American meat packing industry which were exposed by Upton Sinclair in his best selling 1905 novel *The Jungle*. The outrage generated by Sinclair and other investigative writers led to the creation of the Food & Drug Administration and the first comprehensive inspection and regulation of food safety in the United States. The early portion of the 20th Century, including both the Progressive Era and

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the New Deal Era of President Franklin Roosevelt, led to a further growth of a large number of federal, state, and local regulatory agencies and laws, many of which dealing with consumer protection.

However, the modern consumer protection movement began in the 1960s with to the promotion of a Consumer Bill of Rights by President Kennedy, the growth of the so-called "Great Society" program of the Johnson Administration, and the efforts of Ralph Nader and other consumer advocates to highlight the existence of unsafe products and the need for greater government regulation.

The result is that American consumers are protected from unsafe products, fraud, deceptive advertising, and unfair business practices through a mixture of national, state, and local governmental laws and the existence of many private rights of actions. These public and private rights both protect consumers and, at a formal level, equip them with the knowledge they need to protect themselves. Although U.S. mechanisms for consumer protection often exist separately from each other, what the overall scheme lacks in centralization, it gains in depth and variety of protection. Its strength is the array of governmental actors, formal legal rights, and remedies protecting consumers. Its weakness lies in the unequal reality of who has access to the government and the courts.

2. Federal Mechanisms for Consumer Protection

The principal, but not the only, consumer protection agency at the federal level is the United States Federal Trade Commission ("FTC").[1] This section outlines the powers and remedies of the FTC in the consumer protection area and then briefly describes some of the other federal agencies with significant consumer protection responsibilities.

[1] The United States Federal Trade Commission also jointly enforces U.S. federal civil competition law along with the Antitrust Division of the Justice Department. See generally Stephanie KANWIT, FEDERAL TRADE COMMISSION (2010); AMERICAN BAR ASSOCIATION, ANTITRUST SECTION, FTC PRACTICE AND PROCEDURE MANUAL (2007). The web site for the Federal Trade Commission covering both its competition and consumer protection activities can be found at http://www.ftc.gov.

2.1. Federal Trade Commission

The United States Federal Trade Commission (FTC) works alone, and in concert with other federal agencies, to administer a wide variety of consumer protection laws. The overall goal is to afford consumers a deception-free marketplace and provide the highest-quality products at competitive prices. The FTC is an independent federal agency with five Presidentially-appointed, Senate-confirmed commissioners who each serve seven-year terms.[2] No more than three commissioners may be members of the President's political party. Created in 1914, the FTC has two principal goals:

1. to protect consumers by preventing fraud, deception, and unfair business practices in the marketplace and
2. to maintain competition by preventing anticompetitive business practices.

The FTC's Bureau of Consumer Protection aims to achieve the first goal, and is the focus of this section.[3]

2.1.1. The FTC's Jurisdiction

The FTC derives its consumer protection authority primarily from Section 5(a) of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce."[4] According to the FTC, deception occurs when there is a material representation, omission, or practice that is likely to mislead a consumer who is acting reasonably under the circumstances. Unfair practices are those which cause, or are likely to cause, reasonably unavoidable and substantial injury to consumers without any offsetting countervailing benefits to consumers or competition.

In addition to its authority under Section 5(a), the FTC has enforcement and administrative abilities under forty- six other statutes, thirty-seven of which relate to the FTC's consumer protection mission. Among these laws are credit-related acts, such as the Truth in Lending Act, Fair Credit Billing Act, Fair Credit Reporting Act, and the Equal Credit Opportunity Act, as well as continuing enforcement of industry-specific acts, such as the Petroleum

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[2] Biographies of the current commissioners can be found at http://www.ftc.gov/commissioners/index.shtml.

[3] For more information on the relationship between consumer protection and competition law in the United States, see Spencer Weber Waller: In Search of Economic Justice: Considering Competition and Consumer Protection Law. Loyola *Consumer Law Review,* 36, (2005) 631., *also available at* http://ssrn.com/abstract=726512.

[4] 15 U.S.C. § 45(a)(1).

Marketing Practices Act, and the Comprehensive Smokeless Tobacco Health Education Act of 1986, and additional laws relating to consumer privacy such as the Do-Not-Call Registry Act of 2003, and the Controlling the Assault of Non-Solicited Pornography and Marketing ("CAN-SPAM") Act of 2003.

2.1.2. FTC Investigation and Enforcement Authority

The FTC uses its investigative authority to uncover deception, unfair activities, or violation of any statute under which it has authority. The Bureau of Consumer Protection may issue civil investigative demands ("CIDs") to explore possible violations.[5] Like a subpoena, a CID can compel the production of existing documents or oral testimony, while also requiring that a recipient file written reports or responses to questions.[6] Investigations can be triggered by Presidential or Congressional requests, court referrals, consumer complaints, or internal research.

Upon completion of an investigation, if the FTC has reason to believe that a violation exists, and that enforcement is in the public interest, it may issue a complaint to the violating person, partnership, or corporation. A hearing will be held in front of an Administrative Law Judge ("ALJ"), and if the actions at issue are deemed a violation, the ALJ may recommend entry of a cease and desist order.

Cease and desist orders are the FTC's primary tools to stop anti-consumer practices. If a party violates a cease and desist order, the FTC is authorized to use the courts to seek civil penalties and restitution for consumers who are harmed.

A party may appeal an order to the full FTC, then the federal appellate court, and eventually the Supreme Court of the United States, if it chooses to accept the case. If neither party appeals the order, it becomes final within sixty days of being issued. Once final, a respondent's violation of the order could bring a civil penalty of up to $10,000 per violation. A non-respondent who has actual knowledge and violates Commission standards articulated in an order may also be subject to fines.[7]

The FTC further has the authority to make trade regulation rules that specifically define unfair or deceptive trade practices. For example, according to the FTC Telemarketing Sales Rule, it is deceptive when a telemarketer fails

[5] 15 U.S.C.A. § 57b-1(c)(1).

[6] 15 U.S.C.A. § 57b-1(c)(1).

[7] 15 U.S.C.A. § 45 (l).

to truthfully disclose the cost of products or services, or the nature of certain return policies.[8] Knowingly violating FTC trade regulation rules may result in a civil penalty of up to $10,000 per violation.[9]

The FTC also can make victimized consumers whole through restitution and force wrongdoers to disgorge their ill-gotten gains.[10] The FTC seeks these remedies when it can objectively determine a clear violation of a law and reasonably calculate the damages payment. However, where the FTC determines that private actions or criminal proceedings will result in complete relief for the consumer, it may choose not to use the restitution or disgorgement remedies. Finally, if the FTC has reason to believe that a party is violating, or will violate a law, it may seek a preliminary or permanent injunction from the federal district court to prevent the violation from occurring.[11]

The FTC does not have the power to bring criminal charges. Any such federal cases in the consumer protection area would be brought in federal courts by the U.S. Department of Justice. A defendant can be convicted of a criminal offense only upon proof beyond a reasonable doubt before a judge or jury.

2.1.3. Carrying Out the FTC Mandate

Seven divisions of the Bureau of Consumer Protection carry out the FTC's mandate to protect consumers against unfair, deceptive, or fraudulent practices. These divisions include: Advertising Practices, Financial Practices, Marketing Practices, Privacy and Identity Protection, Planning and Information, Consumer and Business Education, and Enforcement.

The Division of Advertising Practices works to prevent false advertising claims, particularly when the claims affect health and safety or cause economic injury. In addition to advertising claims regarding dietary supplements, weight loss products, alcohol, and tobacco, this Division also monitors the marketing of food, violent movies, as well as music and electronic games to children.

Until 2010, the Division of Financial Practices of the FTC was the only agency specifically protecting consumers from fraud or deceptive practices in the financial services industry. Credit card offers, mortgage practices, and debt collection practices were all covered by this Division. These functions are now carried out jointly with the Consumer Financial Protection Bureau created

[8] 15 U.S.C.A. § 6102(a)(3)(C).

[9] 15 U.S.C.A. § 45 (l).

[10] 15 U.S.C. § 53(b).

[11] 15 U.S.C.A. § 45.

by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009 discussed below.[12]

The Division of Marketing Practices addresses the marketing of products and services over the Internet, the telephone, or through the mail. This Division has issued a number of trade regulation rules to address marketing practice concerns. For instance, the Telemarketing Sales Rule governs when and how marketers may use the telephone for sales pitches. Other rules, such as CAN-SPAM Rules, the Franchise and Business Opportunity Rule, the 900 Number Rule, and the Funeral Rule outline proper methods for how, when, and to whom products or services may be marketed.

The newest division, the Division of Privacy and Identity Protection, protects consumers' personal information from being used improperly, and works to ensure that companies with access to that information, such as credit card companies, keep it secure. The FTC also maintains a website wholly dedicated to preventing identity theft.[13]

The Division of Planning and Information manages the Consumer Response Center and the Consumer Sentinel database. The Consumer Response Center receives and addresses consumer complaints via the phone or mail, while the Consumer Sentinel is a central database which contains over 3.5 million fraud and identity theft complaints. The Sentinel website analyzes complaint data to better understand and prevent fraud and identity theft.

Finally, the Division of Consumer and Business Education seeks to equip consumers with the skills to protect themselves by disseminating information to consumers through a myriad of media, including print, broadcast, and electronic outlets. Recent education efforts include the creation of industry-specific websites to educate consumers about how competition in the healthcare, real estate, oil and gas, and technology marketplaces can result in better products at lower prices. When a survey showed that Hispanics were more than twice as likely than non-Hispanic whites to be victims of consumer fraud, the Division extended its outreach by releasing its educational materials in both Spanish and English. The Division also educates young consumers to be smarter shoppers through publications such as "The Real Deal," a booklet that teaches through the use of games, puzzles, and cartoons.[14]

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[12] See Section IC, *infra*.

[13] http://www.ftc.gov/bcp/edu/microsites/idtheft/.

[14] See http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen16.pdf.

A list of the most frequent consumer complaints gives a quick sense of the agency priorities in recent times. In 2012, the top fifteen categories of consumer complaints[15] were:

Rank	Category	No. of Complaints	Percentages
1	Identity Theft	369,132	18%
2	Third Party and Creditor Debt Collection	199,721	10%
3	Banks and Lenders	132,340	6%
4	Shop-at-Home and Catalog Sales	115,184	6%
5	Prizes, Sweepstakes and Lotteries	98,479	5%
6	Imposter Scams	82,896	4%
7	Internet Services	81,438	4%
8	Auto Related Complaints	78,062	4%
9	Telephone and Mobile Services	76,783	4%
10	Credit Cards	51,550	3%
11	Foreign Money Offers and Counterfeit Check Scams	46,112	2%
12	Advance Payments for Credit Services	42,974	2%
13	Television and Electronic Media	41,664	2%
14	Health Care	35,703	2%
15	Mortgage Foreclosure Relief and Debt Management	33,791	2%

These categories of complaints have been quite stable over the past few years.

An example of a successful major FTC initiative that goes beyond dealing with individual law enforcement and complaint resolution came through rule making and innovative market oriented solution in the area of consumer privacy. Prior to 2003, a major annoying fact of American life was the unsolicited telemarketing call where dinner, family, or sleep time would often be disrupted by one or more unsolicited telephone calls seeking to sell unwanted products and services. Typically, these could be credit card offers, insurance deals, newspaper subscriptions, and sometimes outright solicitations for fraudulent schemes.

These calls had grown so invasive that a Time magazine internet poll named telemarketing the fourth worst invention of the 20th Century. By 2003, twenty-seven states tried to help by creating their own Do Not Call Registries, compilations of individual phone numbers that are off-limits from telemarketers, but individual state efforts could not solve what was a problem of national scope.

[15] A complete list of complaints can be found at: http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf.

The FTC had already implemented a Telemarketing Sales Rule in 1995 that governed certain aspects of unsolicited calls, but in 1999 the agency began to investigate possible changes to better protect consumers. After spending three years studying consumer concerns and hearing commentary from interested parties, the FTC published a newly amended Telemarketing Sales Rule on January 29, 2003, complete with Do Not Call Registry provisions.[16] Through this new rule, Americans could end unwanted telemarketing calls with one free phone call to the FTC or though registration through the FTC web site.

When the FTC opened the Registry on June 27, 2003, Americans immediately took advantage of the free service. Less than three months after it opened, over 50 million phone numbers had been registered. On July 27, 2010, 200 million phone numbers were registered on the Do Not Call Registry, indicating the effectiveness of this consumer protection initiative.[17]

2.2. Other federal agencies

Other federal agencies also play an important role in protecting consumers. The U.S. Consumer Product Safety Commission ("CPSC") has the mandate of reducing injury or death caused by consumer products.[18] The CPSC develops product standards for manufacturers while also conducting recalls of any products that could, or do, cause harm.

The CPSC does not however have jurisdiction over all consumer products. For example, food, drug, cosmetic and medical device safety is the focus of the U.S. Food and Drug Administration ("FDA").[19] A major recent initiative of the FDA has been to more deeply regulate the tobacco industry. As a result of the 2009 Tobacco Control Act,[20] the FDA has important new authority to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health generally and to reduce tobacco use by minors. The new law contains restrictions on the use of "Light," "Mild," "Low," or similar

16 See http://www.ftc.gov/donotcall.

17 See *http://www.ftc.gov/bcp/menus/consumer/phone/dnc.shtm*. See generally Douglas C. NELSON: The Do-Not-Call Implementation Act: Legislating the Sound of Silence. Loyola Consumer Law Review, 16, (2003) 63.

18 http://www.cpsc.gov/.

19 http://www.fda.gov/.

20 Family Smoking Prevention and Tobacco Control Act, P.L. 111-31, 111th Cong., 1st Session.

descriptors in the labeling or advertising of tobacco products.[21] The law also grants the FDA new powers to impose civil penalties and even forbid tobacco sales by retailers who fail to comply with age limits and age identification rules regarding tobacco sales to minors.

The National Highway Traffic Safety Administration ("NHTSA") covers automobile, truck, and motorcycle safety.[22] Its consumer protection powers derived from public scandal in the mid-1960s. In the 1950s and 1960s automobiles were designed for style, not safety. Even with accident prevention and driving improvement efforts, automobiles remained the leading cause of death for the population below age forty-four in the 1960s, with about 50,000 vehicular deaths in 1965.[23]

The consumer advocate Ralph Nader made automobile safety a major priority of his grass roots efforts. Nader exposed automobile safety design weaknesses in the April 11, 1959 issue of *The Nation*, and urged that the automobile industry could better prevent injury and death by focusing on crash protection over chrome and styling. Nader's ideas gained national attention when his book, *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile*, was published in 1965.

Senator Abraham Ribicoff of Connecticut prepared hearings on the government's role in traffic safety, assisted by Nader. As Senator Ribicoff's subcommittee questioned automobile executives about the industry's comparatively small investment in safety features despite billions in profits, media interest grew, and the public increasingly favored safety legislation. Accordingly, the White House introduced a car safety bill in 1966 and President Lyndon Johnson called for an end to "the slaughter on our highways."[24] Not to be outdone for their work, Nader, Ribicoff, and others immediately pushed for better protection through an even stronger law.

Eventually, the National Traffic and Motor Vehicle Safety Act was passed unanimously by the U.S. Congress, and on September 9, 1966, President Johnson signed it into law. For the first time in U.S. history the automobile industry

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21 http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm214597.htm.

22 http://www.nhtsa.gov/.

23 Committee on Trauma and Committee of Shock: *Accidental Death and Disability: The Neglected Disease of Modern Society.* National Academy of Sciences, 1966. 8.

24 Lyndon B. Johnson, Remarks Upon Proclaiming National Defense Transportation Day and National Transportation Week (Apr. 22, 1966) (transcript at http://www.presidency.ucsb.edu/ws/index.php?pid=27556).

was subject to unified standards through federal oversight of automobile safety, and cars began to include head rests, energy-absorbing steering wheels, shatter-resistant windshields, and safety belts. Thanks to these changes, and other road safety innovations, motor-vehicle-related death rates began to recede by 1970. [25]

The Federal Communications Commission ("FCC") has broad jurisdiction over broadcast communications and communication common carriers.[26] The FCC has a Consumer and Governmental Affairs Bureau that ensures that consumer interests are considered in FCC decisions. The Bureau also monitors and resolves consumer complaints regarding communications services. Similarly, virtually every federal executive branch and independent agency has some similar office or bureau designed to advance consumer interest in its particular field.[27]

2.3. The Bureau of Consumer Financial Protection

The most significant change in federal consumer protection came this past year as a result of the worldwide financial crisis. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009 ("Dodd-Frank Act")[28] contains a provision, entitled the "Consumer Financial Protection Act of 2010" which established an independent entity within the Federal Reserve System, the Bureau of Consumer Financial Protection ("the Bureau").[29] The new bureau eventually will have a budget of up to $500 million and will consolidate various consumer protection functions now being performed by the FTC and other federal agencies such as the Federal Reserve, the Federal Deposit Insurance Corporation, and the Department of Housing and Urban Development.[30]

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25 Ralph NADER: *The Ralph Nader Reader*. 2000.; Jerry L. MASHAW – David L. HARFST: *The Struggle for Auto Safety*. 1990.; John D. GRAHAM: Auto Safety: *Assessing America's Performance*. 1989.

26 http://www.fcc.gov/.

27 All federal resources for consumers may be reached via www.consumer.gov.

28 For an analysis of the full financial reform provisions of the new legislation see David SKEEL: The New Financial Deal: Understanding the Dodd-Frank Act and its (Unintended). *Consequences* (2010).

29 Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173 §1011(a), 111th Cong. (2nd Sess. 2010) (enacted).

30 John E. VILLAFRANCO – Kristin A. MCPARTLAND: *New Agency, New Authority: What You Need to Know About the Consumer Financial Protection Bureau*. The Antitrust Source, Dec. 2010. *available at* http://www.abanet.org/antitrust/at-source/10/12/Dec10-Villafranco12-21f.pdf.

2.3.1. Powers of the Bureau

The Bureau is charged with:

> Conducting financial education programs; collecting, investigating, and responding to consumer complaints; collecting, researching monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets; supervising covered persons for compliance with Federal consumer financial law; and issuing rules, orders, and guidance implementing Federal consumer financial law.[31]

The Bureau has broad supervisory powers over "nondepository covered persons" and over large banks, credit unions, and savings associations. A nondepository covered person is a person to who provides "brokerage or servicing of loans secured by real estate for use by consumers", who "offers or provides to any consumer any private education loan," "offers or provides to a consumer a payday loan," and that the bureau has cause to believe "has engaged in conduct that poses risks to consumers."[32] The Bureau is authorized to collaborate with the Federal Trade Commission or any other Federal or State agency that may assist it in carrying out its supervisory tasks.[33]

With regard to large banks, saving associations, and credit unions, the Bureau has exclusive authority to examine any insured institution with total assets of more than $10 billion any affiliate thereof.[34] Institutions with less than $10 billion in assets are subject to oversight by the Bureau, but only so far as necessary to support the implementation of Federal consumer financial laws and to determine risks to consumers and consumer financial markets.[35]

The Bureau is charged with regulating "the offering and provision of consumer financial products or services under the Federal consumer financial laws."[36] The statute explicitly defines the "consumer financial products" that are regulated by the Bureau. Financial products include "extending credit and

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[31] H.R. 4173 Title X Subtitle B § 1021(c)(1-5).

[32] H.R. 4173 Title X Subtitle B § 1024(a)(1)(A-E).

[33] H.R. 4173 Title X Subtitle B § 1024(c).

[34] H.R. 4173 Title X Subtitle B § 1025(a)(1-2).

[35] H.R. 4173 Title X Subtitle B § 1026(a-b).

[36] H.R. 4173 Title X Subtitle A § 1011(a).

servicing loans," "extending or brokering leases of personal or real property," "providing real estate settlement services […] or performing appraisals of real estate or personal property," "engaging in deposit taking activities," "selling, providing, or issuing stored value or payment instruments," "providing check cashing, check collection, or check guaranty services," "providing financial advisory services to consumers on individual financial matters," and other similar financial instruments and activities.[37]

The Bureau is also granted the power to include other financial products or services under its scope as it sees fit.[38] Similarly, the bill goes to great length to identify those previously enacted consumer laws, which will now be enforced by the Bureau. These "enumerated consumer laws" include the Alternative Mortgage Transaction Parity Act of 1982, the Consumer Leasing Act of 1976, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Truth in Lending Act, the Truth in Savings Act, among others.[39]

If the Bureau finds an organization to be in violation of a federal consumer financial protection law, it has enforcement authority to pursue actions against that entity.[40] Additionally, the Bureau is required to coordinate its enforcement activities with the FTC. The agencies may take joint or individual actions against an entity in violation of any of the consumer financial protection laws.[41] The Bureau's main enforcement power is the power to bring a civil lawsuit against the entity for any violation of any provision of federal law under its jurisdiction.[42] Such a suit may be brought independently of or in conjunction with charges brought by the FTC.

2.3.2. Specific Bureau Activities

The Bureau may take any action allowable under the statute "to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer."[43] The Bureau may prescribe and apply any rules or require any public disclosures it deems necessary to carry out this obligation.[44]

[37] H.R. 4173 Title X § 1002(15)(A)(i-x).

[38] H.R. 4173 Title X § 1002(16)(A)(xi).

[39] H.R. 4173 Title X § 1002(12)(A-R).

[40] H.R. 4173 Title X Subtitle B § 1024(c)(1).

[41] H.R. 4173 Title X Subtitle B § 1024(c)(3)(A).

[42] H.R. 4173 Title X Subtitle B § 1024(c)(3)(B).

[43] H.R. 4173 Title X Subtitle C § 1031(a).

[44] H.R. 4173 Title X Subtitle C § 1031-32. The rulemaking will require both formal and informal

Additionally, the Bureau requires that a covered person make available to consumers any information concerning a financial product or service that the consumer obtained from the covered person, excepting any confidential information and information that cannot be retrieved in the ordinary course of business.[45]

Finally, the Secretary of the Treasury, in consultation with the Director of the Bureau is required to appoint a "Private Education Loan Ombudsman" to provide assistance to borrowers of private education loans.[46] This Ombudsman is charged with collaborating with the Department of Education to oversee the distribution of loans and provide assistance to borrowers of private or Federal education loans.[47] Additionally, the Ombudsman is required to respond to borrower complaints and to make recommendations to the Director, Secretary of the Treasury, Secretary of Education, Committee on Banking, Housing, and Urban affairs and the Committee on Health, Education, Labor and Pensions of the Senate and the Committee on Financial Services and the Committee on Education and Labor of the House of Representatives.[48]

2.3.3. Specific Enforcement Powers

The Bureau has a variety of mechanisms for enforcing the federal consumer financial laws. The first is general investigatory powers. The Bureau can appoint an investigator to conduct an inquiry into whether any person has violated a law or provision. A Bureau investigator holds subpoena power over witnesses and documents in connection with any investigation or hearing over a suspected offender.[49]

After investigation, the Bureau may determine that further adjudication is required, at which point it can subpoena evidence in formal hearings. [50] The hearing serves as a trial to determine whether the covered person is guilty of a violation. Decisions by the Board are appealable to the United States Court of Appeals for the circuit where the principal office of the covered person is located.[51] Should the offending party be found guilty, the penalty is a monetary

coordination with the Federal Trade Commission. See VILLAFRANCO–MCPARTLAND op. cit. 5.

45 H.R. 4173 Title X Subtitle C § 1033(a-b).

46 H.R. 4173 Title X Subtitle C § 1035(a).

47 H.R. 4173 Title X Subtitle C § 1035(c)(1-2).

48 H.R. 4173 Title X Subtitle C § 1035(c)(3-4).

49 H.R. 4173 Title X Subtitle E § 1052(a-b)

50 H.R. 4173 Title X Subtitle E § 1053.

51 H.R. 4173 Title X Subtitle E § 1053(b)(3).

civil penalty and possibly a referral for criminal proceedings as well.[52]

Since its creation in 2010, the Bureau has pursued several major settlements against companies engaging in deceptive and unfair credit and lending practices. In 2012, Discover Bank agreed to pay a $14 million penalty in addition to $200 million in restitution to 3.5 million customers for engaging for using deceptive sales practices to mislead consumers into paying for credit card add-on products.[53] The Bureau has also prohibited a company in Florida from engaging in any debt-relief sales or advertising for illegal debt-relief practices.[54] Most recently, the Bureau obtained a $6.5 million refund from U.S. Bank to service members who participated in the Military Installment Loans and Education Services auto loan program.[55]

2.3.4. Structure Of The Bureau

President Obama has appointed Richard Cordray[56] to be the first director of the Bureau in January 2012.[57] The Bureau is led by a Director who is appointed by the President with the advice and consent of the Senate for a five-year term.[58] The Director is charged with establishing the departments within the Bureau, which will assist with carrying out the Bureau's mandate.[59]

There are three "Specific Functional Units": Research, Community Affairs, and Complaint Collection and Tracking.[60] In addition to these units there are

[52] H.R. 4173 Title X Subtitle E § 1055–56.

[53] *See* Press Release, Federal Deposit Insurance Corporation and Consumer Financial Protection Bureau Order Discover to Pay $200 Million Consumer Refund for Deceptive Marketing (Sept. 24, 2012), http://www.consumerfinance.gov/pressreleases/discover-consent-order/.

[54] Press Release, CFPB takes action to stop Florida company from engaging in illegal debt-relief practices, (May 30, 2012) http://www.consumerfinance.gov/pressreleases/cfpb-takes-action-to-stop-florida-company-from-engaging-in-illegal-debt-relief-practices/.

[55] See Press Release, CFPB orders auto lenders to refund approximately $6.5 million to servicemembers, (June 27, 2013) http://www.consumerfinance.gov/pressreleases/cfpb-orders-auto-lenders-to-refund-approximately-6-5-million-to-servicemembers/.

[56] Cordray was previously the Attorney General of Ohio, and previously taught as an adjunct professor at Ohio State University School of Law. Prior to Cordray's appointment consumer advocate and Harvard Law Professor Elizabeth Warren served as a special advisor to the President and the Treasury Department during the creation of the Bureau. Ms. Warren is now an elected member of the United States Senate.

[57] Helene COOPER – Jennifer STEINHAUER: Bucking Senate, Obama Appoints Consumer Chief. *The New York Times,* Jan. 4, 2012. *available at* http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html?pagewanted=all&_r=0.

[58] H.R. 4173 Title X Subtitle A § 1011(b-c).

[59] H.R. 4173 Title X Subtitle A § 1011.

[60] H.R. 4173 Title X Subtitle A § 1013(b).

four separate offices within the Bureau: the Office of Fair Lending and Equal Opportunity, the Office of Financial Education, the Office of Service Member Affairs, and the Office of Financial Protection for Older Americans.[61]

The Office of Fair Lending and Equal Opportunity is responsible for overseeing and enforcing any Federal laws "intended to ensure the fair, equitable, and nondiscriminatory to access to credit for both individuals and communities."[62] Additionally, the Office of Fair Lending and Equal Opportunity is charged with coordinating fair lending efforts between the Bureau and other Federal and State agencies, and working with private industry and consumer advocates on the promotion of fair lending compliance and education.[63]

The Office of Financial Education develops and implements "initiatives intended to educate and empower consumers to make better informed financial decisions."[64] Additionally, it is charged with developing programs to improve the financial literacy of consumers through financial counseling, providing information to aid in understanding credit histories and credit scores, and advising consumers with regards to educational expenses, debt reduction, and improving long-term savings strategies.[65]

The Office of Service Member Affairs is responsible for developing and implementing initiatives for military service members and their families to help them make informed decisions with regards to financial products. [66] Similarly, the Office of Financial Protection for Older Americans which provides individuals over the age of 62 with protection from unfair and abusive practices and activities to assist in the financial literacy of senior citizens.[67]

Within the Bureau there have also been established a Consumer Advisory Board and a Consumer Financial Civil Penalty Fund. The Consumer Advisory Board functions to "provide information on emerging practices in the consumer financial products or services industry."[68] The Advisory Board is composed of six members appointed after recommendation by the Federal Reserve Bank Presidents and meets at a minimum of twice a year.[69] The Civil Penalty Fund is

[61] H.R. 4173 Title X Subtitle A § 1013 (c-e, g).

[62] H.R. 4173 Title X Subtitle A § 1013(c)(2)(A).

[63] H.R. 4173 Title X Subtitle A § 1013(c)(2)(B-C).

[64] H.R. 4173 Title X Subtitle A § 1013(d)(1).

[65] H.R. 4173 Title X Subtitle A § 1013(d)(2)(A-F).

[66] H.R. 4173 Title X Subtitle A § 1013(e)(1)(A).

[67] H.R. 4173 Title X Subtitle A § 1013(g)(1).

[68] H.R. 4173 Title X Subtitle A § 1014(a).

[69] H.R. 4173 Title X Subtitle A § 1014(b-c).

maintained in order to provide relief for victims of activities for which charges have been brought against a financial service provider.[70]

While the Bureau is still in its infancy, it is expected to eventually have several hundred employees and with a budget of up to $500 million it will eventually become the largest consumer protection agency in the United States.[71] The Bureau's budget for the fiscal year 2013 totaled $541 million and the estimated budget for fiscal year 2014 is $497 million.[72]

3. State Mechanisms for Consumer Protection

Much like the federal government, state governments act as both consumer law enforcement agencies and consumer advocates, again highly decentralized and without the presence of any single overarching consumer protection department or agency.[73]

3.1. State Level Investigation and Enforcement

In most of the fifty states, the State Attorney Generals are charged with enforcing state consumer protection laws.[74] As consumer advocates for their state populations, Attorney Generals may file lawsuits on behalf of consumers, investigate possible violations, issue injunctions to terminate ongoing illegal activity, obtain restitution on behalf of consumers, bring criminal cases when authorized by law, and make rules to govern trade practices. The National Association of Attorneys General (NAAG) facilitates cooperation among Attorney Generals to enhance their consumer protection effectiveness and

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70 H.R. 4173 Title X Subtitle A § 1017(d)(1-2).

71 Obama Appoints Warren Special Adviser to Set Up New Consumer Protection Bureau. *Antitrust & Trade Reg. Rep.,* 99, (BNA) (Sept. 24, 2010) 367.; Rob LIEBER: Tasks to Get the Consumer Chief Off to a Good Start. *The New York Times,* 7, (Sept. 18, 2010) B1.

72 The Consumer Finance Protection Bureau, Budget Overview *available at* http://www.consumerfinance.gov/strategic-plan-budget-and-performance-plan-and-report/#budget-overview. The decrease represents one-time expenditures that will not occur in 2014.

73 See generally Dee PRIDGEN – Richard M. ALDERMAN: Consumer Protection and the Law (2009); American Bar Association, Section of Antitrust Law, Consumer Protection Law Developments (2009); American Bar Association, Section of Antitrust Law, Consumer Protection Handbook (2004)(each surveying consumer protection law at the state level).

74 See PRIDGEN–ALDERMAN, op. cit. See e.g., Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505 (2010).

support multi-state consumer protection activity and litigation.[75] In larger cities and counties, there may also be a consumer protection division or bureau handling criminal and civil investigations and cases under state or local law.[76]

One of the most successful recent consumer protection initiatives was the joint state-federal National Mortgage Settlement.[77] In 2012, forty-nine state attorneys general and the federal government announced a historic settlement agreement with the five largest mortgage servicing entities in the United States. The settlement has provided over $50 billion in relief to mortgage borrowers and state and federal agencies in connection with allegation over improper mortgage foreclosure practices by the respondents. In the settlement, borrowers received loan modifications, refinancing relief, and payments to those borrowers who lost their homes. In addition, the mortgage servicing firms agreed to nationwide standards for the servicing of both past and future mortgages and the appointment of an independent third-party monitor to oversee and report on compliance with the terms of the settlement.

3.1.1. State Investigative Powers

When State Attorney Generals become aware of a possible violation, the agencies have the authority to issue Civil Investigative Demands, or CIDs. These CIDs may request documents or oral testimony from specific individuals or companies. Attorney Generals may issue CIDs when they have reason to believe a violation has or will occur, and need not have probable cause. Criminal investigations are conducted through the grand jury process and must be proved beyond a reasonable doubt in the appropriate state court before a judge or jury.

3.1.2. Prevention and Enforcement

Most states have statutes prohibiting unfair and deceptive acts and practices modeled to varying degrees on the Federal Trade Commission Act. Under these "Little FTC Acts," each state Attorney General has statutory authority to seek injunctions to remedy unfair or deceptive trade practices. A company may

[75] Information about NAAG's consumer protection efforts can be found at http://www.naag.org/consumer_protection.php.

[76] See e.g., City of Chicago Department of Business Affairs and Consumer Protection, *available at* http://www.cityofchicago.org/city/en/depts/bacp.html. See generally Index of State and Local Consumer Agencies, *available at* http://www.usa.gov/directory/stateconsumer/index.shtml.

[77] *See* http://www.national mortgagesettlement.com/about. http://www.luc.edu/law/centers/investor/national_mortgage.html (full proceeding of conference on first anniversary of settlement analyzing results to date).

face contempt charges if it continues a practice after an injunction has been issued. Attorney Generals may also obtain voluntary assurances of compliance from violating companies. Where state statutes allow, breach of the voluntary assurance is akin to an injunction violation. States also may use civil and criminal penalties to penalize unfair or deceptive trade practices.

Finally, Attorney Generals may seek restitution on behalf of consumers who are victims of fraud and deception. Some states expressly grant Attorney Generals the statutory power to obtain restitution. Other states do so implicitly as a result of state court decisions authorizing such actions. This remedy is especially effective when consumers have been harmed, but monetary damages are not large enough to warrant litigation by private individuals. Restitution is paid directly to affected customers when they can be readily identified and otherwise distributed in lump sums to consumer groups and related nonprofit organizations under the doctrine of cy pres.

In addition to investigatory and enforcement powers, most state consumer protection statutes allow the Attorney General, or other state regulatory or enforcement agency, to create rules that advise businesses of prohibited and acceptable business practices. Approximately twenty states have chosen to create such rules.

3.1.3. State Regulatory Authorities

All states have different systems for addressing the special needs of regulated industries such as energy, transportation, health, and financial institutions. The fifty states have a variety of mechanisms for addressing consumer concerns in these industries, although there is little uniformity between the states or within the same state among the different regulatory structures for each industry.

States also regulate trades and professions through licensing boards and enforcement divisions. These state departments attempt to protect consumers by licensing only qualified individuals to work in specific professions, from health care providers, real estate agents, lawyers, and accountants. Consumers may search state license databases to research potential service providers or lodge a complaint against a licensed professional. Professional licenses can be suspended temporarily or permanently revoked after a hearing with the losing party having a right to appeal within the state court system.

4. Private Rights of Actions for Consumers

As private citizens, Americans use the state and federal court systems to protect themselves from fraud and deceit in the marketplace. At the state level, consumers may use both common law and statutory causes of action such as the Little FTC Acts to bring unsavory merchants into court.[78] Although the federal courts and each state court system operate independently, there are numerous commonalities to the private rights of action protecting consumers.

4.1. Common Law Torts

Common law legal action is one of the oldest forms of consumer protection. Current common law actions provide consumers protection through torts for deceit, fraud, misrepresentation, and breach of warranty.

A consumer may file a lawsuit for deceit or fraud when a vendor intentionally conceals a material fact or makes a false representation of a material fact, knows that the representation is false, and meant to induce the consumer to act based on the misrepresentation. In order for the consumer to be successful in court, a plaintiff must also reasonably rely on the misrepresentation and suffer damage as a result of the reliance. Deceit can occur when a vendor makes a direct false statement, or when a misrepresentation is achieved through silence, concealment, half-truths, or ambiguity about a good or service. While misrepresentation of product facts may bring legal action, mere puffery or opinions are generally not subject to lawsuits for deceit.

If successful in court, a consumer may receive damages for out of pocket losses, rescission of the transaction at issue, damages to ensure the consumer receives the benefit of the bargain, or possibly punitive damages. Most common law consumer protection actions are brought in state court, although actions between citizens of different states can be brought in federal court under certain situations.

[78] For an analysis of how the private enforcement of state consumer protection laws may deviate from the federal FTC Act see Henry N. Butler – Joshua D. Wright: Are State Consumer Protection Laws Really Little FTC Acts? *Fla. L. Rev.* 63, 2011. 163.

4.2. Statutory Causes of Action

Although common law actions have long protected consumers from fraud, it is often burdensome to successfully plead and prove such a case, particularly because a consumer must prove that the seller intended harm. If a common law claim is not possible, consumers may rely on federal or state unfair trade practice statutes to remedy misrepresentations or material omissions.

There is no private right of action under the Federal Trade Act, although there may be private rights under the more specific statutes enforced by the FTC and the new Consumer Financial Protection Bureau. Each state also has some form of consumer protection law, and many are modeled after the Federal Trade Commission Act and prohibit "unfair and deceptive" trade practices. These state laws normally allow consumers to sue for damages and injunctive relief. Consumers have a better chance of success in combating misrepresentations under these statutes because they do not typically require proof that the seller intended harm and often relax other requirements of common law fraud. In addition to protection from unfair and deception trade practices, many states also specifically prohibit certain deceptive pricing, bait and switch tactics, and pyramid sales scheme practices. In addition to preventing the broader harms of "unfair and deceptive" trade practices, state "lemon" laws streamline the remedy process for consumers who purchase a defective new or used car.

4.3. Class Actions and Attorney Fee Shifting

Although filing a lawsuit is an option for combating fraud, when the economic harm is small, expensive litigation is not always a viable option. Class action lawsuits allow victimized consumers with smaller damages to file a lawsuit collectively. However, availability of class action suits also depends on the presence of arbitration clauses ubiquitous in consumer contracts and increasingly common waivers in the arbitration clauses that preclude the right to bring a class action.[79] Bringing a class action lawsuit for common law fraud is difficult because U.S. courts require a high degree of commonality among all the plaintiffs' claims

[79] American Express Co. v. Italian Colors Restaurant, 570 U.S., 133 S.Ct. 2304, 81 U.S.L.W. 4483 (2013).

in order for the class lawsuit to proceed.[80] Still, where there is such commonality, class actions can be a useful tool for consumers to assert their rights.

Attorney fee shifting also makes legal action a possibility for consumers who have suffered low amounts of damages. In the American legal system, each party customarily pays its own legal expenses. However, in many federal and state consumer protection causes of action, and in most class actions, a prevailing party may be entitled to reasonable attorney fees and litigation costs paid by the defendant in addition to any applicable damages. In most circumstances, unsuccessful plaintiffs are not responsible for the attorney fees and costs of the prevailing defendant. Such provisions have the effect of both increasing the incentives to bring such claims and minimizing the cost of a successful lawsuit.

4.4. The Importance of Warranties

Warranties help protect the consumer and guarantee that they receive what they have bargained for even when no misrepresentations about the product were made. Forty-nine states use the framework of the Uniform Commercial Code to protect consumers through express and implied warranties.[81] Express warranties are explicit promises that the manufacturer or seller will stand behind the product sold. These may be either written or oral, but all only as strong as the explicit promise made by the seller.

A more standard level of protection exists in the implied warranty of merchantability. The Uniform Commercial Code requires that all merchant-sold goods are, at a minimum "fit for the ordinary purposes for which such goods are used."[82] This protects consumers against product defects when the goods are purchased from a merchant or someone with a similar level of expertise and skill with the product.

When a product fails to conform to an express or implied warranty, the consumer may either keep the product and seek damages or return the product for a refund. In most cases consumers choose the latter action. If a consumer

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[80] The full requirements of bringing a class action in federal court are set forth in Rule 23, Federal Rules of Civil Procedure. Each of the fifty states has their own separate rules on when class actions are allowed. Most are modeled on the federal rules. *See also* Comcast v. Behrend, 569 U.S., 133 S.Ct. 1426, 2013 WL 1222646 (2013).

[81] The general Uniform Commercial Code is available at http://www.law.cornell.edu/ucc/ucc.table.html. Some states have adopted the U.C.C. with amendments so the text of each state's law must be examined in applying the U.C.C. in specific matters.

[82] § 2-314, Uniform Commercial Code.

retains the product, he may seek difference in value between the good in hand and the warranted good.

The Federal government also affords consumers warranty protection through the Magnuson-Moss Warranty Act.[83] Although it does not require warranties for consumer products, the Magnuson-Moss Warranty Act requires standardization of terms when a written warranty is offered. Such regulation is meant to minimize confusion about warranty terms while increasing warranty coverage clarity.

5. Consumer Credit and Debt Collection

Most Americans use some form of credit to make almost all major purchases. A variety of laws are in place to attempt to protect credit consumers from fraud or deceptive practices in the credit industry.

5.1. Credit Reports

Companies extend credit to a consumer if he or she is deemed creditworthy through a credit history or credit report. These reports contain individual identifying information, descriptions of existing credit and bank accounts, payment history on those accounts, as well as public record information. Until the Fair Credit Reporting Act (FCRA) was passed in 1970, consumers could not easily confirm the accuracy of the information.[84] Passage of the FCRA allowed consumers the ability to view and repair possible mistakes thereby increasing their opportunity to obtain better credit. In 2003, the FCRA was amended to ensure American consumers annual access to a free copy of their credit reports.

5.2. Credit Disclosures

Consumers face a complex credit marketplace where terms in small print, changing interest rates, and a variety of fees can contribute to confusion. To combat such confusion, Congress passed the Truth in Lending Act,

[83] 15 U.S.C. § 2301 *et seq.*

[84] 15 U.S.C. § 1681 *et seq.*

which requires standardized credit disclosures to facilitate consumer ability comparison shop for the best credit opportunity.[85] It further attempts to protect credit consumers from unfair billing practices. The Fair Credit Billing Act also created procedures to require creditors to promptly process billing disputes and corrections.[86] It also created an option for consumers to withhold payments when a good purchased with credit is defective.

5.3. Debt Collection

From 1990 to 2013, U.S. credit card debt increased 252 percent from $243 billion[87] to $856 billion.[88] In addition to enhancing consumer opportunity to obtain the best credit possible, federal statutes also protect consumers who fall behind in debt payments from improper collection processes. The Fair Debt Collection Act prevents debt collectors from using threats, profanity, or lies when attempting to collect from debtors. Collectors are limited to contacting a debtor during reasonable times of the day.[89]

5.4. The Credit Card Act of 2009

The financial crisis of 2008 and beyond produced further changes in the way that credit cards were issued and used by consumers. The Credit Card Accountability Responsibility and Disclosure Act of 2009 ("Credit CARD Act") was enacted on May 21, 2009 to amend the Truth in Lending Act to further protect consumers from abusive practices by credit card issuers.[90] It not only provides for increased disclosure and availability of the terms of a credit card agreement, but also specifically prohibits and restricts certain activities and practices by credit card issuers.

The Act places restrictions on the way in which card issuers may adjust the interest rate of an individual's credit card. The Act requires that a cardholder be

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[85] 15 U.S.C. § 1601 *et seq.*

[86] 15 U.S.C. § 1601 *et seq.* (enacted as an amendment to the Truth in Lending Act).

[87] US. Federal Reserve, Statistical Release (Mar. 7, 1990).

[88] U.S. Federal Reserve, G.19 Consumer Credit Statistical Release, (July 8, 2013).

[89] 15 U.S.C. § 1692 *et seq.*

[90] Associated Press, Obama Signs Credit Card Bill, *CBS News,* May 21, 2009, *available at* http://www.cbsnews.com/stories/2009/05/22/politics/main5033322.shtml.

given notice of an increase to their interest rate or other significant change no later than 45 days before that increase or change is to take effect.[91] At the time of this notice, the cardholder must also be notified of their right to cancel the account.[92] The Act also prohibits a credit card issuer from increasing the interest rate on a card unless it occurs after a previously specified period of time, it is in accordance with the card agreement and is tied to a publicly available index out of the issuer's control, or the increase is pursuant to a payment plan worked out due to hardship on the part of the cardholder.[93]

The Act also places limits on the fees and charges that a credit card issuer may impose on a cardholder. A card issuer may not impose any finance charge on a balance that accrued prior to the current billing period unless it relates to the resolution of a dispute or an adjustment to a prior charge.[94] The Act also requires card issuers to allow a consumer to opt-in to programs, which allow transactions to occur even if they would be over the limit whenever a fee would be involved for such an allowance.[95] This means that if a consumer wishes to be allowed to use the card, despite an inadequate balance they would have to elect to do so with their card issuer, otherwise the transaction will simply be denied. The Act requires that such penalty fees be "reasonable and proportional" to such a violation of the cardholder agreement.[96]

The Act requires specific procedures for the payment of credit cards. A credit card bill payment is required to come due on the same day of each month.[97] However, if such a payment is due on a weekend or holiday on which the card issuer does not receive mail, the bill may not be considered a late payment until the next business day.[98] Finally, the card issuer may not issue a credit card unless it takes into consideration the ability of the prospective cardholder to make the required payments under the card agreement.[99]

The Act takes various steps towards the protection of consumers from deceptive practices and towards the protection of young consumers. The

[91] Credit Card Accountability Responsibility and Disclosure Act of 2009, H.R. 627 Title I §101 111th Cong. (1st Sess. 2009) (enacted).

[92] Credit Card Act, H.R. 627 Title I §101 111th Cong. (1st Sess. 2009) (enacted).

[93] Id.

[94] H.R. 627 Title I §102.

[95] Id.

[96] Id.

[97] H.R. 627 Title I § 106.

[98] Id.

[99] H.R. 627 Title I § 109.

Act requires that card issuers make available on the Internet the credit card agreement that it has issued to a consumer.[100] It also requires that any company that offers a free credit report also disclose that a free credit report is already available under Federal law at "annualcreditreport.com."[101]

With regard to younger consumers, a credit card may not be issued to a person under the age of 21 unless the agreement is also signed by a legal guardian or cosigner, or the applicant submit proof of an independent means of repaying the obligations under the agreement.[102] Furthermore, any institute of higher learning that markets credit cards to its students in conjunction with a credit card issuer must publicly disclose such activities.[103]

Finally, the Credit CARD Act goes so far as to protect users of prepaid store gift cards. In general, the Act prohibits expiration dates on gift cards unless it is more than five years after the issuance of the card and the expiration terms are clearly stated.[104] Additionally, the issuer of a gift card may not charge a service or inactivity fee to the user of a gift card unless the fee is conspicuously stated and there has been no activity with respect to the card within the twelve preceding months.[105]

6. Consumer Associations and related groups

In addition to government based agencies, consumer associations and other nonprofit entities also play an important role in consumer protection matters. They have played a critical role in investigating, publicizing, lobbying, litigating, and researching consumer issues. US consumer groups or associations lack the statutory right to bring super-complaints or collective action suits as is the case in several European countries, but they do have the power to bring complaints to the agencies and sue in their own name in the courts. Unlike the situation in the EU and most European countries, an agency complaint in the US is normally informal and does not require formal agency action (or judicial review) if the government agency chooses not to pursue the matter.

[100] H.R. 627 Title II § 204.

[101] H.R. 627 Title II § 205.

[102] H.R. 627 Title III § 301.

[103] H.R. 627 Title III § 304.

[104] H.R. 627 Title IV § 401.

[105] Id.

Nevertheless, many of the developments described above are the result of one or more private actors bringing to the government's, or the public's, attention conduct that harms consumers either physically or economically. Much like governmental action in this area, there are numerous different private groups focused on different aspects of the consumer protection field as outlined above. A small sample of such private sector entities follows.[106]

6.1. Citizen Utility Boards

Citizen Utility Boards are nonprofit, nonpartisan agencies that exist to represent the interests of residential utility consumers in their respective states or regions. They typically address concerns related to quality and price of natural gas, electric, and telephone services.[107]

6.2. Consumer Federation of America

The Consumer Federation of America has four main functions. First, it advocates for consumers to state and federal legislative and regulatory bodies. Second, it researches consumer behavior and concerns through polling and surveys. Third, it attempts to provide education about consumer concerns by disseminating press releases, reports, and other material to the media, government representatives, and consumers. Finally, it supports a variety of local consumer-related organizations.[108]

6.3. Consumers Union

The Consumers Union was founded in 1936 and is a nonprofit, nonpartisan organization that educates consumers about a wide variety of products. To achieve its stated mission, "to work for a fair, just, and safe marketplace for all consumers," the Consumers Union publishes the magazine, *Consumer Reports*,

[106] A representative list of national consumer protection organizations can be found at National Consumer Organizations, *available at* http://www.infoplease.com/ipa/A0002120.html.

[107] See, e.g., Citizens Utility Board, *available at* http://www.citizensutilityboard.org/.

[108] Consumer Federation of America, *available at* http://www.consumerfed.org/.

as well as two newsletters, *Consumer Reports on Health* and *Consumer Reports Money Adviser.*[109] *Consumer Reports* provides product reviews of cars, computers, appliances, extended warranties, and even sporting equipment so that consumers may have reliable third-party information before making a purchase. The Consumers Union also supports initiatives for health care access, food safety, and consumer choice in media.[110]

6.4. Institute for Consumer Antitrust Studies

The Institute for Consumer Antitrust Studies is a nonpartisan, independent, academic center designed to explore the impact of antitrust enforcement and consumer protection law on the individual consumer and the public, and to shape public policy in these fields. Part of the Loyola University Chicago School of Law, the Institute contributes to consumer protection through teaching, research, symposia, publications, consumer advocacy, and academic colloquia on consumer and competition law.[111]

6.5. National Consumer Law Center

The National Consumer Law Center is a nonprofit organization that advocates on behalf of low-income individuals who have been harmed by deception, fraud, or unfair practices. In addition to addressing concerns with credit, credit reports, and debt collection, the National Consumer Law Center deals with payday loans, predatory lending, public utilities, and other fraud.[112]

6.6. Public Citizen

Founded in 1971 by Ralph Nader, Public Citizen is a nonpartisan, nonprofit organization that represents consumer interests before the executive, legislative, and judicial branches of the U.S. Government. In order to retain its

[109] ConsumersUnion.org, About Consumers Union, *available at* http://www.consumersunion.org/about/.

[110] Consumers Union.org, *available at* http://consumersunion.org/.

[111] Loyola University Chicago School of Law, Institute for Consumer Antitrust Studies, *available at* http://www.luc.edu/antitrust.

[112] National Consumer Law Center, *available at* http://www.consumerlaw.org.

independence and maintain its ability to impartially represent consumers, Public Citizen refuses donations from the government, corporations, or professional associations. Public Citizen advocates specifically for clean and safe energy sources, just trade policies, safe vehicles, and effective, affordable prescription drugs and health care.[113]

7. Conclusion

Judging how the United States compares to other jurisdictions or satisfies the international standards set forth in the United Nations Guidelines for Consumer Protection is difficult.[114] The rights of safety, information, choice, representation, redress, consumer education, basic needs, and a healthy environment are enshrined in a plethora of formal statutory and regulatory protections at the federal, state, and local level. In addition, the sheer size and scope of economic activity in the United States economy and the relatively high GDP and per capita income often provide a reasonably competitive and consumer friendly economy.

However, focusing on the formal rights and remedies of consumers provides only a partial picture of the state of consumer protection in the United States. Because of the emphasis on the formal nature of legal consumer rights, much depends on access to the legal system. Unfortunately, there is no constitutional or statutory right to legal representation in consumer protection matters, or civil litigation in general. Consumers without practical access to the courts still benefit when the many government agencies discussed above take action on their behalf. Consumer associations also help fill the gap, as do legal aid bureaus and other forms of legal clinics. The availability of private rights of action which provide for different types of damages, attorney's fees, and costs to prevailing plaintiffs further help, but are still an incomplete solution.

Only certain causes of actions are covered, and only those cases with the best chances of prevailing and the best chance of recovering substantial damages will be brought, because of the needs of the private bar to obtain its fees at the end of the litigation. The United States has come a long way from the era of caveat emptor, but much improvement is necessary in terms of education for

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[113] Public Citizen, *available at* http://www.citizen.org.

[114] Department of Economic and Social Affairs, United Nations Guidelines for Consumer Protection, *available at* http://www.un.org/esa/sustdev/publications/consumption_en.pdf.

consumers to have the working knowledge to effectively protect themselves and utilize the many formal rights they enjoy. The critical research in the years to come must focus not on the law on the books, but on the law in action to determine whether consumers fully benefit from their impressive set of formal legal rights.

UCP – HUNGARIAN PRACTICE IN THE TELECOM SECTOR

Márk Erdélyi*

1. Hungarian implementation of the UCP Directive in the telecom sector in general

Five years after the Unfair Commercial Practices Directive (UCPD) entered into force, it is timely to review the results of implementation and application and compare them with the objectives of the directive to find out whether they have been successfully fulfilled. In order to do so, we should first take a look at the main goals of the UCPD directive, which are the following:

- eliminating barriers resulting from the different laws on unfair practices,
- providing a common and high level of consumer protection,
- clarifying legal concepts,
- providing legal certainty,
- achieving full harmonization in this field.

According to the recent (April 2013) report of the European Commission on the application of the UCPD[1] the member states' laws are harmonized. According to Article 3(5) of the directive, Member States were allowed to apply national provisions, which were more restrictive or prescriptive than the UCPD for a period of six years ending on 12 June 2013. Only five member states

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* Legal director of Telenor Hungary (the second mobile network operator in Hungary). Founder and former head of a consumer NGO, with a result of more than 1 billion HUF – approximately 3.5 million Euros – fines imposed on companies based on complaints concerning unfair commercial practices.

[1] Page 4 in 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') http://ec.europa.eu/justice/consumer-marketing/files/ucpd_report_en.pdf

claimed they had stricter rules[2] in place. Thus, the question of harmonization seems relevant only regarding the application of the directive. The question is simple: can multinational companies conduct cross-border advertising or set-up uniform marketing campaigns covering several Member States?

2. The average Hungarian consumers of the telecom sector

The present article seeks to answer the above question with reference to the Hungarian market. Hungary has a population of ten million, with three mobile network operators on the telecommunications market (Telekom, Telenor and Vodafone) as well as a few virtual operators. Telekom also operates a fixed network.

With 11.5 million voice subscriptions[3] and 2.8 million mobile internet subscriptions,[4] the average consumer *([...] who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors [...])*[5] knows the available mobile services, using such services every day *(there are 116 mobile subscriptions per 100 inhabitants)*[6].

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[2] Denmark, Finland, Ireland, Latvia and Sweden, page 4. in 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') http://ec.europa.eu/justice/consumer-marketing/files/ucpd_report_en.pdf

[3] Page 2, Flash Report on Mobile Phone, August 2013, http://english.nmhh.hu/dokumentum/160293/mobil_gyj_2013_augusztus_eng.pdf

[4] Page 2, Flash Report on Mobile Internet, August 2013 http://english.nmhh.hu/dokumentum/160392/mobilinternet_augusztus_eng.pdf

[5] Preamble 18 in 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')

[6] Page 2, Flash Report on Mobile Phone, August 2013, http://english.nmhh.hu/

3. Overview of UCP cases in the Hungarian telecom sector

Hungary had already regulated unfair commercial practices before the directive, thus we can compare the practice before and after the directive came into force.

During the five years preceding the implementation of the directive, there were 49 investigations concerning unfair commercial practices. Telenor was the subject of six investigations, 24 cases were related to Telekom *(including fixed-line offers)*, while 19 cases were closed with respect to Vodafone. In the five years following the implementation of the directive, only 20 cases were opened – five cases with respect to Telenor, six cases related to Telekom *(including fixed-line offers)* and nine cases in connection with Vodafone. In the period preceding the implementation of the UCPD, of the 49 cases there were 19 infringements. However, following the implementation of the UCPD, there were 15 infringements within the 20 cases decided. Therefore, we may conclude that the operators took more care to achieve lawful communication[7].

Operator	During the 5 years preceding UCP implementation	During the 5 years following UCP implementation
Telenor	6	5
Telekom	24	6
Vodafone	19	9
SUM:	**49 investigations** – infringements: 29	**20 investigations** – infringements: 15
	Conclusion: the number of investigations decreased with 60% after the implementation of the UCP	

The total of the fines imposed before and after the UCP was implemented do not differ significantly, amounting to approximately 2 million Euros in each period. However, we may discern a significant decrease with respect to Telekom and Telenor with a concurrent, significant increase regarding Vodafone.

Operator	During the 5 years preceding UCP implementation (EUR)	During the 5 years following UCP implementation (EUR)
Telenor	280.000	57.000
Telekom	1.750.000	1.010.000
Vodafone	240.000	960.000
SUM:	**2.270.000**	**2.027.000**
	Conclusion: significant decrease for Telenor and Telekom, with a concurrent and significant increase regarding Vodafone	

dokumentum/160293/mobil_gyj_2013_augusztus_eng.pdf

7 Case law collection from the Hungarian Competition Authority website, http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=112&m170_act=4

The implementation of the directive was belated in Hungary; a new law was adopted, which entered into force on 1 September 2008. The Competition Authority – the main authority for unfair practices in the telecom sector – intended to continue its existing UCP practice even after the implementation of the directive, with the result that there were no major changes in the telecom area.

4. Benchmark: the average consumer

According to the UCPD's benchmark the average consumer is a person, who is reasonably well informed, reasonably observant and circumspect. The Hungarian Competition Authority published its principles on the application of the UCP,[8] according to which: (i) deception is also possible in relation to consumers in possession of significant knowledge regarding the given service; and (ii) the consumer relying on the trustworthiness of the advertisement without any doubt is a reasonable consumer. We may find similar examples proving that the Hungarian Competition Authority sets additional requirements for advertisers in the form of such additional terms, while the average consumer criteria of the UCPD reduces the requirements for advertisers, since a reasonably well informed consumer should not be informed about all details.

5. No real change in the practice of the authorities after the implementation of the UCPD in Hungary

The Hungarian case law in the telecom sector further substantiates the fact that although the concept of the average consumer was introduced with the UCPD, there was no real change in the way the authority interpreted what may be expected from the consumer *(the average consumer is not expected to know the practice of the commercial market (Vj-194/2004,[9] Following the implementation of the UCPD: Vj-36/2012, Vj-12/2009.), and the consumer is not required to actively seek information about the offer (Vj-123/2006, Following the implementation of the UCPD: Vj-12/2009, Vj-119/2010).*

Furthermore, there was no change in the interpretation of the transactional

8 http://www.gvh.hu/gvh/alpha?do=2&pg=95&m5_doc=6269&m92_act=1&st=1

9 All the case law available on the Competition Authority's website: http://www.gvh.hu/gvh/alpha?do=2&pg=10&m545_act=3&st=1

decision, which was not considered an act, but rather a process, each step or element of which is protected *(Transactional decision – not an act but a process and the misleading communication affecting any part of such process is relevant. Favorit tariff case, After UCPD: Telenor – ING co-promotion (Vj-93-2011, while it cannot be deducted from the directive: (k) "transactional decision" means any decision taken by a consumer concerning whether, how, and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting).*

According to the practice of the Hungarian Competition Authority, the mere possibility of misleading suffices for infringement without the need for the disadvantage to be manifested. *(Telenor – djuice – free wap case, "wap is free of charge during weekends", however, most of the marketing materials failed to include that such offer is limited to 10 Mbytes/month. (Vj-123/2006) The court decided that it is not necessary for the disadvantage to actually materialize: the practice is already deemed illegal in case the possibility exists that the consumer might be misled. After UCPD: Telenor ING co-promotion (Vj-93-2011)).*

6. Change regarding loyalty conditions

Following the implementation of the UCPD, one change regarding the communication of loyalty agreements was discernible. Telecom firms rarely indicated in their marketing communication materials that in order to receive a handset for free, the recipient must conclude a 12 or 24 month loyalty agreement with the company, with the obligation to pay fees to the firm during that contractual period. In 2006 the Competition Authority investigated all operators and imposed fines on each of these firms, for failing to inform the subscribers of the loyalty conditions. The Competition Authority stated that the loyalty period is an important term of the agreement and since the loyalty period allows the service provider to "capture" the consumer, it "obviously" has an effect on the market *((Vj-89/2006 (Telenor), Vj-188/2006 (Telenor), Vj-131/2006 (Telecom), Vj-169/2006 (Vodafone) cases))*. Subsequently, all operators made reference to loyalty in their ads. However, implementation of the UCPD occurred in a Vodafone case *(Vj-9/2010)* and recently in a Telenor case *(Vj-78/2012)* where Telenor failed to make reference to the loyalty agreement in its posters concerning a handset campaign, based on which a competitor filed a complaint. However, the Authority decided that since the consumers are

aware of the loyalty practice, it is in itself no longer illegal to refrain from communicating such conditions. The same argument was made earlier in the Vodafone case (Vj-9/2010) as well an Antenna Hungária case (Vj-100/2010).

7. Challenges under UCPD in the Hungarian telecom sector

7.1. The Telenor – ING co-promotion case

Telenor and a financial institute conducted a co-promotion, in the framework of which Telenor clients were called and asked whether they were willing to meet a representative of the financial institute. On the first meeting the consumer was shown a presentation raising financial awareness, however, no offer was made. An offer was only made on the occasion of the second meeting, in case the consumer agreed to such meeting. Telenor offered 120 free minutes to those who met the representative of the ING. Since Telenor communicated 120 free minutes, without mentioning that these minutes must be used up within a period of 12 months, restricted to 10 minutes in each month, and only within the Telenor network, the Competition Authority fined Telenor.

The Authority stated that despite the fact that the offer was free of charge, the consumers had to consent to the handling of their data as well as meeting the representative of the financial institute as a first step in the transactional process, and in fact, the entire transactional decision process is protected. The problem with this decision is that it actually deviates from the definition of the directive: commercial practices are acts connected *directly* with promotion of products.[10] In the above mentioned case there was no direct promotion, no goods were offered with the 120 free minutes. Furthermore, the transactional decision in the directive requires, for example, payment to be made but in this case, no payment had been made.

Telenor asked a company to conduct a survey among the consumers who had received the 120 free minutes. Among 1000 consumers only one consumer said that if he had known that the 120 free minutes was only available in monthly installments, he would not have consented to the meeting. In the judicial review the court stated that this survey clearly demonstrates that Telenor's offer was

[10] "[…] business-to-consumer commercial practices" (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

misleading since one consumer was definitely misled. The conclusion is that apparently Hungary imposes stricter requirements than which the directive requires, since with regard to transactional decisions the directive stipulates the following: *"any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting"*. In this case the offer was free for the consumers, was not connected directly to any other promotion as the directive requires, the consumers suffered no harm, no payment was made by them, thus it was not a transactional decision according to the UCPD and still it was found misleading in Hungary.

7.2. The 5 days payback guarantee case

Telenor offered a free 5-day trial period to consumers purchasing mobile internet. This was very advantageous for consumers since they could take home the device and sample the service wherever they wished. If consumers were not satisfied they could bring back the internet modem and were released from the 24 month loyalty. A sum of almost 1000 HUF was required as initial payment at the time of the conclusion of the contract which was not refunded even in the case of cancelling the contract within 5 days. Three campaigns were investigated by the Competition Authority. The Authority found that the consumers were misled because there was not sufficient reference made to the non-refunding of the initial payment amounting to approximately 3.5 Euros. In the first campaign no mention was made of the failure to refund such payment, in the 2nd and 3rd case reference to this end was made in small print.

The practice was deemed misleading, since it was hard to see the small print, according to the Authority. The problem with this decision is (i) that the non-refunding did not materially distort the behavior of consumers, since this small amount of money was not a significant loss for a trial period and a possible release from the 24 month loyalty. Moreover, the customers could use the service for 5 days, while the directive stipulates material distortion of the consumers' behavior as follows: *"to materially distort the economic behaviour of consumers means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise"*. The second concern (ii) is that the trial period was fair towards the customers, since

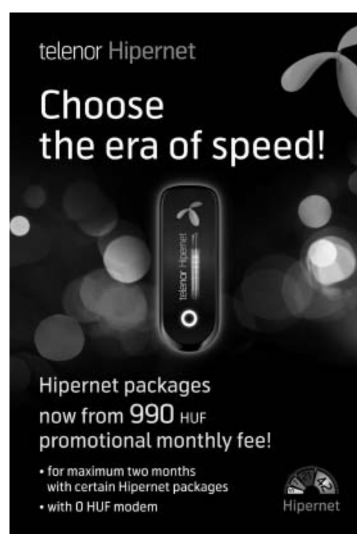
Telenor suffered great losses on account of the used mobile internet sticks, while the consumer lost only 1000 HUF and was released from loyalty with no need for further justification. Therefore, in this case, we find further evidence for the imposition of stricter requirements than the directive, since a non-material part was considered an essential part of the communication in a practice which was very advantageous and fair to the customers.

7.3. UCP Practice in a real poster

Presented here a poster demonstrates how many details telecom firms have to disclose in a mobile internet offer:

The package name, the price and 0 Ft modem constitute the commercial content, while the rest of the information, such as the reference to the tariff type: Hipernet 42, 7, 21, or the reference to loyalty are legal requirements to avoid misleading the consumers. All information featured in small print is due to legal requirements that subscribers must to be informed of:

- the availability of the offer *(between January and April, with specific Hipernet tariffs and loyalty),*
- that the first initial payment will not be refunded in case the 5-day trial period is cancelled,
- the guaranteed download speed,
- the territorial availability of the service,
- that mobile internet speed depends on network coverage, modem parameters and network capacity,
- that the offer cannot be combined with other offers,
- that further details are available in shops and on the website.



The same advertisement without the legally required information – only containing the marketing elements – looks like this.

Of course this cannot be the aim, consumers must be adequately informed. The next advertisement shows how a marketing communication poster should look according to the requirements of UCPD. In this example the marketing message is not swamped with the legal terms, but it features the terms necessary for informing the average consumer of the fact that: this offer is restricted to certain packages and the reduced monthly fee is only regarding the first one to two months. The requirements of the directive create the right balance between marketing needs and consumer protection.

8. Conclusion

Let us now return to the main question of the present paper: can multinational companies conduct cross-border advertising? At this moment the answer is no. The telecom sector companies in the Member States cannot set-up uniform marketing campaigns to cover several member states. As the Hungarian example shows, the authorities retained their former practice, while the ensuing slight changes made came mainly from the development of the market and were not the result of the UCPD. Significant further action must be taken in order to align the practice of Member States' authorities. We hope that such action will be taken in the near future and companies in the EU will be able to apply advertisements used in other Member States without any modifications.

CONSUMERS PROTECTED OR IS THE APPLICATION OF THE UCP DIRECTIVE HELPING CONSUMERS?

Áron Somogyi*

1. Foundation

This paper provides a close analysis of the enforcement of the legislation on commercial communication published in the subject of financial services. This analysis aims at establishing whether the relevant national law enforcement practices and thus the national and Community legislation provides proper protection or not. Where the legal practice is unsatisfactory as regards protection, I will attempt to present the possible causes, on the one hand, and to prepare proposals to ensure more effective consumer protection and to achieve long-term consumer welfare. In order to carry out this analysis and to prepare proposals, I will use the findings of behavioral economics.

2. Behavioral economics and the classical decision-making model

Behavioral economics is currently the *"mainstream"*[1] trend. This economics approach completes the classical consumer decision-making model using conclusions from experiences gained through experiments. It is important to highlight that the followers of behavioral economics do not talk about a break from the neoclassical approach that put rational consumer decision-making into

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[1] The graphic at the following link is a good example of the "main role" played by behavioral economics and shows the advent of behavioral economics against the neoclassical approach. http://books.google.com/ngrams/graph?content=behavioral+economics%2Cneoclassical+economic+theory&year_start=1960&year_end=2012&corpus=15&smoothing=2&share= In: Maurice E. Stucke: Behavioral antitrust and monopolization. available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961327

the center. Behavioral economics sets up to complete the existing recognized theory, that is, the rationality hypothesis. It can also be said that the reference points in the calculations and experiments of this trend are almost always those established by the rationality theory. The primary issue in behavioral economics is *"how economic operators actually behave compared with the idealized neoclassical hypotheses, which is to say that the reality of the behavioral assumptions plays a central role"*.[2]

Economics recognized the limitations of the neoclassical theory about 20 years ago and many competent consumer protection organizations (such as Federal Trade Commission – FTC, OECD, the European Commission) have since addressed the findings of behavioral economics.[3] Based on the things described herein, it can be established that behavioral economics is not an extreme economic approach with only a few followers, but a discipline with results known (and recognized) by regulatory and legislative organizations that play a key role in addressing consumer protection issues.

According to the neoclassical[4] economic approach, the consumer is a rational person who is always able and willing to process all offers communicated to her/him and s/he tries to reach profit maximizing decisions when taking economic decisions. By way of simplification, the science of marketing describes consumer decisions in terms of a consumer who a) recognizes the problem, b) gathers information, c) evaluates the alternatives, d) makes a purchasing decision and finally e) takes into account post-purchase consumer behavior (the question of satisfaction)[5]. I note in this regard that, in my view, Act XLVII of 2008[6] places a rational consumer, that is, the "neoclassic model" in the center of the regulation when it states that *in the evaluation of the commercial practice, it is necessary to rely on the behavior of a consumer who acts rationally, informed with due care and diligence [...].*

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[2] Koltay, Gábor – Vincze, János: Fogyasztói döntések a viselkedési közgazdaságtan szemszögéből. *Közgazdasági Szemle*, Vol. LVI, June 2009. 496. [hereinafter referred to as the "Koltay–Vincze"]

[3] Stucke op. cit.

[4] In this paper, I consider the results of neoclassical economics the traditional classic approach. However, it should be noted that the history of economic ideas draws a distinction between classical and neoclassical economic approach. I shall therefore present below the consumer decision-making mechanism based on the neoclassical approach.

[5] Philip Kotler: *Marketing management.* Budapest, Műszaki Könyvkiadó, 1981. 4th edition, 175., Figures 6–4.

[6] Article 4(1) of Act XLVII of 2008 on the prohibition of unfair commercial practices against consumers.

Behavioral economics papers present the classical approach as follows: *"1. An economic decision-maker has consistent (free of contradictions and "full") preferences which are given. (De gustibus non est disputandum.) 2. In addition to the possibilities ensured by physical and informational limitations, an economic decision-maker will always make the decision most favorable to him or her. 3. The decision-maker will always weigh his or her decision options correctly and only the level of knowledge can preclude the evaluation of the outside world."*[7] The Koltay–Vincze paper notes that consumer attitudes such as self-interest seeking (ignoring the actions of others), insatiability and the assumption that the decision-maker consumer *"has all the means of mathematical probability calculations"* are part of the rationality theory.[8]

The following question follows from the above: is the consumer rational? Does the consumer always make correct, or more precisely, rational decisions striving to maximize his or her profits? According to behavioral economics, the answer is definitely "no" to this question. If consumers would always make rational decisions, no one would buy a losing lottery ticket because it would be a waste of money.[9] And if consumers do not make the correct choice, then what causes the so-called consumer choice deviation?[10] It shows that consumers are unable to evaluate their own preferences? Or, if they are able to evaluate their own preferences, then they are simply not able to rationally evaluate the offers showed to them with due diligence? Why do consumers repeatedly make decisions that cannot be explained by the rationality theory?

A plausible answer can be given to the above question both for the legislation and the law enforcement authorities based on the classical consumer decision-making model. This plausible solution is summarized in section 68 of the basic principles developed by the Office of Economic Competition (hereinafter referred to as "OEC"), which states that *"in accordance with the above, consumer choice deviation can be explained by two phenomena: on the one*

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7 Koltay–Vincze op. cit. It should be noted that the original version of this paper was sponsored by the GVH Center for Competition Culture.

8 Ibid. 496.

9 Colin Camerer – Samuel Issacharoff – George Loewenstein – Ted O'Donoghue – Matthew Rabin: Regulation for conservatives: behavioral economics and the case for "asymmetric paternalism". U*niversity of Pennsylvania Law Review* vol. 151., 1230. http://www.hss.caltech.edu/~camerer/paternPLR.pdf This paper tries to show, through lottery purchases, that we tend to attribute high expectations to low probabilities when promised an exceptional prize.

10 Section 67 of the GVH principles: "This phenomenon is called a consumer choice deviation which means that the actual decision of the consumer differs from optimal despite of consumer optimization."

hand, consumers do not carry out information search of an appropriate level and, on the other hand, a company exerts unfair influence on the information search carried out by the consumers."

Therefore, according to the OEC principles, consumer choice deviation has two reasons: either consumers pay no attention or the company is unfair – no other options are mentioned. There is no need to address the first reason because, if the purchasing decision is irrelevant for the consumers, then it is in vain for the other economic agents (in particular, companies) to inform the consumers about the features, risks and all other properties of a specific product, the content of the information provided will be completely irrelevant and the money spent unnecessarily will represent the costs related to the release of the information in question.

Based on the criteria and studies presented below, I find questionable the second reason (that is, if consumers act with due diligence and gather information, then the explanation can only be the unfair commercial practices of the company that lead to consumer choice deviation).

3. Consumer choice deviation – explanation based on behavioral economics

I cannot engage in summarizing *all* theories and experiences, but I propose to rethink the above foundation developed by the OEC based on some practical examples and experiences from the domain of financial services. These examples refer to credit cards and so-called "upfront" fees cancelled, related to loan agreements.

3.1. Consumer credits and credit cards

Based on a review of the relevant literature, the market of consumer credits and credit cards is described by the Koltay–Vincze paper as a market with so-called self-control problems. What are these self-control problems?

According to the literature, self-control problems are those phenomena which occur *"when we feel that consumers over-consume (under-consume) certain products compared to what they would really want; unnecessarily postpone (bring forward) the consumption of something; apparently unreasonably limit*

their freedom of movement; and make unprofitable investments".[11] The use of credit cards typically poses such a self-control problem. Credit card holders are overconfident and believe that they will be able to withstand their urge to immediate over-consumption, and even if they fail to withstand this urge, they intend to pay back their credit card debts during the *interest-free* period. The Koltay–Vincze paper refers to the following model for credit cards to support the self-control problem [Laibson–Repetto–Tobacman]: *"naivety should also play a role, that is, the property that households cannot anticipate their future preferences and actually spend more than was expected. According to this model, if this is not the case, not 60% but merely 20% of households would use credit cards."*[12]

3.2. A live dog or a dead lion?

A further "consumer choice deviation" in the domain of credit cards derives from the notion of so-called hyperbolic discounting. This can be summarized as follows: consumers attribute a higher level of utility to a product that can be immediately obtained than to potential future consumption. The latter is calculated by the consumers using a different and not constant discount rate as a function of time. Folk wisdom says that "a live dog is better than a dead lion". In these experiments, the question usually is that *"for example, in a study by Thaler [1981], participants had to answer the question of what amount would they feel to be equivalent to 15 USD received now if it was given to them after one month/one year/ten years. The answers were consistent with a very high and acutely decreasing discount rate: participants use a discount rate of 345%, 120% and 19% over a horizon of one month, one year and 10 years, respectively."*[13] This seems to contradict the neoclassical approach that states that in such cases participants should use the same discount rate.
Behavioral economics partly uses hyperbolic discounting to explain the success of credit instruments that are advertised as "without initial costs" (upfront

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[11] Koltay–Vincze op. cit. 508.

[12] Koltay–Vincze op. cit. 512.

[13] *Banki ajánlatok a viselkedési közgazdaságtan tükrében.* Prepared by the International Banker Training Center (Nemzetközi Bankárképző Központ), 2011. Collaborators: Sebestyén Krisztián, Pintér Klára and Zsebő Béla.
As regards hyperbolic discounting see: Lippai, László: Az intertemporális diszkontálási folyamatok jelentősége a fogyasztói döntésekben. *Közgazdasági Szemle*, Vol. LVI., July-August 2009. 689–708.

fees cancelled) and those for which the creditors advertise an initial period of preferential interest rate. I would note that Article 210/B(2) of Act CXII of 1996 on credit institutions and financial enterprises states that *for mortgage agreements, in case the customer performs according to the agreement, the financial institution may not charge any fee or cost similar in nature to interest, levied on a regular basis and may not offer at the time of conclusion of the agreement reduced rates for a limited period.*

3.3. Other errors

In the case of credit cards, further so-called "cognitive errors" may also occur. Consumers tend to over-rate the extent of the discount related to the initial preferential interest and to enter into an agreement and have to pay a high interest at a later stage. Several studies show that those who easily "fall" for the promised preferential interest, are also those who, on the one hand, tend to accumulate more debts, and who, on the other hand, are generally higher risk debtors than those consumers who handle the offers mentioned at their local value.[14] A further problem found is that consumers typically do not understand contractual terms and conditions, and they are not able to carry out a proper comparison of these terms and conditions, which also means that they will not necessarily choose the offer that is favorable to them.

3.3.1. Informational noise and hidden conditions – banc accounts and deposits

David Laibson[15] shows the relation between hidden contractual conditions and "extra services" such as profit centers. According to an example presented at a conference organized by the FTC[16], the annual costs related to managing a bank account by "US Trust" Bank (*such as ATMs, IT tools*) amount to 40 $. Therefore, the bank account management fee for this service package is 40 $, but the bank charges no other costs for these "extra services" in this account package. In order for the bank to get further clients, it should take measures and offer different gifts to *"naïve"* consumers for 50 $, such as a toaster or a DVD

[14] Based on the Koltay–Vincze op. cit.

[15] Presentation of his professional carrier: http://www.ftc.gov/be/consumerbehavior/docs/bios.pdf.

[16] A detailed description of the conference materials and related studies are available at the FTC webpage: http://www.ftc.gov/be/consumerbehavior/docs/agenda.shtm

player. Furthermore, in order for the bank to make profit, it generates different "extra services" for an amount of 90 $. A *"naïve"* consumer will not necessarily "get" that he or she has actually paid the 40 $ fee for the use of the bank account. A rational consumer would pay this fee of 40 $ and freely spends the other 50 $. With reference to the specific example of the "US Trust" Bank, it should be noted that the introduction and operation of such a product do not conflict with any legal provision. As shown through the legal cases described in the section below, the company advertising the product should provide precise information about the product, but it is not obliged to draw the attention of the consumers to the difficulties in comparing the offers, that is, the consumers should not be separately warned of the disadvantages of the offers.

This example also shows that in case a new operator appears on the market, it can offer a cheaper product, but this probably does not happen because if some services become free-of-charge, even only in appearance, the consumers will not repeatedly pay for these services and, at the same time, the new operator will also bear costs. The example also makes it clear that the operator has no interest to educate consumers because an informed and clever consumer is not that "profitable", and therefore companies otherwise try to conceal information. The issue of education should probably be solved by the regulatory authorities. The above case presents the issue of understanding and comparing the offers by consumers.

Dean Karlan and col. have conducted an interesting experiment in the market of consumer credits, but which led to generally valid findings.[17] This experiment, conducted in South Africa, is summarized by the repeatedly cited Koltay–Vincze paper by stating that, based on the psychological characteristics in the offer, *those who fill their offer with positive characteristics may afford an increase in interest up to 1-4%.* This experiment confirms that the psychological characteristics in an offer have a substantial effect on the offer, but this effect cannot be estimated with precision.

3.3.2. Additional findings

The following experiment has drawn the attention to the cognitive error deriving from the regulatory context, but also made by the consumers. According to the regulation entered into force in the USA, mortgage brokers must communicate that they are paid by the creditor bank for their activities. The key element in

[17] The experiment is presented on the FTC webpage: http://www.ftc.gov/be/consumerbehavior/docs/slides/Karlan.pdf

this experiment was that some consumers were provided this information and some were not. The results showed that informed consumers do not trust the broker and choose to contact a bank branch where they will select a credit that is more expensive taken as a whole. The cognitive error consists in the failure of the consumer to grasp the fact that the income of bank employees also depends on the amount and price of the credit granted. This experiment confirms, on the one hand, that in addition to incorrect consumer decisions, an incomplete regulation can produce significant damages and, on the other hand, that correct information may be useful to the consumer.

We shall consider the regulatory environment in force known, but it should be added that a similar regulation is in force in Hungary, as well, taking into account the relevant provisions of the Credit Institutions Act, which provides that prior to the mediation of the financial service, the mediator must clearly inform the potential client, in writing, about *the entity on which behalf the mediator acts and that the mediator may receive a fee for the mediation of financial services only from the principal.*[18] At the same time, Article 4(4) of Act CLXII of 2009 on consumer credits also states that *the credit mediator must specify in the commercial communication on the credit the entity on behalf of which the mediator acts.*[19]

I am not aware of studies on the extent to which Hungarian consumers trust agents. However, it can be established that there is need for personal advice, especially in case of complex products. Sales by agents are also characterized by the fact that agents contact consumers based on recommendations, and in my opinion, the relation between the person making the recommendation and the consumer plays an influencing role. It should also be noted that pursuant to provisions of the Credit Institutions Act in force, *during the facilitation of the financial service contract the agent* (or more precisely, the independent mediator) *must analyze and provide the client with sufficient offers but with the service offers of at least three competitors if available on the market [...].*

On these grounds, I believe that trust is built until actual advice is given and that there are cases where no sales can be made through a bank branch, and therefore, no substantial suspicions are raised and the vigilance of the consumer cannot be significantly influenced by a single line of information in a large print document. It should also be noted that, in the cases I am aware of, the agents'

[18] Article 219/A(1)(e) and Article 219/C(4)(d) of the Credit Institutions Act.

[19] The obligation to inform, according to the Credit Institutions Act, specified in Footnote 32, should not apply if this obligation is provided for by the legislation on consumer credits.

activity is influenced not by the person of the principal, but rather by the amount of the commission. However, the regulation on mandatory information contains no provisions on the amount of the commission, which may have an impact on the relation between the client and the agent, if any.

3.4. Behavioral economics in the Hungarian Financial Supervisory Authority's (HFSA) recommendations?

From the point of view of the issues addressed in this paper, it is important the notion of *consumer* used by the Hungarian Financial Supervisory Authority (HFSA). The Act adopted by the implementation of Directive No. 29/2005 has introduced shared competence rules, that is, in some procedures the HFSA shall apply the legal provision identical with the OEC. It may be advisable to compare the OEC principles with the recommendations developed by the chairperson of the HFSA.[20]

According to the recommendation made by the chairperson of the Hungarian Financial Supervisory Authority No. 1/2011 (IV. 29.) on the application of the general consumer protection principles[21], the primary purpose is to have the consumer protection provisions influence the entire functioning of the institution supervised (from product development and training of administrators through the processes affecting the consumers).

In addition to reducing the informational asymmetry, the reason for issuing this recommendation is that "*there is a system level risk to any consumer behavior which puts the immediate short-term advantage on the first place during product selection, even if the consumer was warned about its dangers."*[22] In my opinion, this statement can be interpreted as a reference to the recognition of the findings of behavioral economics and is clarified by the HFSA in the same paragraph, by admitting the existence of erroneous consumer decisions, as follows: *"as regards some financial services, as a result of the global crisis in 2008, the number of disappointed consumers has significantly increased. Their dissatisfaction has several root causes: on the one hand, the extremely*

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[20] The chairperson of the HFSA shall form the legal practice of the institutions supervised by developing recommendations based on the mandate specified by Article 21(c) of the HFSA Act.

[21] Available at the HFSA webpage: http://www.pszaf.hu/data/cms2303017/fogyved_ajanlas_1_2011.pdf

[22] Recommendation No. 1/2011 (IV. 29.) of the chairperson of HFSA, page 2, II, paragraph 2.

disadvantageous exchange rate changes in the case of foreign currency loan contracts and, on the other hand, incomplete or unilateral information of some financial service providers, and the irresponsible consumer choice due to financial ignorance”.[23]

It should be also mentioned the *Recommendation No. 9/2006. (XI. 7.) of the Supervisory Council of HFSA on the principles of client information and consumer protection prior to retail credits.*[24] Section B.2 of this recommendation states that *“if a financial institution advertises a credit with preferential terms and conditions, it should clearly present its advantages against the standard credits with non-preferential terms and conditions and specify with precision the time frame in which the advantage applies and what amount of savings (if quantifiable) does it represent to the client.”* This means that this recommendation implicitly contains the law described by economics which states that consumers are not necessarily able to compare more complex offers.[25]

3.5. Summary

As a well-recognized trend with empirical experiences, behavioral economics aims at identifying the difficulties and business tricks that lead to make decisions, deemed to be rational according to the neoclassical theory, when choosing a product or service. Based on the above, we can draw the conclusion that in many cases the consumer error is part of the product (such as the credit card) itself, while in other cases the lack of a proper evaluation of the offers causes the consumer choice deviation. It can be also noted that there is a difference between the approaches of the two organizations (OEC and HFSA) applying the same legislation. The question is what answers are given by the legislation and, based on this, by the law enforcement to the issues recognized and described above.

[23] Recommendation No. 1/2011 (IV. 29.) of the chairperson of HFSA, page 2, II, paragraph 2. The statement cited should not be confounded with cases where consumers do not care about the consequences of their decisions.

[24] http://www.pszaf.hu/bal_menu/szabalyozo_eszkozok/pszafhu_bt_ajanlirelvutmut/ajanlas_ft/pszafhu_ajanlirelvutmut_20061117_1.html

[25] Compare with Decision No. Vj-182/2007.

4. The legal practice of OEC

We will examine the decisions taken by the OEC as regards the behavioral economics issues described above. There is no doubt that the economic agents are familiar with the above consumer decision models or at least the product types. The focus is on the extent to which the above theories (probably known by the OEC) are reflected in the practice of the OEC. An additional question is whether reference can be made to the findings of the above researches within the regulatory frame set out by the Unfair Trade Act. Furthermore, it is a question whether legal representatives of the companies examined make reference to the above issues and are there any cases assessed and satisfactorily closed by the appeal courts or the OEC.

4.1. OEC practice developed based on the Unfair Trade Act

The OEC (in several decisions: Vj-74/2009; Vj-33/2010) states that the *Council of Competition emphasizes in relation with Chapter III of the Unfair Trade Act in force before September 1, 2008, the conceptual findings by the courts and the Council of Competition should accordingly be applied as regards the Unfair Trade Act.*[26] These findings may be summarized based on Case No. Vj-74/2009 (CIB Rapid credits secured by real estate), as follows.

The practice developed by the company should comply with the requirement of fairness and the information on essential product features should be true and precise.[27] The law protects the entire decision-making process; that is, not only the moment when the consumer makes a decision, but the entire process of decision-making, including drawing attention. Not even the development of consumer needs can be done unfairly. In this context, it should be stated that *"the mere fact that, as a result of unfair conduct or the business practice, the consumer contacts the enterprise is already objectionable since this way the enterprise has a chance to 'convince' or 'make' the consumer to make a decision favorable to the enterprise."* The infringement should refer to an essential feature of the product. The price *(such as the interest rate)* and the access time *(promptness)* are such essential features [Vj-74/2009, Section 66].

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26 Vj-33/2010. http://www.gvh.hu/domain2/files/modules/module25/149730869C89A46C6.pdf, page 12, Section 19.

27 Vj-74/2009, Section 52.

The OEC decision makes reference to the prior decisions of the Supreme Court, which state that the competent authority should examine not only those things that eliminate consumers' freedom, but also those that limit such freedom.[28]

In this process, it is necessary to rely on the behavior of a consumer who acts rationally, informed with due care and diligence. Based on the decision by the appeal court,[29] the OEC states that a rational consumer is a person who unconditionally trusts the truthfulness of the advertisement because a rational person is also someone *"who has no doubts about the information being given through the advertisements and the trustworthiness of the advertiser, but treats the advertisements trusting that the requirement on business fairness is fulfilled in a reasonably cost-efficient information process".*[30] The purpose of the advertisement is to resolve the informational asymmetry.

As regards financial services, in addition to reference to the prior practice of the Supreme Court, the following are established: in the presentation of the financial services, enterprises must provide precise and clear information during the development of consumer intention. Advertisements should be credible, real and precise in themselves without any additional information. This does not imply full disclosure, but it definitely should not contain untrue, deceptive and incomplete information. The information should be deemed irregular if later there is a possibility to fully disclose all real information.

In addition to the above, it should be stated that the infringement takes place even if the information is incomplete (any essential information is concealed). Special care should be taken in case of financial services and the consumers are expected to carry out a fairly extensive information search (as they are supposed to strive to maximize their profit), but *"this cannot constitute the unlimited transfer of the responsibility to provide information onto the consumer who is already unfairly influenced by puffed-up slogans in a specific decision making process*."[31]

4.2. "Interest-free for up to 45 days" – cases related to credit cards

In the cases related to credit cards, behaviors were usually examined before the Unfair Trade Act entered into force on September 1, 2008. One of the most

[28] Supreme Court, Kf.II.39.104/2000/3.

[29] Metropolitan Court of Budapest, 2.K.33639/2007.

[30] Vj-74/2009, Section 57.

[31] Vj-74/2009, Section 60.

frequently referenced decisions is Decision No. Vj-56/2006 adopted in the competition procedure in the case of the advertisements on credit cards issued by National Savings and Commercial Bank Plc (Országos Takarékpénztár és Kereskedelmi Bank Nyrt; *hereinafter referred to as "OTP"*). As a result of this procedure, OTP was held liable and the OEC required OTP to pay a fine of 100,000,000 HUF (based on the procedure repeated related to the determination of the fine).

In its defense, the OTP made reference to the fact *"it found decisions in the practice of the Office which fails to establish an infringement because the advertisement referred further the consumer to obtain detailed information (Vj-170/1999.)"* and that the Bank makes available all essential information to the consumer when the contract is concluded. However, in its defense, the enterprises involved in the procedure failed to draw attention to consumer self-control problems and other errors in relation to credit cards.

As a result of the procedure under Chapter III of the Competition Act, in addition to the protection of the consumers' freedom to choose, the decision in question also draws attention to the fact that erroneous information may affect competition because unfair enterprises deprive other fair enterprises of clients. The grounds for the decision establish that the infringement is done at the time when the information is published and the legal measure is the interpretation of the information by a rational consumer from which an enterprise cannot be exempted by transferring the information obligation onto the consumer and holding the consumer to account for the failure to do so.

The OEC decision states that *"from the point of view of competition law, an enterprise cannot be expected to communicate all essential features of its products or services in its market information, especially in their usual mode of manifestation, in advertising, the content and the volume of which are limited by the designation of the advertisement tools."* The Council of Competition established the illegality of the *"You can use your credit line interest-free for up to 45 days"* condition. This infringement derives not from the term "up to" or its insufficiency, but from the fact that the advertisements contained no indication that the absence of interest is conditional upon other conditions, as well, such as the credit should be used to purchase products and the entire amount should be repaid during the grace period.

In the case of credit cards, neither the enterprise nor the Council of Competition addressed the self-control problems identified by the behavioral economics and other difficulties presented in Section 3 of the records. The Council of Competition fails to take into account that when selling such a product,

consumer information has an increased significance due to the difficulties with which the consumer is faced when making decisions in relation to a product.

The case underwent judicial review (*Supreme Court, Kfv. IV. 37.380/2008*), the main findings of which were partially already summarized above; however, one aspect is important to be highlighted. The plaintiff OTP states that *"an over-informed advertisement is unable to fulfill its functions, that is, drawing attention: the advertising sector confirmed that a reader is unable to receive and process more than three items of essential information. Therefore, the legislator takes another path and provides for an obligation to provide clients with strict and detailed information in the relevant legislation (hereinafter referred to as 'Credit Institutions Act')."* This is also a difficulty identified by behavioral economics. In response, the Supreme Court stated, on the one hand, that *"according to the judicial practice developed in this domain, the information should be deemed irregular if later there is a possibility to fully disclose all real information".* On the other hand, the Supreme Court further establishes that *"advertisements should be credible, real and precise in themselves without any additional information. This does not imply full disclosure, but it definitely should not contain untrue, deceptive and incomplete information."*[32] In my view, the court applies a formal legal approach to address this difficulty identified by behavioral economics.

In Case No. Vj-151/2007, new information related to credit cards was brought into the focus of the procedure. In this case, the phrase "credit line interest-free for up to 46 days" was examined during which the OEC practically repeated the arguments specified in the OTP decision No. Vj-56/2006, described in detail above. However, as regards this case, the opinions related to advertisement channels can be highlighted.

The decision in question addresses the advertisements published on the Internet and notes that *"concerning the information published on the Internet, it should be taken into account that in a specific case, consumers can move forward by "clicking", however, the actual information of consumers is not served if any information that is additional to the primary information (such as information required to properly interpret the interest-free promise) can only be reached by further "browsing" (such as reading and analyzing operation rules, list of conditions and other similar documents) in the case of such complex product*

[32] BH2010. 26, Supreme Court, Kfv. IV. 37.380/2008.

that is difficult to understand."[33] In this case, the company under examination did not request the judicial review of the decision.

4.3. *"Without initial upfront charges" – cancelled upfront fees*

In its decision in case No. Vj-113/2010,[34] in relation to UniCredit Bank Hungary (hereinafter referred to as "UCB" or "Bank") under examination, the OEC established that the Bank engaged in unfair trade practices against the consumers after September 1, 2008, so it adopted a behavior under Section 20 of Annex 1 to the Unfair Trade Act (so-called "black listed behavior"). Therefore, the OEC ordered the Bank to pay a fine of 8,000,000 HUF.

According to the findings, during its communication campaign between April 25, 2008 and October 30, 2008, the UCB sent the following message to the consumers: *"request a credit without upfront charges! 0 HUF payment commission, 0 HUF valuation fee and 0 HUF management charges"*. The investigation conducted by the OEC found that in the case of some loans advertised under the *"without upfront charges"* (for acquisition of dwellings – the "Home credits" product) the Bank paid the credit to a hedge account and charged a fee of 1,500 to 15,000 HUF to the client when the credit was transferred from the hedge account to the seller.

I want to outline two statements from the defense drawn up by the Bank. In addition to the different media surfaces and their different permeability to information, the representative of the Bank (probably by reference to Article 7(2) of Unfair Trade Act) separately analyses the radio advertisements, the TV advertisements and the advertisements placed in the press, brochures and advertisements in the subway. In its defense, the representative states that these advertisements contain a warning that the information is not exhaustive and the availability of the detailed conditions established by the Bank. The representative added that, in his or her view, an advertisement is not a suitable medium to present all conditions. *"The entity under investigation emphasizes that a rational consumer can be expected to read those information element that are part of the attention-drawing part of the advertisement."*[35] In response

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[33] Vj-152/2007, Section 39, second dot.

[34] The full text of the decision is available at webpage: http://www.gvh.hu/domain2/files/modules/module25/19107472D0A9619BA.pdf

[35] Section 114 of the Decision.

to the practice of the Council of Competition and the Court, the Bank states that, in its opinion, the warnings to read its advertisements do not constitute the unlimited transfer of the responsibility to search for information onto the consumer; the Bank does not expect expressly suspicious consumers and it does not offer channels that would allow to expressly "convince" the consumers.

Pursuant to the Council of Competition, the information published by the Bank is able to influence consumers' choice because *"any essential feature is one that may be important when choosing between competitive services or products".* A cancelled upfront charge has an impact on the decision of the consumer and therefore it should be deemed to be an essential feature.

Sections 154 and 155 of the decision in question show partial reflection to the issues discussed concerning the comparability of the offers when state the following: *the Council of Competition notes that the consumers cannot be expected to check the truth of all information published. As regards the information search, it should be taken into account the reception and acceptance by the consumer of the information when it is too much, from different sources / of different forms / content / volume (electronic / print, laws / general contractual conditions / advertisements / advertisement tools). In addition to the above, the clients* may have access to documents describing the products before the contract is concluded, but at this point they have already decided to contact a specific bank. *Furthermore, the Council of Competition notes that these documents do not contain clear explicit information on charging the transfer fee.*

Based on the grounds for both the defense and the decision of the Council of Competition, it can be established that neither party addresses the "cognitive error" hidden in the bank's offer. The defense emphasized the completeness of the information, obviously based on the earlier practice of the OEC, and not the fact that the consumers should be provided with additional information according to the provisions in force.

It should be noted that the key element of the offer was the cancelled charge, which can be compensated by applying a higher interest rate and further extra services. The OEC failed to investigate the existence of these extra services. The judicial review of the decision in question is ongoing. In Case No. Vj-74/2009, the OEC did not establish an infringement in the case of the so-called banners

because the consumers can access the required information by clicking without additional search.[36]

Decision No. Vj-33/2008 contains interesting findings concerning the effect of the upfront fees cancelled and the comparison of offers. According to the short presentation, in the procedure against the K&H Bank Zrt. and K&H Biztosító Zrt., the Council of Competition examined that the offer advertised with the *"up to 100% reimbursement"* slogan published by the entity under investigation was in compliance with the Competition Act.

In essence, the offer implies that it paid back the fee for compulsory vehicle insurance to those clients of the insurer who deposited savings in a certain amount using the saving products offered by the Bank. The amount of the discount depended on the amount deposited. Before the offer in question, the insurer conducted a market research to establish the number of clients who use the offer *"imagined"* by it. The market research found that only a limited number of clients would take advantage of this investment opportunity, from which it is clear that only a few would be eligible for this discount. However, the entities under investigation launched their advertisement campaign in the change period 2007 using this message because, according to the Council of Competition, *"the key message of the campaign conveyed to the consumers that they have the possibility to reduce or avoid a mandatory insurance costs that is, otherwise, considered by them an unpleasant experience"*.[37]

The entities under investigation were convicted primarily because none of the clients were actually eligible for the 100% reimbursement since this investment opportunity was associated with costs. As planned and not concealed by the entities, this offer relies on those errors (such as excessive self-confidence) which are also addressed by the behavioral economics and will be presented below. By contrast, when evaluating the behavior of the entities, this was "only" evaluated when determining the amount of the fine and only indirectly. As regards the behavior in question, the Council of Competition says that *"it can be used to deceive consumers because it failed to communicate the conditions required to interpret the offer, while the number of clients who may obtain the*

[36] In this issue, it should be noted that the new publication of the FTC (http://ftc.gov/os/2013/03/130312dotcomdisclosures.pdf) contains rules on hyperlinks, as well, which state that all hyperlinks should receive good visibility and should not be used as a tool for the advertisers to conceal essential information.

[37] Vj-33/2008, Section 106.

amount(s) of the discount communicated based on the minimum amount of the investment units is negligible compared to the number of consumers reached by the information and targeted by the message."

Based on the research results of behavioral economics, I believe that even if the conditions in question are actually communicated, this publicity campaign relies on the excessive self-confidence of the consumers and the errors previously mapped and identified by the entity. A rational consumer who conducts an exhaustive search is expected to "know", but in my opinion, it would be recommended to evaluate the offer in itself beyond the issue of the incompleteness of the information. In this regards, the OEC probably failed to find a legal opportunity, based on Article 4(1) of the Unfair Trade Act, which states that *"when evaluating the commercial practice, it is necessary to rely on the behavior of* a consumer who acts rationally, informed with due care and diligence *taking into the language, cultural and social aspects of the commercial practice and the products.* I wish to give voice to my opinion that this offer was designed to address only a limited number of clients. Therefore, I believe that *in such a situation* not even a *rational consumer can be reasonably expected* to correctly evaluate the offer in question. In my view, the details of the offer cannot be summarized in a single advertisement; see Decision No. Vj-182/2007.

A further "yield" of the current Case No. Vj-33/2008 is that, in accordance with the decisions on credit cards, concerning the term "up to" it was established that *"its use implies for the consumers a possibility that will necessarily be realized, not without all limitations, and indicates that there may be conditions associated in order to access, in particular, the advertised product features."*[38]

4.4. Comparison of offers and the questions "got" by the consumers

In Case No. Vj-182/2007, already referred to in the issue of *"upfront charges"*, the OTP under investigation advertised its credit products in the autumn of 2007 with the associated condition of "16,510 HUF/month for every 5 million HUF" and "now without upfront charges". The findings related to the upfront charges were already summarized above. Concerning the condition of *"16,510 HUF/month for every 5 million HUF"*, I wish to highlight that according to the behavioral economics theory it is a typical consumer limit that, when comparing offers, they are better able to estimate the amount of the monthly installments,

[38] Vj-33/2008, Section 90.

while they have difficulties to understand the monthly obligation to pay interest expressed in annual percentage rate.[39] As a result of this, a typical behavior is for the consumer to accept an offer with an unfavorable interest, but expressed as an amount of the monthly installment, in contrast with a more favorable interest expressed in percentage.

During the publicity campaign in question, the OTP made the main message of the campaign, among others, that it has a credit product with a *monthly installment of 16,510 HUF for every 5 million HUF.* However, according to the Council of Competition, the consumers were not properly informed about the fact that this preferential installment applies only during the first year of the repayment period, which is otherwise 25 years.[40]

During this case, the actual problem characteristic to the consumer decision-making related to the preferential offer in question was not investigated again. The entity under investigation was convicted because the advertisement on the offer did not contain, or not in a form perceivable by the consumers, the fact that the interest is dependent on conditions and is applicable only for a limited period of time.

All advertisements investigated in Case No. Vj-182/2007, used a "*" *(star)* for both the APR (annual percentage rate) and the installment. Based on its prior legal practice,[41] when making its decisions, the Council of Competition also takes into account the messages that consumers really *"got"*. In the abovementioned decision, the OEC summarizes how many messages can a consumer "get" in the case of each advertising media, broken down by media interfaces. *A driver or a passer-by, who is in no hurry, has maximum 1 second or 2-3 seconds, respectively, to perceive a large-scale poster. Therefore, a large-scale poster may contain a maximum number of 3 elements in order to continue to be effective (main line, picture and logo). The really effective large-scale posters contain two elements (picture and logo) or only one element. This means that the main message of the advertisement plays an important role and the role of "small prints" in the information of consumers is practically negligible. The same can be said about the perception of the advertisements on vehicles by consumers. TV spots or advertisements on vehicles are usually suitable to deliver a more limited amount of data compared with printed advertisements [...].*[42]

[39] Sebestyén–Pintér–Zsebő op. cit.

[40] The Council for Competition raised other objections, as well, see Vj-182/2007, Section 70.

[41] Vj-33/2005.

[42] Vj-182/2007, http://www.gvh.hu/domain2/files/modules/module25/11924A1607D1144F9.pdf

5. Summary proposals

Before drawing up summary proposals, it should be noted that the OEC practice passes the judicial test. On this basis, it should be recorded that the above decisions, based on the decisions adopted by the appeal courts, fully comply with the legislation in force. It should also be pointed out that the practice of the OEC has not changed after the Unfair Trade Act entered into force based on the decisions examined.

In the cases related to the examples analyzed by behavioral economics, it can be established that the OEC issued convictions due to the incompleteness of information in all cases. The OEC failed to take on the task of "judicial development" concerning the erroneous consumer choices [K&H-ügy, Vj-33/2008], in the case of which the enterprise based the preferential offer on the exploitation of a previously known error of the consumers. It is a fact that the Unfair Trade Act places a rational consumer in the focus of the regulation, but according to Article 4(1), the overall behavior characteristic to a specific consumer group should (also) be taken into account. There is no doubt that in this case an erroneous consumer choice is an overall behavior, at least based on the results of the behavioral economics. In my opinion, the actual decision-making point is in obtaining the preferential offer (discount) both in Case No. K&H-s Vj-33/2008 and No. Vj-113/2010 and related current account fees are not essential. In both cases, the essential decision-making point for a rational consumer is the characteristic of the preferential offer.

On this basis, I propose for consideration of the OEC to amend its principles on consumer decision-making (in accordance with the HFSA recommendations) to allow for a consumer choice deviation even in the case when the enterprise provides full disclosure. If the OEC takes this under consideration, it should be added what expectations has the OEC from consumer information, specifying, in particular, what useful information the advertising enterprise should publish in order to make a correct decision.

It is proposed to consider each provision of the special sectoral legislation and the relation of the legal practice pursuant to the Unfair Trade Act. Occasionally, financial sectoral legislation do provide for full disclosure, and the enterprises are required only to specify the information as to the place where the detailed information can be accessed. In this respect, I refer to the relevant legal provision

on displaying the SDIR (standardized deposit interest ratio), as an example.[43] However, the practice developed as a result of the judicial decisions requires detailed and complete information. Neither the enterprises nor the law enforcement authorities do not dispute that some advertisements have only a limited capacity to convey information. There is agreement that this is a decision-making process which, as a whole, leads to a purchase decision, and not an impulse, displayed as an advertisement. All abovementioned decisions contain that a specific advertisement should be true and precise in itself and that in the evaluation of an advertisement other information provided at a later stage cannot be taken into account. These may also lead to the conclusion that complex financial product and preferential offers (such as deposits combined with investment products and investment units) cannot be or may only be advertised under the threat of a fine, since Case No. Vj-182/2007 establishes that a large-scale poster may use 2-3 main messages. In my opinion, this contains an unjustified limitation. The requirement on full information may preclude the information about the difficulties in consumer decision-making.

My proposal suggest that based on the practice analyzed and described, first the regulation, then law enforcement should help reducing consumer choice deviation, even by providing for the type of mandatory information should be specified on a credit card product in reaction to the substantial difficulties in decision-making.

At the same time, it can be established that there is a decision saying that it should be taken into account that it is an advertisement, which has its characteristics. In my opinion, there was such a decision even before the Unfair Trade Act, where the legal provision in Article 7(2) of the Unfair Trade Act presently in force was partly applied. Despite the reference made by the OEC to Article 7(2) [UniCredit Bank – Vj-113/2010], the practice remained the same according to which advertisements should be true and precise in themselves, without any further information. Banners and advertisements accessible online ("by clicking") are a true exception to this rule. I consider it appropriate to apply the more lax rules on online advertisements in a wider context based on Article 7(2) of the Unfair Trade Act.

In my view, the argument that says that an enterprise luring the consumers may convince the consumers *should also be reviewed*. On the one hand, this is not in the interest of the enterprise (an unsatisfied consumer who will not

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43 Government Order No. 82/2010, Article 7(1).

return) and, on the other hand, the research conducted by the OEC[44] confirms that this is not the practice for financial services. At the same time, this research establishes that the administrators do not try to "dump" the product offered on the clients immediately on the first occasion, but give the clients time to think about the offer and the contract is concluded at a later time.[45]

A further *proposal* refers to the wider use of the Key Information Documents[46] (*hereinafter referred to as "KID"*), known from the domain of investment services, for some products. In July 2012, the European Commission proposed the use and implementation of these documents for retail investment products (investment services).[47] The structure of the proposed *Key Information Document* may be summarized as follows: What is this investment? Will I lose my money? For how long should I keep my money here? What are the risks and what are my obligations? What are my expenses? What happened in the past? How much will I get back if I withdraw [from the investment]? According to the proposal, colors should also be used when drawing up these documents. These colors could indicate the level of risk associated each product, the yield and so on. The American literature states that it is important to review the regulation on consumer information. This regulation should not necessarily focus on product features, but specifically targets errors in consumer decision-making and on the *way the consumer typically use* a specific product.[48] A survey conducted by the OEC confirms that

[44] Study results on the quality of information provided by the banks, June 9, 2008, available on the OEC webpage at the following address: http://www.gvh.hu/gvh/alpha?do=2&st=1&pg=58&m5_doc=5464&m92_act=2

[45] Ibid. 22. *The branch administrators did usually not forced the test buyers to make an immediate decision and conclude a contract, they rather tried to explore the possibilities for further inquiry and contact. In contrast, one third of them is passive, they waited for the clients' questions and provided information only to these questions in relation to the products. Provision of encouragement for further contact is more typical to the administrators dealing with savings (55%) and less typical to those selling the credit cards (38%).*

[46] We are not aware of the corresponding Hungarian term, and therefore, we will hereinafter use the term "Key Information Document". In my opinion, such as a "Key Information Document" is the investors' information provided for in Article 105 Act CXCIII of 2011 on investment fund managers and collective investment forms (hereinafter referred to as the "Fund Managers Act").

[47] COM(2012) 352 final, 2012/0169 (COD), available at the following webpage: http://ec.europa.eu/internal_market/finservices-retail/docs/investment_products/20120703-proposal_en.pdf

[48] Oren Bar-Gill: Competition and consumer protection: a behavioral economics account. *Law & Economics Research Paper,* Series Working Paper no. 11–42., December 2011. 2.

administrators not necessarily provide clients with a copy of the General Terms and Conditions, but with a list of conditions and sales aid. This may be used as an argument that *KIDs* should be used and, in my opinion, these documents should be introduced and used.

I propose to introduce a common color coding system which warns the clients of the *"difficulties"* associated with the product and a notice about the place where the details are available, as well as the conditions that are required to be provided to the clients as early as the time of the transaction. In most cases, this compulsory information is already part of the practice, such as the compulsory information provided for in the Act on consumer credits[49] or the contract concluded in relation to money transmission services. The abovementioned information, in their reviewed and short form, may facilitate an effective consumer decision-making.

If such product information is introduced for financial services, I see an opportunity to have the advertisement contain only the information on the risks associated with the product, as with drugs or alcoholic beverages, such as *"attention, regular and excessive use of the credit card may lead to over-indebtedness; please thoroughly read the product information before signing the contract".* In addition to the above (that is, advertisements are able to convey only limited information), to support my opinion, I refer to the Koltay–Vincze paper which states that *"the regulation on the obligation to provide information remains the only real regulatory tool, but it seems that this is not fully efficient either. Further studies should be conducted to determine the appropriate manner to regulate information provision. One possibility is to warn against the risk of over-indebtedness just as in the case of the risks associated with smoking, but it is a question of whether it is effective or not. Another possibility is to require the enterprises to constantly provide information to warn clients about the costs".*[50]

In my view, the above draws attention to the fact that the legislation in force and the legal practice based on this is not able and cannot manage all problems. Case No. Vj-33/2008 also confirms that there are and always will be products that exploit consumer choice deviation. Credit cards can typically be such products, which present risks. However, we should not deviate from the question of rationality, like behavioral economics deviated from the neoclassical theory.

[49] Article 6 of Act CLXII of 2009 on consumer credits.

[50] Koltay–Vincze op. cit. 514.

As stated above, the prohibition may avert the consumers to the unregulated market (such as *usury*). Small loans are needed and therefore, we should move toward an appropriate regulation, education and efficient information.

Finally, consumer education cannot be emphasized enough. It is not enough to have a warning in the advertisements, and the overall consumer protection education should gain in importance. By reference to the studies conducted on individual stories by Agarwal et al. (2008), the Koltay–Vincze paper states that *"clients learn and become increasingly able to know both their own ways and the contracts. However, this knowledge becomes obsolete. Old knowledge is more and more forgotten and only recent experiences count which is also a form of imperfect rationality."*[51]

[51] Koltay–Vincze op. cit. 513.

ARE FINES FINE? SANCTIONING INFRINGEMENTS OF THE DIRECTIVE ON UNFAIR COMMERCIAL PRACTICES IN HUNGARY

Tihamér Tóth*

1. Introduction

The Hungarian Competition Authority (Gazdasági Versenyhivatal, "GVH") has always been competent to investigate misleading and aggressive business practices with a potential impact on free and fair competition. In 1991, the very first year of its operation, the GVH established 13 infringements.[1] The first cases involved bait and switch advertising, and false information on price discounts, practices that occupied the agenda for two decades to come. Most of the companies subject to these early sanctions do not exist anymore. The big and recognizable names of the retail, telecom and financial services sectors that turn up in the hearing room of the competition authority now were first investigated only in the late nineties.[2]

A legal rule without appropriate and effective sanctions is ineffective. In the legal realm sanctions reflect the seriousness of the underlying legal norm. In Europe, imposing fines is the most common sanction when it comes to the illegal behavior of a business undertaking. After comparing the competition rules of European jurisdictions, the first modern Hungarian Competition Act of 1990 relied heavily on monetary sanctions. Introducing criminal penalties was not on the agenda. Interestingly though, some typical commercial practices,

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[1] That compares with three cartel cases and 12 decisions regarding abuse of dominant position. The total amount of fines was HUF 61 million. About half of the misleading cases, especially those relating to advertising contravening other regulations in the tobacco and alcohol sectors, were based on a general clause of the Act prohibiting a number of unfair business practices. This catchall clause did not appear in the Competition Act of 1996.

[2] The first global company that had to pay a fine was Unilever in 1992 with HUF 2 million.

like the use of false product trademarks, misleading information on the quality of products and other, "more socialist" crimes like charging unfairly high prices or disobeying price regulations had been included in the Criminal Code ever since 1978.[3] Publicly providing misleading information was first criminalized by Section 296/A in 1994, mirroring the provision of the Competition Act. The sanction was imprisonment up to two years or criminal fines. However, unlike the competition law provision, it has never been rigorously enforced by public attorneys and thus was not taken seriously by managers and marketing professionals.[4]

In this paper I endeavor to explore what enforcement and sanction policy Hungary opted for and how it has been applied by the Competition Authority and the review courts. We will see that moderate fines are a routine consequence of unfair commercial practices in Hungary. After presenting the principles of the GVH fining code, I summarize the practice concluding that fines are not high enough to deter most types of illegal behavior. Therefore, other sanctions of an administrative and criminal law nature will also be discussed. Finally, the role of soft legal instruments, like commitment decisions and education with compliance programs will be explored.

2. The UCP Directive

Misleading advertising has been subject to European rules since the mid '80s.[5] The aim of the directives was setting harmonized rules for the common market to secure a minimum level of protection for European consumers. In addition to the substantial rules, the directive on misleading advertising also included some principles on how national institutions should enforce the national implementing measures. Member States were asked to introduce adequate and effective means to control misleading advertising to serve the interests

[3] Sections 278-303 of the Act No. IV of 1978.

[4] In 2012 a new criminal code was adopted by the Parliament. Section 417 of the Act No. C of 2012 includes basically the same provisions. If the misleading information relates to health claims or to environmental protection issues the sentence may reach three years. However, neither the old, nor the new text covers price related information in contrast to the ingredients, origin or the quality of the product which are, at least in Hungary, less important for the average consumer than prices.

[5] Council Directive 84/450/EEC of September 10, 1984 related to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising. It was repealed by Directive 2006/114/EC of the European Parliament and of the Council on December 12, 2006 concerning misleading and comparative advertising.

of consumers, the general public, and competitors fairly playing the game.[6] It was left to the Member States to decide whether to empower administrative agencies to investigate conduct or to have courts adjudicate these legal issues.[7] At a minimum, these national institutions were expected to have the power to order the prohibition or cessation of the misleading advertising. National rules of procedure had to make accelerated procedures possible, for example, by way of interim measures. Though it was not obligatory, Member States could have enabled their agencies or courts to require the publication of their decisions, in whole or in part, and the publication of corrective statements.

The UCP's rules on national procedures and sanctions have not brought much novelty here in Hungary. It is still for Member States to lay down rules on penalties and procedures. They can choose between the administrative or the judicial model. The penalties are expected to be effective, proportionate and dissuasive.

Hungary opted for the administrative model meeting the above mentioned principles well before the UCP Directive was adopted. The GVH did not hesitate to launch investigations if unfair advertising was threatening competition. A pragmatic allocation of work developed with the government controlled[8] 'real' consumer protection agency focusing on other unlawful business activity endangering consumer rights beyond getting the right information. The legislature saw no reason to change this, only the allocation of cases among the authorities was re-regulated. The Competition Authority got the largest and most substantial piece of the cake involving unfair practices that may have significant impact on competition. The consumer protection agencies deal with smaller, mainly local, unfair commercial practices (*further: UCP*), while the financial supervision agency investigates minor banking and financial services infringements.

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6 See Article 4 of Council Directive 84/450/EEC. Article 5 also mentions the potential role played by self-regulated bodies, but only as 'addition to the court or administrative proceedings'.

7 If a Member State opted for the administrative model, it had to make sure that reasoned decisions are adopted by an independent authority and that they can be appealed before a court.

8 The GVH has always been an independent authority, just like the German Bundeskartellamt. The National Consumer Protection Office had the benefit of supervising a country-wide network of local offices, but it was subject to frequent reorganizations and changes in government.

3. Sanctioning misleading practices: the early days

Protecting the process of fair competition and the interests of consumers has always been a priority of the GVH. This is evidenced by both the number of procedures and the size of the fines. In 1992, a record fine of HUF 100 million was imposed on a distance selling company for its aggressive and misleading practices.[9] A fine like this would be considered fairly high even today, disregarding the high levels of inflation in the past two decades. It was also remarkable that the GVH routinely investigated practices that were expressly prohibited by sector specific regulations. The explanation for this was that these companies achieved unfair competitive advantages as well, calling for competition law sanctions beyond the sector specific consequences. It was fairly common that competitors were policing the market, since complainants had a uniquely strong position comparable to that of a plaintiff before a court. A good example was the 'which-is-the-best toothpaste war' between Colgate Palmolive and Procter & Gamble that ended in 1994 essentially as a draw with a HUF 30 million fine imposed on both companies.

In 1996 a new competition act was adopted.[10] The most important reason for this new legislation was bringing Hungarian antitrust rules more in line with the competition rules of the common market.[11] The rules on misleading information were not changed substantially. The rules on fines were fine-tuned. The fining rules focused on the seriousness and the length of the infringement, and listed the most frequent aggravating and mitigating circumstances.[12]

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[9] The term distance selling refers to buying products from a distance, for example, online or over the phone. This fine also accounted for 77% of the total fines in 1992. However, a great number of fines imposed on smaller undertakings were never collected due to lax procedural rules. Today, unpaid fines are regarded to be like taxes and are collected by the tax authority. In 1993, a car retail company was ordered to pay the same substantial fine partly because it did not inform its customers that the vehicles it imported from the U.S. did not meet the requirements set by the Hungarian transport authority and owners were required to pay additional expenses as a result to get approval.

[10] Act No. LXXXVI. of 1990 was replaced by Act No. LVII. of 1996.

[11] For the discussion of the legislative developments see Tihamér TÓTH: Competition Law in Hungary: Harmonisation towards E.U. Membership. *European Competition Law Review*, 1998/6. 358–369.

[12] It is worth mentioning at this point that fines have always been an optional consequence of finding an infringement. There is no obligation for the GVH to fine the responsible undertaking. Despite this, the decisions do not start with an explanation on the *existence* of the fine but simply try to substantiate its *size*. In some other fields of administrative law, like transport, the authority has no option but to impose a fine, where the fine amount is sometimes fixed by the legislator.

The first competition act stipulated that if the harm caused by the infringement can be calculated the GVH could impose a fine trebling this amount. This provision was applied in several cases of misleading advertising where the price paid to the advertising agency was used as a base.[13] The Competition Act of 1996 deleted this rule. Taking the marketing budget as a starting point for the calculation of fines reappeared a decade later in the fine guidelines issued by the GVH.

With some exceptions, fines were not very serious, especially compared to the size of the undertakings. This was also reflected in the scant reasoning of their amount. The two to three sentence long texts in the end of the decision simply enumerated the relevant factors taken into account and usually did not even express which of those factors were aggravating and which were attenuating. To put it differently, fines were not calculated. Fines were the result of a complex and subjective weighing of all the relevant factors of the case. It is no wonder that judges found it easy to reduce their fine levels by one-third on average, and without much reasoning.[14] It cannot be excluded that council members anticipated and took into account this almost automatic fine downsizing and they responded by inflating the original fines.

The years 2000-2001 were important for the development of the GVH's fining policy. The Competition Council seemed to be prepared to adopt higher fines, taking its role more seriously. This change was the result of several factors. The amendment of the act introduced a 10% turnover based ceiling for fines,[15] which was not only to save the companies from fatal consequences but also served as an orientation point for the GVH and the review courts to set the right level of fines. Secondly, with the strengthening of the cartel policy additional serious infringements came to light deserving fines of a much higher dimension. This increase could have had a side-effect on the cases of misleading advertising decided by the same council members. Thirdly, the human factor was also relevant. Following the reorganization of the Competition Council, the majority of

[13] The review courts quite often departed from this and used the alternative general approaching weighing all the pros and cons, usually reducing the fines by one-third.

[14] This was done by finding certain circumstances which were not entirely taken into account by the GVH. For example, in case Vj-132/91 related to Fogyi weight loss pills, the original fine of HUF 3 million was reduced to HUF 2 million due to the information provided at the points of sale largely correcting the misleading TV ads. It is interesting to note that the Supreme Court's judgment approving the decision of the first instance court expressly states that administrative competition law fines do not have deterrent functions (judgment No. Kf.II.25.357/93).

[15] More precisely, the turnover achieved by the group of undertakings can also be taken into account if the reasoning of the decision clearly identifies that group.

the council members were replaced by lawyers and economists willing to impose fines of a magnitude existing in the practice of most European agencies. The GVH also started to elaborate on a calculation method and publishing its fining guidelines. However, it took several years to agree on, and to implement, the new method. Deterrence and punishment were acknowledged as the main aims of sanctioning, though for some judges it took more years to make this move.[16]

4. Hungarian rules on fines and the practice of the GVH

The Competition Act includes general rules on fining applicable to both antitrust and cases of misleading advertising. The legal maximum of 10% of the previous business year and the non-exhaustive list of relevant circumstances, like the length and seriousness of the infringement are the most important legal rules.[17]

Fining guidelines in misleading advertisement cases were published and signed by the president of the GVH and the chairman of its Competition Council in 2007.[18] The starting point of the calculation follows the logic of the antitrust guidelines[19] by selecting a basic amount that is further adjusted by other

[16] According to traditional wisdom, administrative law sanctions are there just to ensure that substantive administrative rules are respected and order is maintained. Some judgments of the Supreme Court expressly state that phrases like deterrence and punishment belong exclusively to the sphere of criminal law (i.e. case Vj-48/2006, number of judgment Kfv. III. 37. 154/2009/5. sz., adopted on December 1, 2009. The GVH fined Magyar Telekom for HUF 100 million, the second instance review court reduced it to HUF 70 million, and the Supreme Court approved it).

[17] Section 78 (3) lists the following as relevant factors: gravity of the violation, duration of the unlawful situation, benefit gained by the infringement, market position of the parties violating the law, imputability of the conduct; level of cooperation by the undertaking during the proceeding, and existence of any repeated displays of unlawful conduct.

[18] Notice No. 1/2007(http://www.gvh.hu/gvh/alpha?do=2&st=1&pg=42&m5_doc=4575). Section 36 (6) of the competition act empowers the president of the GVH and the chairman of the Competition Council (being one of the two vice-presidents of the GVH) to jointly issue notices summarizing the basic principles of the law enforcement practice of the authority. These notices should have no legal binding force as their function is to increase the predictability of law enforcement. Despite this clear wording, the Constitutional Court and also the Supreme Court held that the GVH should act in line with its own notices, unless it provides a clear explanation for not doing so. For further details see my paper in Hungarian: Az Alkotmánybíróság határozata a Gazdasági Versenyhivatal közleménykiadási jogáról. (explaining the Constitutional Court's decision on the competition authority's competence to issue guidelines noting the unintended impact it may have on the independence Competition Council members) *Jogesetek Magyarázata,* 2010/1. 12–19.

[19] The first antitrust guidelines were included in Notice No. 2/3003. The actual antitrust fining document is Notice No. 1/2012.

relevant factors. In UCP cases the starting point is usually the relevant costs of publishing the misleading or otherwise unfair communication. The wider and the more intensive the campaign was, the higher the fine could be. The relevant marketing budget is not an objective starting point. First, it can be manipulated by the contracting parties with a long term and complex relationship. Second, since usually only parts of the marketing campaigns are found misleading, the GVH needs to make a subjective adjustment. For example, the GVH takes just 25% of the budget as a starting point for the calculation of fines if only 25% of the messages coded in the advertisement were found unlawful. Yet, this remains the best starting point. The guidelines envisage an alternative route to approach the correct fine levels: the Competition Council may choose to take a certain percentage up to 5% of the turnover related to the product or service during the period of the infringement.[20]

If the GVH follows the marketing budget based approach, the next step is to take into account the aggravating and mitigating circumstances. By the end of this second step the amount of the fine may be increased by 100%. If the misleading practice relates to credence products[21] or expensive products where the mistake caused by the misleading act cannot be corrected in the course of frequent similar purchases, the amount of the fine can be increased. Other negative factors are the intensity of the campaign, including the temporal scope and geographical coverage. Market impacts can also be relevant, composed of the size and market share of the company, the intensity of competition on the relevant market and also roll-on effects on other related markets. Examples of circumstances that can help reduce the fine are, for example, the availability of other correct, and complete, pieces of information that the consumer may acquire before making a buying decision.

The attitude of the undertaking can also influence the size of the fines. The notice emphasizes that competition law infringements are decided on an objective legal basis, still subjective intent and attitude may influence the level of fines. Correcting the mistakes made and providing compensation to the

[20] This is a rarely used option. If it was to be applied, the first and second step of the calculation process would merge: the correct level of per cent is determined on the basis of the relevant aggravating and mitigating circumstances. In case Vj-67/2006, focusing on misleading labeling of Chappy dog food products, the Competition Council imposed fines reaching 1.5% of the related turnover. This was further reduced to take into account the costs related to the required new package labels.

[21] Products whose qualities are difficult to judge even after consumption. The notice is based on an expansive reading of this phrase when it mentions not only health care products but also financial services or services provided to elderly people.

victims are the signs of a true will to change behavior for the future. On the other hand, if an undertaking commits several different types of unfair actions, it may deserve a harsher penalty.

The third step of the fining process is to consider recidivism and the effectiveness of the sanction. According to the guidelines, the amount of the fine can be adjusted in light of the size of the undertaking to achieve the right level of deterrence. It may be increased if the calculated fine seems too small for a large company and can be decreased if a single product company is caught with unlawful behavior.[22] Furthermore, if an undertaking commits similar infringements multiple times, its fine may be multiplied by that number. Note that only infringements of the past five years are taken into account for this calculation. Review courts had disagreed whether it was lawful to apply such a multiplier in the course of the complex weighing of pros and cons by a public agency. The final ruling of the Supreme Court upheld the use of a mathematical formula, like this, if the facts of that case are strong enough to support this strict approach.[23]

Some cases were decided before the publication of the guidelines where the principles of the new fining policy were tested by the Competition Council. In February 2006 the GVH imposed a enormous fine on Colgate's 'your doctor's choice' campaign also claiming that Colgate's toothpaste can provide the solution to the 12 dental related problems.[24] The reasoning followed a three-step approach. First, the costs of the campaign were chosen as a base for the calculation. Second, the relevant aggravating and mitigating circumstances were each listed, and measured with an appropriate percentage totaling 100%.[25] Third, it was considered whether the calculated fine was high enough to effectively deter, i.e. whether the application of a multiplier was needed to reflect recidivism. In this case, the Competition Council raised the starting amount by 43%. It was not increased further since the GVH considered that a fine reaching 2.5% of the turnover in the previous business year was deterrent enough.

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[22] However, this adjustment was rarely, if ever, used by the GVH. My argument in this paper that certain fines are not big enough to deter would differ if the Competition Authority had routinely analyzed how the nominal fines relate to the absolute size of the undertaking addressed by the decision.

[23] See my paper in Hungarian: A Legfelsőbb Bíróság ítélete az OTP Bank Nyrt. és a GVH közötti perben. (analyzing the practice of the GVH and review courts in applying mathematical formula) *Jogesetek Magyarázata* 2010/4.

[24] Vj-148/2005. The fine was HUF 257 million.

[25] This mirrored the structure of the antitrust fining guidelines: consumer harm up to 30%, competition harm up to 30%, attitude of the undertaking up to 20% and other factors up to 20%.

One problem with the application of these guidelines has been that the reasoning of decisions were not detailed, often omitting the reference of this notice. One of the reasons could be that the size of the marketing budget, being the basis of the calculation qualifies usually as a business secret. Most of the cases decided by the Competition Council in 2012 refer to these guidelines as a basis for calculating the fine in the actual case. However, it is hard to track how the GVH came to the final amount, since the reasoning only lists the various factors taken into account without adding a certain weight or percentage to them.

My closing remark regarding the text of the fining guidelines is that the notice has never been reviewed and corrected in line with the practice.[26] Not even the adoption of the implementing measures of the UCP Directive served as an impetus to rethink and refresh the notice. One obvious change in the practice and the notice could be to herald a stricter fining policy in relation to blacklisted illegal behaviors. This, together with the frequent absence of notice by the Competition Council of its reasoning for most decisions may have led to the conclusion that the guidelines no longer reflect the general principles of the GVH and they have become *de facto* dead letter. However, this is not true if we look at the decisions of the past two years. Now the reasoning of the decisions refers to the notice of the GVH. The reader, be it the addressee or a third party in the market, can still not ascertain how exactly the GVH calculated the amount of fines. In my humble opinion this weakens the educational-deterrent effect of GVH decisions.

5. Current practice of the GVH

The figures of 2012 show that the average size of fines imposed in UCP cases varied in the range of tens of millions of Forints.[27] There were just two procedures where fines reached the symbolic 100 million HUF level. This amount is still far from being excessively high given the large size of the undertakings involved. There were some cases, before the UCP Directive was implemented, where the Competition Council tried to follow a stricter approach calculating and imposing fines between 100-300 million HUF. This trend changed a couple of years ago, and now recorded fines rarely reach 100 million.[28]

[26] The antitrust sister guidelines were amended several times and even withdrawn for some years before re-adoption in 2012.

[27] The Hungarian Forint (HUF) is used herein as the currency for fines. At the time of this writing, approximately 300 HUF equaled 1 EUR, and 230 HUF equaled 1 USD.

[28] Some of the potential reasons for this change include: the cases investigated now relate to

One field with market-wide infringements, claims misleading the origin of food products, was sanctioned with a light hand. In 2012, the GVH imposed a HUF 10 million fine on Auchan[29] and a HUF 5 million fine on Penny Market[30] referring to guidelines No. 1/2007. The fines were based on the costs related to the unlawful communication campaign. The uncertainties surrounding the exact definition of 'hungaricum' and the short, one-week period of the infringement were taken into account as attenuating circumstances. Although the decisions declare that the GVH intended to impose deterrent fines, it is doubtful whether HUF 10 million is of that magnitude. It seems that the third step envisaged in the fining guidelines was ignored.[31] In the Auchan case the reasoning of the decision even emphasizes, as an aggravating factor, that the company had recently been fined twice, for 30 million each time, for similar conduct. The HUF 5 million fine on Penny Market also seems rather small given that the company had committed several other infringements in the past and the unlawful campaign ran for almost a year and a half.

The highest fines of 2012 were imposed in two investigations targeting Vodafone and Magyar Telekom each having claimed to have the fastest and best mobile data network.[32] Following Vodafone's 'best' campaign the Deutsche Telekom owned Magyar Telekom also started to advertise that it had the fastest broad band mobile data network.[33] The Competition Council explained that in markets with just a few well known players a claim to be "number one" can also be regarded as a comparative advertisement, even though the competitors are not expressly mentioned.[34] The Council added that in a market subject to rapid and frequent technological improvements it is almost impossible to verify the truthfulness of a claim for the whole length of a marketing campaign.

smaller advertisement campaigns, the new rules of the UCP legislation may have required a more modest approach, and the frequent change of Competition Council members.

29 Vj-17/2011, decision of August 22, 2012.

30 Vj-18/2012, decision ofMarch 27, 2013.

31 A practice like this will certainly not be challenged before a court. No one will complain that the GVH does not follow its own guidelines.

32 Cases Vj-37/2011. and Vj-38/2011.

33 The legal basis of the two decisions was the Hungarian version of the UCP directive and the Act on Advertisements implementing Directive No 2006/116/EC of the European Parliament and the Council on comparative advertising. The relationship between these two types of unlawful advertising activities and the respective directives is that in order to qualify as a lawful comparative ad, it should not be misleading under the UCP Directive.

34 Case C-381/05 De Landtsheer Emmanuel, judgment of 19. April 2007, sections 16–17.

Vodafone, who started the marketing war, had to pay HUF 50 million, only half of the amount imposed on the second actor, Magyar Telekom. According to the GVH, the difference is due to the different marketing budget of the companies. However, in my view, the Competition Authority should have given more weight to the fact that Magyar Telekom launched only a follow-up campaign and that Vodafone advertised itself four times longer than the market leader Magyar Telekom.

Some months later, in March 2013, the third largest operator, Vodafone was fined again. This time, HUF 30 million for claiming that between February and March 2012 its network was accessible "countrywide" and "everywhere" compared with, and in contrast to, the other two mobile service providers' networks.[35] Regarding the fines, the Competition Council recalled the serious effects due to the length of the intensive campaign and the repeat infringement.

Despite the intentions of the Competition Council reflected in its strong wording, given the previous infringements of the company and bearing in mind the usually high costs of the TV campaign, the 30 HUF million fine cannot be considered a serious deterrent at all. It is nothing more than a marketing tax that companies eager to get even a temporary competitive advantage are prepared to pay. In the field of misleading advertising the negative publicity attached to a fining decision does not seem to bite. Consumers may have been accustomed to newspaper headlines heralding that the GVH sanctioned this and that company again. Consumers may not believe in advertisement as much as the GVH is hoping they do. Or, some consumers may disagree with the sometimes stubborn interpretation of the GVH and do not feel mislead by the challenged practice. This may undermine the moral stigma effect of UCP sanctions.

Before condemning the GVH for using ever lower fines it shall be noted that there are certain types of misleading acts where the GVH does not hesitate to impose fines reaching even the maximum level allowed by the law. In addition to some health related products, cases involving lottery-like financial services[36] demonstrate service providers that seem to continuously disregard the clear and well-articulated expectations of the GVH. Recently, Orion Lux Kft. Was fined

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35 Vj-37/2012.

36 Members of these consumer groups pay installments for a long period that forms the basis of the credit they will acquire in the future. Unlike with banks, consumers will not get the loan after the contract is concluded. The service includes a gambling element: only the lucky ones will get access to financial resources fast and conveniently. The rest of the consumer group should wait for an uncertain time period to benefit from membership.

HUF 3.4 million and Euromobilien Kft.-t fined close to 1 million.[37] Their ads were deemed to be misleading because they neglected to inform clients about the entry fee that members must pay to join the consumer group. These fines do not seem to be burdensome in nominal terms but they are significant compared to the size of the companies. Euromobilien Kft. had to pay the maximum 10% of the turnover in previous financial year because it was regarded as a repeat offender.

6. The aim of fining

Why does the GVH impose fines on undertakings? Are these fines high enough? To answer these questions we must explore the role of sanctions in the legal arena. If misleading or otherwise unfair information provided by an undertaking is capable of influencing consumer behavior there needs to be a response. Efforts need to be taken, the sooner the better, to avoid competition distortions by undermining the position of companies obeying the rules and to protect the interests of consumers. Ordering the cessation of the activity seems to be the first and most important step one anticipates from any institution empowered to enforce the UCP prohibition. However, cessation alone can hardly be called a sanction. It may not even hurt the company responsible for the misleading advertising. Something more needs to occur. The aim is, of course, not to be punitive. The aim is to re-establish the legal order and to persuade the company and other market players that the challenged behavior runs against the public interest.

In the past, the reasons for fining decisions did not include a reference to the intentions of the GVH. The first instance when the aim of fining appears in a decision was an imposition of a HUF 100 million fine on Egis in 2004. The Competition Council set the fine in order to sanction the illegal behavior and to deter other market players. One year later, in a decision addressed to the mobile telecom company Pannon, the importance of special and general deterrence was emphasized.[38]

[37] Vj-57/2011, decision adopted in September 2012.

[38] Vj-170/2004. In some cases it was also not entirely clear whether deterrence is 'just' an overall policy aim of the Competition Authority or it is also one of the several elements that are considered during the calculation of the fines. For example, in the reasoning of the Free Choice case of 2010 the Competition Council 'took into account the preventive aim of fines'. However, it was not clear whether this was one of the aggravating circumstances or was nothing more than a side note. Point 39 of the antitrust fining guidelines include deterrence as a potential

The fining guidelines of 2007 refer to a Supreme Court opinion shared by the GVH according to which the aim of fining is to deter market players from committing unfair commercial practices that could endanger fair competition. That aim requires fines that are proportionate but still put a substantial burden upon the company thus deterring it, and other market players, from committing infringements.[39] The GVH also lists three aims that influence its fining policy: 1) special and general deterrence; 2) punishment of misbehavior; and 3) confirmation to law abiding companies of their actions.[40]

From a sanctioning policy point of view, it is essential to find and apply the legal consequence that is actually effective in changing the behavior of market players. Furthermore, it is also crucial to explain to the alleged wrongdoer and other market players that the practice was indeed unlawful.[41] While there is not much debate that cartels are wrong, there are some commercial practices being punished by agencies as unfairly misleading while companies believe that they were doing nothing wrong. The main reason is that it is very difficult to define which elements, if lacking, in an advertisement would lead to a misleading omission type of infringement. It is also not easy to determine what type of misinformation may change the transactional decision of the average consumer.[42]

It may be the consequence of both inefficient sanctions and resistance on the side of companies that has led to high levels of recidivism in Hungary. Fines will

additional step in the calculation process: when the fines calculated on the basis of relevant turnover are deemed to be insufficient to deter a company with a considerably larger total turnover, the amount of the fine can be increased.

[39] Judgments quoted are Kf.III.27.599/1995/3, Kf. I.25.217/1993/3. és Kf.II.27.096/1995/4. However, it is fair to mention that there were other cases where the Supreme Court expressly denied the role of deterrence in competition law stating that this is an attribute of criminal law (see judgment quoted at footnote 16.)

[40] See point 4 of the Guidelines. Interestingly, the antitrust guidelines of the GVH mention just two aims. Point 10 of the Guidelines No. 2/2012 states that beyond punishment the aim is special and general deterrence. The previous antitrust guidelines included these two objects).

[41] For sanctioning policy to be effective it is also essential that the wrongdoer expects that its conduct will be revealed and punished to a high degree. This may not happen often with secret cartels, but unfair commercial practices, especially misleading advertising, are by definition in the public domain. In these instances how well resourced and motivated the public agencies are seems to be the only issues.

[42] In Hungary, the same approach can be witnessed in the antitrust field as well. Huge fines are imposed only in hard core cartels where no businessman could really argue that he was not aware of the negative consequences of his behavior. In some UCP cases it is not easy to predict which advertisements will be challenged by the Competition Authority. The appropriate font size of letters in a TV ad, the overall message of the campaign, and the completeness of the TV ad all leave much room for debate and uncertainty.

not have the required educational impact when a company does not realize that it infringed the law and it manifestly disagrees with the order, firmly believing that the agency got it wrong and its advertisement was fair. Well known and respected companies frequently organizing complex advertisement campaigns top the list: Magyar Telekom, Tesco, Vodafone.[43]

If we review the size of fines imposed on these companies, there is no correlation between repeat infringements and the size of the fine. For example, fines imposed on Vodafone amounted first to zero, then: HUF 15 million in 2004; HUF 10 million and 5 million in 2005; 2 million in 2006; 20 million and 5 million in 2007; 5 million in 2008; 10 million in 2009; 5 million, 60 million and 40 million in 2010; and finally 100 million in 2011. From those fine levels we may conclude that fines reflect the size of the campaign investigated and the seriousness of the infringement rather than the repeat nature of similar infringements.

Punishment and prevention, 'the two ps', are the two most often cited justifications for causing harm to a wrongdoer. However, if we delve a little bit deeper, we may realize that it is not that easy to follow both paths. In my view, the punishment aim necessitates a more objective, behavior-based approach, while the deterrence and education way of sanctioning puts the emphasis more on subjective, personal attributes. Fining guidelines strive to reconcile these different philosophies, relying more heavily on the objective punishment concept. The calculation of the relevant turnover and most of the relevant factors are conduct based.

Actual intent and state of mind should be the starting point of any sanctioning based on the deterrence objective. However, intent and state of mind are rarely considered seriously in cases, presence is simply assumed.[44] The subjective side of the infringement story is now just one among several elements influencing the level of fines. I argue that the existence of culpability should be the very first question asked, lacking culpability the fine should be zero. It is true that competition law responsibility is an objective one. However, when we are talking about sanctions, subjective and personality-related factors should play a larger role to the extent we are claiming special and general deterrence as the main driving forces behind fines.

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[43] A 2011 review of the GVH practice over the past 20 years showed that Magyar Telekom was number one with 21 infringement decisions, Tesco second with 14 decisions, and Vodafone third with 13 cases.

[44] The GVH's position is that a company like that involved in the investigation should have known the consumer and competition impacts of its advertisement activity.

Without a certain level of culpability it is ineffective to impose sanctions, especially large fines on companies. Yet, fines are imposed routinely in UCP cases, without considering why and how monetary sanctions will change the world, or at least the motivations of the companies. Consequently, fines reaching some tens of millions of HUF are considered by many market players as a kind of marketing tax. They often believe that regardless how well intentioned and prudent they were, the GVH would always find mistakes.

7. Beyond fines – other administrative sanctions

UCP decisions of the GVH include other sanctions beyond fines. It is fairly common to order the trader to publish the operative part, or a short summary, of a decision or a corrective statement. The decisions usually explain how and when it should be done. The media, the timing and the size is usually similar to that of the advertisement found to be unlawful. Measures like this are effective in both correcting the market failure, at least *pro futuro*, and in deterring similar law infringements. An advertisement stating that the company behaved unfairly and deceived consumers strengthens the negative publicity of the GVH decision. Furthermore, the costs related to this 'public' advertisement put an additional financial burden on the company beyond fines.[45] Orders like this do create some extra work for the GVH, since the fulfillment of the obligations must be checked in the course of a special follow-up procedure, but this is a price worth paying.

Beyond corrective measures like this, the GVH does not really have other options to sanction an undertaking for UCP infringements. Just to compare, in a closely related legal area, the consumer protection agencies may choose from a wider range of sanctions. The consumer protection authority is empowered to order the undertaking to stop the distribution of the product or may even order the provisional closure of a shop if the life or health of consumers is endangered.[46]

45 Therefore, the costs of the corrective measures should be taken into account when calculating the appropriate level of fines.

46 Act No. CLV of 1997 on consumer protection, § 47 (1).

8. Beyond corporate fines: individual sanctions

A global consensus seems to emerge that corporate fines alone are not sufficient to deter antitrust infringements. Thus, individual sanctions, be they criminal or administrative in nature are also a necessary element of an efficient sanction regime. The same should apply to unfair commercial practices, especially in those cases where an undertaking is a repeat infringer and the legal rule is a clear one. This last condition is crucial, since there are several UCP cases where the infringement decision is based on fairly subjective reasoning.

When considering individual sanctions, criminal law is often the first thought. However, before relying on the harshest type of legal consequence, it is worth considering other options. Disqualification of directors and individual fines can also be considered as appropriate tools to deter UCPs. In theory, decision makers also face corporate responsibility for the damage they have caused to the company. Unlike in other jurisdictions, there is not much case law in this area in Hungary.[47]

Hungarian administrative law is characterized by fines imposed on undertakings that are held responsible for the infringement. The same is true for competition law. There are just two possibilities when individuals may be ordered to pay a fine. First, there are procedures involving private entrepreneurs, where the undertaking is also a natural person at the same time. Second, when a decision is not implemented in due time, the GVH may order the natural person in charge, usually a director to pay fines. There is also an indirect way when the identity of 'real persons' may play a role. When it comes to the imposition of a fine, it can be an aggravating circumstance if the director of the company had previously worked with another company that was held responsible for similar unfair commercial practices.[48]

Disqualification of directors is also a sanction that exists in Hungarian corporate law. Some years ago the legislature tried to extend this to competition law. However, the proposed legal regime was found to be unconstitutional. The main argument of the Constitutional Court was that the principle of due process would be infringed when the directors had to prove their innocence before an administrative law judge in a non-adversarial process.[49] I believe

[47] For an excellent overview of U.S. practice see Spencer Weber Waller: Corporate governance and competition policy. *George Mason Law Review,* Vol. 18., 2011/4.

[48] Decision Vj-8/2005, approved by the Municipal Court by judgment No. 3.K. 33.331/2005/10.

[49] The law would have provided that the GVH automatically establish the responsibility of the managing directors for the infringement committed by the undertaking. Only then could they

that this past failure should not hinder rethinking the potential of this type of sanction. Although originally it was envisaged just for cartel infringements, it could also be applied to deter repeat UCP infringements. Just like with other more severe sanctions, it would be important to restrict them only to clear cases where individual culpability is obvious, i.e. for breaches of blacklisted clauses.

Criminal law consequences could also be reconsidered. It is not the GVH that investigates crimes, though the example of the tax and customs authority may also be cited to call for criminal investigative powers by an administrative agency. Even if the GVH does not seek such powers, it could formulate and pursue a policy of subsequently referring certain serious UPC infringements to the public prosecutors. This would especially be required for repeat infringements relating to life, health or other important public interests. I would not advise this option for those cases where the decision is highly subjective such as in telecom or banking cases where the impact of misleading omissions on transactional decisions is considered.

9. Beyond sanctions: Commitments

Commitment orders of the Competition Council do not establish the infringements of the law but the GVH accepts, and makes binding, the new course of business proposed by companies under investigation. These commitments often include elements that otherwise could not be directly enforced by the GVH in an infringement decision. Advertisement related commitments usually involve the provision of corrected and detailed information of consumers. In some instances banks agreed to support TV campaigns about the pros and cons of their new financial products. The point is that although commitments are not sanctions as such, they nevertheless may carry a substantial financial burden similar to fines. Undertakings are still pleased with this since they can preserve their goodwill this way. However, wide use of commitments could undermine deterrence efforts. If companies were to believe that it is worth risking a GVH investigation since they can merely receive a commitment order, there might be more misleading information in the public domain. It is thus important to restrict the application of this measure to cases where, for example, there has been no established pattern of behavior, or where the existence of specific sector

have had the opportunity to argue before the review court, in a special procedure without a hearing, that the action of the company was not imputable to them.

regulations makes the application of UCP rules more unclear.

In 2013, the GVH issued guidelines explaining its approach when accepting commitments in UCP cases.[50] The GVH explained its UCP focus by recalling that most of its procedures relate to misleading advertising. Hence, the GVH was in a better position to publish guidelines in relation to these types of investigations.

The Hungarian Post Office has thus benefited recently from this type of closure when the GVH decided that Magyar Posta offered sufficient remedies to please the competition concerns raised initially by the authority.[51] The investigation began because consumers at post office desks were not properly informed about the costs of paying with debit or credit cards instead of using cash.[52] Magyar Posta agreed to employ not only verbal but also written communication that using a card in the post offices is regarded as a cash withdrawal subject to charges set by the issuer of the card.

This decision shows how difficult it may be to accept commitments in UCP procedures. Promising to discontinue the allegedly illegal action is not sufficient. The GVH is eager to get more change than simply declaring the practice illegal. It is questionable what, if anything, consumers received for added value in the Magyar Posta case since providing consumers with complete information would be a natural consequence of an infringement decision as well. The added value offered by the company was perhaps the provision of written materials beyond verbal communication which made the members of the Competition Council not sanction the company. Whether consumers are better informed now than they were before the GVH intervention, is a good question.[53]

[50] Guidelines No. 3/2012 of the GVH, published on October 2, 2012. Commitments were first introduced for antitrust issues so that the agency could flexibly solve complex problems that did not cause significant damage to the functioning of competitive markets. Despite this, the recent guidelines cover only UCP-related cases. See: http://www.gvh.hu/domain2/files/modules/module25/21547566B761BF934.pdf

[51] Vj-67/2011 decision of September 12, 2012.

[52] The GVH was not pleased that the employees of the post office are required to mention that use of plastic cards amounts to a cash withdrawal and not to a normal card payment that is usually free in Hungary, at least to the customer using the card. The GVH urged the company to provide more exact information.

[53] Consumers do not get information at the counter about how much exactly it would cost them using their card instead of paying in cash.

10. Soft deterrence: Education – compliance

Education, raising awareness and sanctioning should go hand in hand. Most business people involved in competition law infringement are knowledgeable and profit conscious. The public agency enforcing UCP rules should do its best explaining its approach. This is a must since most of the rules, even the blacklisted core practices allow wide room for interpretation. In theory, if an undertaking cannot be aware of the exact content of a norm, then it is almost impossible to follow the rules and it is ineffective to impose fines condemning its misbehavior, at least if one intends to follow the deterrence path. Therefore, decisions should be well-reasoned[54] and supplemented by other soft law instruments like guidelines, guidance, press releases.

The GVH performs in this respect fairly well. Although business and marketing people may disagree with the conclusions of the authority,[55] the decisions and even the termination orders are well reasoned. The rules of the game should be clear to a large extent for those familiar with the practice of the GVH, even though one might not like some of these rules. The Competition Authority is also active on the policy making and education stage. It frequently issues guidance or press releases if a general unfair market practice is identified. For example, communicating certain financial services as if the members of consumers groups were receiving credit services.[56]

Another example for educating the public is the case of Hungarian products. Slogans like ‘Hungarian product’, ‘Hungarian quality’ or the use of the Hungarian tricolors are frequently used by supermarkets to promote the sale of food products. Based on its experience gained in the course of its procedures, the GVH issued a press release explaining its approach.[57]

Corporate lawyers and attorneys with competition law experience should also do their best to extend the scope of compliance programs to cover UCP issues as well. Companies involved in the telecom, banking, retail and consumer products

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[54] This is true not only for infringement decisions but also for those decisions finding no unlawful behavior. Both types of decisions help establish the line between acceptable and impermissible actions.

[55] The overly long procedures may also create great uncertainty in the market.

[56] Relying on its established practice, the GVH decided also to publish a communiqué explaining its approach and warning consumers on March 26, 2010. See: http://www.gvh.hu/gvh/alpha?null&m5_doc=6428&pg=58

[57] Q&As, October 26, 2011, See http://www.gvh.hu/gvh/alpha?null&m5_doc=7360&pg=58. The GVH recalls that even price sensitive Hungarian consumers tend to choose products of Hungarian origin if the price difference is not significant.

business will face competition law issues and visit the hearing rooms of the competition agency earlier and more often in cases of a misleading advertising rather than antitrust. Company managers should be educated to know the risks of their unfair marketing efforts.

11. Conclusion

In light of the inherently subjective nature of some marketing practices qualified as unfair commercial practice, I advocate a step-by-step approach with more efficient fines and targeted individual sanctions to better serve the aim of deterrence. In the first place, it would be more effective not to impose sanctions at all if the company has committed an unlawful act for the first time.[58] An exception could exist by taking into account material and personal factors. From a material point of view, the infringement of established rules, especially those included in the blacklist of the UCP Directive deserves sanctioning compared to violations of less clear rules. On the subjective side, the size and past practice of the undertaking should also be considered before the imposition of a fine.[59] It would be sufficient to make guidelines for the company and other players[60] in the market how the GVH interprets the content of a general rule. If a similar infringement occurs within a reasonable period of time, like five years, a monetary sanction capable of determent should be applied. That would be, for some companies, in a higher range than the tens of millions of HUF fines imposed recently. The size of the company should be better reflected in the amount of the fine, even if the relevant marketing budget continues to serve as the starting point of the calculation. Third, the decision makers should also face individual sanctions if their companies do not learn from history and commit repeat infringements endangering social and human values like health. Decision makers could also face criminal law sentences as an ultimate consequence.

[58] There is a similar, often neglected rule in Hungary. Section 12/A of the Act No. XXXIV of 2004 on small and medium sized enterprises requires public administrative bodies not to impose monetary sanctions on first-time SMS offenders, unless life, health or environment is endangered.

[59] The definition of SMS could serve as an objective threshold for this purpose.

[60] In this respect it is a difficult question whether competitors of the undertaking subject to the investigation should be expected to read and understand a decision not addressed to them. The GVH seems to expect also other undertakings to be aware of its decisions.

ADVERTISING SELF-REGULATION. PROMOTING SELF-REGULATION FOR LEGAL, DECENT, HONEST AND TRUTHFUL ADVERTISING

Erika Finszter*

1. Regulatory techniques – hard law-self regulation

The legislative activity of the EU follows principles such as democratic legitimacy, subsidiarity, proportionality and legal certainty, promoting simplicity, clarity and consistency. Traditionally, the member states and EU institutions use the technique of hard or statutory law regulation form . This technique is characterized by centrally prescribed rules and hard law enforcement which has some serious disadvantages, such as its high cost and rigid applicability. In light of these and other disadvantages of the traditional regulatory techniques, the three European bodies entrusted with legislation (European Parliament, Council, Commission) agreed upon new perspectives of legislation. This agreement, the Interinstitutional Agreement on Better Lawmaking (2003), includes some new and not-so-new techniques such as consultation and with focus on private or soft law, namely self-regulation and co-regulation, as demonstrated below:

1.1. 2003. The Interinstitutional Agreement on Better Lawmaking 17-24

The Interinstitutional (European Parliament, Council, Commission) Agreement on Better Lawmaking (2003/C 321/01) laid down the foundation for self- or private-regulation techniques in the EU. The Agreement recognizes the so-called alternative regulation mechanisms (namely self- and co-regulation) as legal instruments consistent with Community law, and stipulates the definitions of self- and co-regulation applicable in the member states for the purposes of Community law. These definitions provide the bases of private or soft lawmaking

* Advertising Self-Regulatory Board, Hungary.

in the EU although further considerations of grey areas where co-regulation, self-regulation and statutory regulation overlap are also foreseen.

1.1.1. The definition of co-regulation[1]

"Co-regulation means the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognized in the field (such as economic operators, the social partners, non-governmental organizations, or associations)."

The main point is that substantive law (as to its objectives) is defined by a statutory Community act implemented by state legislation or the Community legislator, while the procedure for achieving those objectives is (partly or entirely) performed by non-governmental bodies.

1.1.2. Definition of self-regulation[2]

"Self-regulation is defined as the possibility for economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines at the European level (particularly codes of practice or sectoral agreements)."

So in this case both the objectives and the attainment of those objectives are in the hands of non-governmental bodies.

Self-regulation is a voluntary action, and the aim of the participants is manifold: demonstrating their commitment to fair competition or acting against fraudulent competitors are just two of these possible goals.

2. Grey areas of self regulation / co-regulation

It is worth pointing out that co-, self-regulation and other mixed techniques are all legislative mechanisms, not beyond but within the legislation of a given country or the Community. Therefore, in this respect they are not alternatives of legislation but alternative legislative techniques as alternatives to statutory legislation; the decision to use them is taken by the legislative body of the state. However, in the field of pure self-regulation the participants decide to act, make rules and enforce them among themselves. This "legislation" is embodied into the legislation of a country (Community) according to governmental decision

[1] Interinstitutional Agreement on Better Lawmaking paragraphs 18–21.

[2] Interinstitutional Agreement on Better Lawmaking paragraphs 22–23.

(legal backstops, acknowledgment, so forth) but may also working effectively without such central actions (think house rules).

The widely accepted benefits of self-regulation are manifested in its rapid and effective response to the problems raised by the consumers. The SRO can act within days or weeks of the consumers' complaint and 'ban' the advertisement unacceptable for reasons of the costs incurred by the industry– such burdens include the costs and time scale of judicial proceedings.

2.1. Self-regulation in the field of advertising, the Advertising Round Table report[3]

Private regulation in the area of advertising has a history within and outside the EU. Worldwide organisations such as the ICC (International Chamber of Commerce[4]), WFA (World Federation of Advertisers[5]), EASA (The European Advertising Standards Alliance[6]) have been using self-regulation and co-regulation mechanisms successfully for decades. That is the reason why when talking about self-regulation it is the practice of self-regulation in the field of advertising that first comes to mind.

2.1.1. What is self-regulation in advertising?

"Self-regulation (SR) is 'a system by which the advertising industry actively polices itself. The three parts of the industry (advertisers, advertising agencies, media) work together to agree standards and to set up a system to ensure that advertisements which fail to meet those standards are quickly corrected or removed' (EASA)"[7]

Self-regulation in advertising is based on a tripartite mechanism where the three groups of participants represent the three main fields of the advertising industry namely:

- advertisers – developing the message of the advertisements;
- the media – forwarding advertisements to the public;

[3] Self-regulation in the EU advertising sector: A report of some discussion among Interested parties – Health and Consumer Protection Directorate General, 2006 July.

[4] www.iccwbo.org

[5] www.wfanet.org

[6] www.easa-alliance.org

[7] Advertising Roundtable Report 1.1.

- agencies – creating advertisements for the given message in a form comprehensible and preferred by the consumer.

The objectives of SR are enshrined in charters drafted by the participants with due consideration to the objectives set forth under Community or statutory law. Self-regulation in advertising as a legal technique is effective and successful in that it provides a quick, adequate response to a problem (the ad ruled against is eliminated from the public by the voluntary and prompt action of the advertiser and/or media) but it cannot carry the burden of eliminating all the problems of the advertising business.

A good, reliable SR is:

- effective – quick, flexible, low-cost;
- independent – transparent, involving independent persons in the adjudication bodies;
- covers not only ads but all the forms of commercial communication – on-line behavioral advertising, direct marketing and other emerging techniques must be covered;
- funded by the industry – financed through a levy or membership fee paid by the participants on a voluntary basis.

2.1.2. Models of self-regulation across the EU 2.2

"There are wide national differences across the EU as regards the use of self- and co-regulation and statutory regulation. A number of countries use and promote self-regulation; others allow a limited role for SROs, and in others the co-regulatory structure dominates the system."[8]

The scope, main goal or focus of national legislation orientates SR as well, with a focus on fair competition, consumer protection, regulation of media content and so on. The national tradition of using certain legal instruments is also decisive – and some are more likely to accept soft law than others. In the German tradition for example, statutory regulation prevailed as the exclusive regulatory technique and it took several years to create and operate a well-functioning SR. For these reasons the self-regulatory systems were developed nationally, rather than on the EU level. The Advertising Roundtable Report names three models:

– Self-regulation within a strong legislative framework

Legislation allows for an extensive scope of self-regulation, for example in Spain or the UK. The self-regulatory organizations (SROs) in these systems are

[8] Advertising Roundtable Report 2.2.

characterized by their high-profile responsibility, playing a complementary role to statutory legislation. Overlaps (Spain) instead of clear links (the Netherlands) between the jurisdiction of SROs and statutory legislation may give rise to problems in this model.

– Self-regulation restricted by law

Detailed national legislation leaves little space for SR in Germany and Austria. In these countries advertising law falls under strict and detailed competition law rules, which can ultimately have the effect of restricting SRO activity to issues of taste and decency.

– Emerging self-regulatory systems

The new member states of Eastern and Central Europe – including Hungary – all fall under this model. The main issue for these countries is to define the SRO's relationship to statutory law, consumer protection organizations, consumers and competitive undertakings, states the Roundtable Report of 2006. In Hungary – as elaborated below – SRO activity and co-regulation techniques have since gained wide acceptance.

2.2. Ofcom[9] statement[10] – Criteria for constructing a self-regulation mechanism

The legal environment and legal traditions of the UK recognize and promote self-regulation and co-regulation to a degree unknown on the Continent. The Ofcom is the main authority in the field of advertising law. The proposals of the above-mentioned statement are designed to assist the advertising industry in delivering effective self- and co-regulation. The statement recognizes "that industry approaches work best where the incentives of industry are aligned with those of the public."[11]

The Ofcom statement views the different legal techniques as a continuum of degrees of formal intervention in the markets beginning with a situation of absolutely no intervention (no regulation) and ending with statutory regulation,

[9] Ofcom (office of communications) – independent regulator and competition authority for the UK communication industries, www.ofcom.org.uk

[10] Ofcom statement identifying appropriate regulatory solutions: principles for analyzing self- and co-regulation, 10 December 2008.

[11] Ofcom statement.

with self-regulation and co-regulation as a transition between the first and final stages.

There is a possibility to move from statutory regulation to self- or co-regulation as evidenced by the example of the TV Advertising Code standards enforcement in the UK where current statutory regulation can be repealed to give way to self- or co-regulation.

The Ofcom statement sets forth the best-practice criteria for self- or co-regulation. According to the statement self- or co-regulation mechanisms are most likely to work properly under the following circumstances:[12]

- public awareness – consumers have to be informed about the existence and aims of the SRO;
- transparency – both the stakeholders (members of the SRO) and the consumers have to have confidence and awareness, which can be achieved through publishing annual reports and conducting far-reaching public consultations;
- significant participation from the side of the industry – the stakeholders should represent a very high proportion of traders in the marketplace or the vast majority of consumers;
- adequate commitment of resources – this mechanism is financed by the industry. It is important make adequate resources available in order to achieve the objectives set, while the distribution of costs must be proportionate so as not to exclude smaller traders;
- Enforcement – individual companies breaching their obligations must be sanctioned ('name and shame' is an accepted and effective sanction);
- clarity of processes and structures – clarity of institutional structures, procedures and funding arrangements;
- audit of members and programs – Key Performance Indicators must be set for the industry and the SRO to ensure the achievement of the objectives;
- system of redress – consumer complaints must be resolved quickly and effectively;
- involvement of independent members – the involvement of consumer organizations, other non-governmental organizations and experts is important to gain trust and respect for the mechanism;
- regular review of objectives and aims – the previously determined objectives have to be reviewed, because they may have been fulfilled

[12] Ofcom statement figure 4.

since or rendered moot by changes on the market;
- non-collusive behavior – the mechanism has to be transparent, in compliance with hard law, and capable of demonstrating the industry's commitment to non-collusive behaviour.

Naturally not all of the above-mentioned criteria have to be asserted to an equal degree in all mechanisms. The system in place in Hungary is an example of the implementation of best practices in the EU, most of all for its effectiveness in preventing the publication of unacceptable advertisements (copy advice) and in handling consumer complaints. Thus it places the emphasis on the active participation of the industry, enforcement measures, involvement of experts and an effective system of redress.

2.3. Co-regulation agreements under the Act on Media Services and Mass Media

Pure self-regulation is characterized by the lack of formal oversight by the government or the regulator. Pure statutory regulation is when state intervention imposes direct obligations by way of legislation, enforcing such rules by the court. In between those two mechanisms there are several possibilities available to achieve an objective. There are systems where the objectives pursued are prescribed by hard law, while the enforcement is the burden of self-regulating organizations, and *vice versa*, where industry-set rules are enforced by the state. The co-regulation system established in Hungary by the Media Act is closer to the first model: the rules laid out in the Act are – under certain circumstances – enforced by a procedure of the SRO. It is worth pointing out that parallel to this system, the Hungarian SRO operates the purely self-regulatory mechanism regarding the ethical rules prescribed by the Hungarian Code of Advertising Ethics[13] (Code).

As a fundamental principle, the Act on Media Services and Mass Media underlines that self- and co-regulatory procedures play an important role in the ambit of media regulation.[14]

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[13] Available in english from here: http://www.ort.hu/images/Pdf/english/Code%202009.pdf

[14] Act CLXXXV of 2010 on Media Services and Mass Media Article 8.

2.3.1. Application and compliance with the Act[15]

2.3.1.1. General rules (Articles 190-196)

The goals of employing co-regulation mechanisms are "facilitating voluntary observance of law and achieving a more flexible system for law enforcement."[16] The co-regulation system of the Act includes the objectives and sets the shared administration fields, which are expressly specified in the Act; and the cooperative performance of tasks which cover a wider range of activities (joint performance of tasks, implementing principles of activity, service development, programs of public concern linked to media administration and media policy). These objectives are achieved by concluding a so-called administrative contract between the Media Council and the SRO. The code of conduct applied by the SRO under the Act differs from the one employed under the purely self-regulatory mechanism operated by the same SRO. The difference is apparent from fact that a separate code is included in the administrative agreement. The code in the administrative agreement does not include the self-imposed rules set by the advertising industry but follows the provisions of the Act. The Media Council participates in the financing of the SRO in performing its tasks as specified under the Act and the administrative agreement.

2.3.1.2. Proceedings of the self-regulatory Body (Articles 197–200)

The proceedings of the SRO by no means fall under the regulatory powers of the Media Council or any other authority. The SRO's involvement precedes and supplements the activities of the Media Council. This means that in cases falling under the scope of the Act, a self-regulatory procedure precedes the exercise of the regulatory powers of the Media Council. The cases foreseen under the Act in which the SRO may, and preferably should take action are as follows (Paragraph (2) of Article 192):

- supervision of compliance with Articles 14–20 of the Press Freedom Act or any of those provisions in relation to printed press products,
- supervision of compliance with Articles 14–20 of the Press Freedom Act or any of those provisions in relation to online press products,
- supervision of compliance with Articles 14–20 of the Press Freedom Act or any of those provisions in relation to on-demand media services,

[15] Act CLXXXV of 2010 on Media Services and Mass Media Part IV. chapter VI. Articles 190–202.

[16] Act CLXXXV of 2010 on Media Services and Mass Media paragraph (1) of Article 190.

- supervision of compliance with Part Two, Chapter I of Media Services and Mass Media Act or any of those provisions in relation to on-demand media services.

As a result, the SRO's monitoring activity covers printed and online press, as well as on-demand media services as regards their compliance with Articles 14–20 of the Press Freedom Act[17]. The abovementioned articles of the Press Freedom Act stipulate rules regarding:

- the respect for human dignity;
- the prohibition of abuse of consent to publish statements,
- the prohibition of media content violating the constitutional order;
- the prohibition of media content liable to incite hatred against any nation, community, minority or majority;
- the protection of the intellectual, psychological, moral and physical development of minors;
- discernibility of commercial communications from other media content, ban on surreptitious commercial communication;
- prohibition of media content offensive to religious or ideological convictions;
- prohibition of media content encouraging conduct possibly harmful to health, safety or the environment;
- ban on commercial communication promoting tobacco products, weapons, ammunition, explosives, gambling games organized without the permission of the state tax authority, prescription medication and therapeutic procedures (for the latter two see also exemptions in the Act on commercial advertising and other relevant legislation);
- naming the sponsor of the respective media content and further rules on sponsoring.

The compliance of on-demand media services with certain provisions of the Press Freedom Act is also covered by the SRO's supervisory functions. Such provisions concern the following areas:[18]

- mandatory rating of the program in accordance with the categories set forth under the Act for the protection of children and minors;
- rules on balanced information with respect to media content.

[17] Act no. CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content.

[18] Act no. CLXXXV of 2010 on Media Services and Mass Media Part two Chapter I. Requirements regarding the content of media services Articles 9 and subsequent articles.

The activities of the SRO follow the traditional fields of SRO competence, namely: handling individual cases (originating from the SRO members or the Council, see: copy advice); dispute settlement (traditionally called complaint handling), as well as the supervision of the operations and conduct of members (monitoring).

2.3.1.3. Exercising supervision over the Self-Regulatory Body[19]

The supervision exercised by the Media Council includes the continuous monitoring of the compliance with the provisions of the administrative contract signed by the SRO. The SRO has the obligation to provide the Media Council with the data necessary for the supervision, including access to the decisions made by the SRO and regular reports to the Media Council on SRO activities and tasks performed under the administrative agreement. In case of infringement, the supervising Media Council has the right to request the SRO to act in accordance with the contract and, if the SRO fails to comply, the Media Council may terminate the contract and – if necessary – launch a regulatory procedure. Thus far, the record of cooperation between the SRO and the Media Council remains unblemished, with the SRO handling all cases forwarded to it by the Media Council in due manner.

2.3.1.4. Co-regulation agreement concluded with the Hungarian Advertising Self-Regulatory Board (Article 191 et seq.)

One of the self-regulatory bodies involved in co-regulation under the Act is the Hungarian Advertising Self-Regulatory Board (Önszabályozó Reklám Testület). "Co-regulation, naturally, does not replace the autonomous self-regulating activity of ÖRT (Advertising Self Regulatory Board) – based on the Ethical Code of Hungarian Advertisers – but complements it with the stipulations of the behavioral code forming the appendix of the administrative agreement entered into by and between ÖRT and the Media Council."[20]

Requests from the Media Council for action by the SRO fall under the administrative agreement but also under the SRO's parallel self-regulatory mechanism. Thus, when the Media Council notices that a consumer complaint submitted to the Council falls under the rules of the Hungarian Code of Advertising Ethics instead of the rules of the Act, it forwards the complaint to the SRO to conduct its procedure as a self-regulatory body. The SRO also

[19] Act CLXXXV of 2010 on Media Services and Mass Media Articles 201 and 202.

[20] www.ort.hu About co-regulation.

accepts complaints submitted by the consumer under the administrative agreement; guidance in relation to the submission is published on the home page of the Hungarian SRO.[21] According to this guidance, the SRO does not deal with editorial content or commercial publications issued via linear media services (television and radio), product placement, insertion of sponsoring information in live programs or political advertisements under the co-regulation clause. The joint-adjustment activity of the Media Council and the SRO is restricted to the aforementioned specific media forms and legislative rules. The codes of conduct included in the administrative agreement and in the Hungarian Code of Advertising Ethics are separate, as are the proceedings and sanctions of the SRO's activity. However, the basic rules and principles do not differ, giving the SRO's activity a definite framework within which it acts to promote legal, honest and truthful commercial communications throughout the industry, regardless of the media used or the form of the communication.

3. The legitimacy of advertising self-regulation

Self-regulation in the field of advertising looks back on a long history both in the EU and the rest of the world. It is effective and fast, with low or no cost incurred by the consumer or the state budget. However, some critics point out that self-imposed rules are unacceptable and that the industry's efforts to ensure fair competition and consumer protection are not credible. The argument for self-regulation can bring up several convincing examples including successful 'bans' (elimination from the public) on advertisments in breach of the Code within just days of the complaints submitted against such ads – these are results that no other method of enforcement can claim to have achieved.

3.1. Advertising Roundtable Report[22]

The legitimacy of self-regulation may be founded on the objective of serving the public good (such as fair competition and consumer protection, and more specifically, legal, honest and truthful commercial communications) and

[21] http://www.ort.hu/en/self-regulation/complaint/co-regulation-complaint

[22] Self-regulation in the EU advertising sector: A report of some discussion among Interested parties – Health and Consumer Protection Directorate General, 2006 July.

by making explicit the member traders' commitment to employing SR for furthering the public good. The voluntary and ready action of the members (stakeholders) of SROs can ensure the enforcement of the objectives and guarantee of consumer protection.

3.2. Interinstitutional Agreement[23]

The Interinstitutional Agreement identifies transparency, representativeness and added value as the basis of the legitimacy of SROs. Transparency means in particular the publicizing of agreements, annual reports of activity and best practices. Representativeness of the parties involved is fulfilled when the majority of the consumers and/or traders of the respective market are covered by the activity of the SRO. The added value toward the general interest may be interpreted as identical to the promotion of the public good in accordance with the Roundtable Report.

3.3. Legitimacy issues in the Cafaggi study[24]

The study referred to presents a case study on transnational private regulation in the advertising industry as part of the research project 'Private Transnational Regulation: Constitutional Foundations and Governance Design,' funded by the Hague Institute for the Internationalization of Law (HiiL) (Cafaggi study). The study concludes that private regulators establishing the codes of conduct lack the legitimacy of powers or enforcement mechanisms the state in turn possesses. The success in motivating the normative behavior of the members of the SROs depends largely on the extent to which such activities are accepted and supported by members subject to regulation. An SRO and its activity may be deemed legitimate based on the following conditions:[25]

- Inclusion
- Procedural transparency

[23] Interinstitutional Agreement on Better Lawmaking paragraphs 17–????

[24] Fabrizio CAFAGGI – Colin SCOTT – Linda SENDEN: Constitutional Foundations of Transnational Private Regulations – Research Project. In: Paul VERBRUGGEN: *Case Study Report:Transnational Private Regulation in the Advertising Industry.* 2011. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256043

[25] CAFAGGI–SCOTT–SENDEN op. cit. III.B.1.a).

- Accountability of regulators
- Values

Inclusion describes the degree to which the regulated parties (advertising industry members such as advertisers, agencies and media) are involved or represented in the decision-making process of the SRO. At the same time, it is worth recalling that in order to win the public's trust, it is important that independent parties also take part in the process in addition to consumer and legislative bodies.

Procedural transparency includes – as illustrated by the Cafaggi study – the following requirements: openness, accessibility, equality, consistency, proportionality, motivational duties and fair procedures.

Accountability means securing the mechanisms that ensure control over the SRO's activity affecting its members (those regulated) as well as consumers (the one to be affected positively or negatively by the regulated party).

Values are key to every instance of regulation; their importance is also emphasized by the Interinstitutional Agreement with reference to added values, and in relation to the public good in the Roundtable Report.

3.4. The effectiveness of advertising self-regulation

In general, the flexible and rapid response to consumer complaints or to commercial communications in breach of the relevant codes of conduct are the main characteristics of self-regulation. The Cafaggi study states that[26] "the principal aim of private regulation of advertising content is to ensure that advertising is fair, honest, tasteful and not misleading." The factors of effectiveness are identified by the Cafaggi study as follows:

- industry commitment – it must be ensured that industry members follow and adopt the rules set (see also figure 4 in the Ofcom statement, and the Interinstitutional Agreement in relation to covering the vast majority of the market and consumers);
- private interests – among the motivations of industry members to act in accordance with the rules may be concrete commercial benefits or reputation related concerns (see also the Roundtable Report regarding corresponding consumer and industry interests);
- continuous government pressure and oversight – the threat that new state

[26] Cafaggi–Scott–Senden op. cit. III.B.4.

legislation may be adopted or executive action may be taken entices industry to maintain effective self-regulation;
- credible sanctioning policies – non-compliance or breach of the self-imposed rules must have consequences, such as 'name and shame' in the form of the SRO publishing its decision, naming the wrongdoer industry member or imposing sanctions based on contractual stipulations.

4. The hard law basis of self-regulation and co-regulation in advertising

In Hungary, the legal bases for advertising self-regulation are explicitly included in the preamble and chapter 3 of Act XLVII of 2008 (on the Prohibition of Unfair Commercial Practices Against Consumers) based on Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive UCP), as well as the Act on Media Services and Mass Media referred to above.

4.1. Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices Against Consumers (Act)

In its Preamble, the Act recognizes "the importance of professional self-regulation, the aim of which is to eliminate unfair commercial practices and strengthening, for this purpose, the monitoring of compliance with the codes of conduct formulated in the framework of self-regulation."[27] According to the Act, the code of conduct must comply with the provisions of the Act and member traders are to comply with the code of conduct they have undersigned. The Act gives emphasis to the significance of the trader's commitment to the code of conduct by providing for the sanctioning of traders (as misleading) "claiming to be a signatory to a code of conduct" when in fact "the undertaking is not."[28] The Act also sanctions some cases of "non-compliance by the undertaking with commitments contained in codes of conduct by which the undertaking has undertaken to be bound."

[27] Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against the Consumers (Act) Preamble and UCP preamble (20).

[28] Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against the Consumers Appendix (1).

Some other commercial practices regarding the misuse of codes have also been blacklisted[29] in the UCP:

- "Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorization."
- "Claiming that a code of conduct has an endorsement from a public or other body which it does not have."
- "Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorized by a public or private body when he/it has not, or making such a claim without complying with the terms of the approval, endorsement or authorization."

As the commitment to a code of conduct is voluntary, traders are unlikely to fail to comply with the code once they have endorsed it. In Hungary, the code is the Hungarian Advertising Code of Ethics and the body responsible for controlling compliance with the code is the Advertising Self-Regulatory Board (Önszabályozó Reklám Testület or ÖRT). The member traders may submit their advertisement (or any other form of commercial communication) before publishing, asking whether it is compliant with the Code, thereby ensuring compliance (copy advice).

The UCP as a form of Community regulation is a maximum or fully harmonized directive, therefore, since the Hungarian Act follows the wording of the Directive, the Hungarian jurisdiction must follow the meaning elaborated by the Community's jurisdiction.

4.2. Guidance on the implementation/application of Directive 2005/29/ EC on Unfair Commercial Practices (Guidance) [30]

The Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices (UCP) is a Commission staff working document. Since theaim of the Directive and its implementation is "to ensure that both consumers and traders are subject to the same rules across the EU, (and) it is very important that national authorities and courts contribute to the uniform implementation and consistent enforcement of the Directive," the Guidance attempts to assist in developing a convergence of practices.

[29] Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices against the Consumers Appendix (2)–(4).

[30] The Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices 1.10 The relationship between the Directive and self-regulation.

The Guidance sees the codes of conduct and bodies operating these as partaking in the enforcement of the Directive, deeming the code owners as entities exercising control – parallel to the enforcement ensured by the Member States – over unfair commercial practices. According to the Guidance, the Directive provides protection against traders falsely claiming to participate in a code, to protect the general consumer trust in self-regulatory codes.

The breach of private rules (codes) is sanctioned (in some cases) under the Directive, providing the codes with further staturory law basis. Thus, on the one hand, the hard law feature of the act is a threat to trader members of the codes – imposing further legal sanctions in case they fail to comply. However, on the other hand, placing the code in the statutory legal system affords it greater importance and strengthens the trust consumers may have in the codes.

4.3. Advertising Roundtable Report 2.1

The Roundtable Report sees the role of self-regulation in acting against unfair commercial practices as twofold. On one hand, it is an instrument for the traders that may help them comply with the UCP and other rules. Traders adopting the code can reinforce the trust of the consumer in their own activity and may also use the self-regulatory mechanism to ensure that their commercial communications activity is in compliance with the rules.

On the other hand, through its control over commercial practices, self-regulatory bodies can offer an enforcement technique that prevents further administrative or judicial action.

4.4. Cafaggi study[31]

The Cafaggi study includes some interesting insights about the possible objectives of legislative regulation in the field of advertising. Ensuring truth in the marketplace by regulation of the commercial practices of traders is an obvious but hardly achievable objective of regulation. Remedying the information asymmetry in the market is a more feasible objective for state regulation and self-regulation as well. The regulation of the UCP is in harmony with this statement when in some cases it requires the advertiser to not only avoid false statements but also

[31] CAFAGGI–SCOTT–SENDEN op. cit. I.C.

sets forth the obligation to disclose information when communicating with the consumer. Other objectives based on social and ethical considerations are also apparent in advertising legislation, such as restricting the advertisement of harmful products (tobacco, alcohol) or protecting certain vulnerable consumer groups (children). On the other hand, self-regulatory mechanisms and their codes are widely accepted in the field of ethical restrictions. Commercial practices are prohibited by hard law when they are misleading or result in unfair competition. Beyond these objectives of private actors, self- and co-regulation are a necessary complement to public regulation.

The structure of the relevant rules does not differ: statutory regulation, self- and co-regulation have "devised advertising rules in relation to specific media, vulnerable groups and product sectors."[32] The degree of protection may vary, and surprisingly enough, the provisions of some private regulations are stricter. A very vivid example is given by the rules of alcohol advertisements determined by the alcohol industry containing several rules unknown to statutory legislation (one example is the age limit of 25 for those appearing in an alcohol advertisement).

As there are specific rules, there are also some specific legal instruments unknown to statutory authorities but widely used by the SROs.[33] Two of these are copy advice and pre-clearance. The SRO provides copy advice upon request in relation to unpublished commercial communications or even for storyboards, scripts, unfinished products. The goal in this case is to help the advertiser (agency, media) create an ad in compliance with the rules. EASA, and the Hungarian SRO within it, operates a system where advertisers may submit their request for copy advice online providing the applicant with the copy advice of not one, but several national SROsThis way, the ad can be cleared EU-wide in just one step. The countries participating in this system are: Austria, Belgium, Canada, Czech Republic, France, Germany (misleadingness), Germany (taste and offense), Greece, Hungary, India, Ireland, Italy, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey and the United Kingdom.[34]

Pre-clearance is the revision of a finished ad before its publication and is mandated either by law, contract, a code rule or as a form of sanction for the prior breach of the code.

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32 Cafaggi–Scott–Senden op. cit. I.C.3. Scope.

33 Cafaggi–Scott–Senden op. cit. I.C.4. Instruments.

34 Access to the system here: http://european.clearcast.co.uk

Speaking of hard law, the bases and limits of private (self- and co-) regulation, as well as the possibility for its collision with competition law must be mentioned. No private regulation or contractual commitment can result in harming fair competition, and all SROs and code owners need to be aware of this imperative.

5. Advertising Self-Regulation in Hungary

Self-regulation in advertising has a history, beginning with the regulation of published advertisements. As time passed and statutory legislation changed, self-regulation grew to cover not only classical advertisements but also all commercial communication andbusiness-to-consumer communication originating from the trader. Therefore, whenever I refer to an ad or advertisement, this is meant to include any type of commercial communication targeting the consumer.

The Hungarian SRO, the Advertising Self-Regulatory Board (Önszabályozó Reklám Testület or ÖRT), is a member of the European association, EASA (European Advertising Standards Alliance), serving as its chair for the last five years. Ildikó Fazekas, Secretary General of the Hungarian self-regulatory organization, Önszabályozó Reklám Testület (ÖRT), was elected Chairman of the European Advertising Standards Alliance (EASA) in 2009 – and has held this position for four years.

5.1. EASA – A working model of self-regulation

5.1.1. The added value of self-regulation

The European Advertising Standards Alliance (EASA) is a non-profit, non-governmental organization based in Brussels. It "is the single authoritative voice on advertising self-regulation issues and promotes high ethical standards in commercial communications by means of effective self-regulation, while being mindful of national differences of culture, legal and commercial practice."[35] It is a European organization but has members from other parts of the world as well.

Advertising self-regulation provides an effective complementary and alternative dispute resolution mechanism for consumer complaints. It is free of charge, fast and independent and it unburdens the courts. Its benefit for

[35] EASA homepage http://www.easa-alliance.org/About-EASA/Who-What-Why-/page.aspx/110

the advertising industry is the possibility to demonstrate its commitment to responsible and trustworthy commercial communication as well as the benefits of the dispute resolution mechanism. For the consumer it is a complementary tool of consumer protection offering flexibility, speed and effectiveness uncharacteristic of the courts or other authorities. With the copy advice tool it aims to avoid problems before they surface, preventing commercial communication in breach of the rules from going public. For the state (legislator, courts and authorities), it is a mechanism ensuring fair competition and consumer protection and is free of charge for the taxpayer.

The mechanism of self-regulation has its own set of rules and procedures to apply to those rules. The rules of the Code (the international and the Hungarian as well) are based on the International Chamber of Commerce (ICC) code. The code covers the widest possible range from the environment to children's and online marketing issues covering all industry members, including special rules for alcohol, gambling and other products. The code and its regular revisions seek to ensure that all consumers and traders in the global market abide by the same rules. The Code follows statutory legislation, in some instances even setting more stringent rules (e.g. alcohol), while prescribing its own set of rules for taste and decency as well.

Based on this code, the EASA and its members have versions designed to ensure flexibility (conformity with national taste and decency issues) and stability for the global market in the rules of advertising. The EASA aims to be a "one-stop shop" for consumer feedback and complaints. That is the reason why it regularly monitors members' activities to ensure consistency in applying the set of rules, operating a website for cross-border complaints and offering copy advice to the traders of different member states. Furthermore, that is the reason it tries to follow the ever-changing ways in which the traders communicate with the consumer, covering online ads, online behavioral advertising techniques, direct marketing and so forth.

There is some criticism regarding the legal status and effectiveness of self-regulation. It is said that regulation works better than self-regulation, and that self-regulation diminishes the rule of law. Against that criticism it must be said that statutory legislation does have its limits: it cannot be as absolute and detailed that it can handle all the issues arising in the ever-changing advertising industry. Emerging advertising techniques come and go overnight at a speed industry members and their organization can better handle than statutory legislation. However, it must be kept in mind that self-regulation always operates within a legal framework with due consideration of the authorities'

(courts') activities assisting the industry members. Thus, statutory legislation and the related practice set rules for self-regulation, which operates within such confines and not beyond them. Self-regulation is not likely to favour the advertising industry over the consumer but helps the industry comply with the expectations of consumers and consumer organizations instead. One of the reasons why self-regulation in the field of advertising is so successful is the fact that the commercial communication of the traders is constantly under the spotlight. Furthermore, it is worth recalling that self-regulation is basically a voluntary action, employing not hard sanctioning but voluntary fulfillment and assistance to traders in compliance with the restrictions on advertising.

5.1.2. Limits of self-regulation

Though the benefits of self-regulation are manifold, there are some limits to such activities as well. One of the objectives of self-regulation is to fight against rough traders, however, it is not an instrument of criminal law. An effective self-regulation mechanism is based on the legal framework of statutory legislation. SROs try to cover all forms of commercial communication but there are limits to that as well. Such mechanisms do not cover all forms of corporate communication of traders (for example annual reports and media statements are excluded). Self-regulation mechanisms cannot change the state of society in the context of legal, decent, honest and trustful advertising, but it can contribute to the promotion of these values. Self-regulation cannot limit the number of advertisements as quantitative restrictions are usually put in place by legislation (see Act CLXXXV of 2010 on Media Services and Mass Media Articles 33–35) and enforced by the authorities.

5.2. Hungarian SRO – the Hungarian Code of Advertising Ethics[36]

The first Hungarian Code of Advertising Ethics (Code) was created by the Hungarian Advertising Association – unprecedented in the entire region – in 1981. With this, a collection of norms was established based on the code of the Paris based International Chamber of Commerce (ICC). Since then, several revisions were carried out, most recently in 2009. The Code is now operated by the Hungarian Advertising Self-Regulatory Board (Önszabályozó Reklám Testület ÖRT). Its rules follow those of the ICC Code and are in compliance

[36] http://www.ort.hu/images/Pdf/english/Code%202009.pdf

with the statutory legislation of the EU and Hungary. The Code includes rules for all types of commercial communication, with some special rules for media groups and products such as alcohol and gambling.

Through its procedure the ÖRT seeks to clear the advertisement (or other type of commercial communication) submitted, stating that it complies (or fails to comply) with all the state imposed rules as applied by its authorities, as well as the ethical standards of the Code.

6. The tasks of the Hungarian advertising self-regulatory organization

The Hungarian SRO (Önszabályozó Reklám Testület, ÖRT, Hungarian Advertising Self-Regulatory Board) – as part of the EASA's SRO system – defines the three areas of its activity as follows:

- copy advice – rendered in relation to commercial communication preceding its publication;
- complaint handling – complaints may be submitted by a consumer or a competitor;
- monitoring – a thorough overview of one specified field of advertising – aimed at children, for example.

Furthermore, its activity covers the compilation of, and comment on, best-practice leaflets and other guidance sources created by the EASA for its members to ensure consistent procedures. The ÖRT – like all advertising SRO's in the EASA alliance – is a tripartite organization with members from the advertisers (traders, competitors), agencies (those creating the advertisements or the commercial communication in general), and media (those publishing the commercial communication). The funding of the ÖRT stems from membership fees. All services are free of charge for the consumer and for all members.

6.1. Copy advice[37]

Providing copy advice makes up the overwhelming majority of the ÖRT's activity, with a weekly case-load of 15-20 cases. Copy advice is defined as "confidential, non-binding pre-publication advice about a specific advertising

[37] http://www.ort.hu/en/self-regulation/copy-advice

proposal, provided by an SRO to an advertiser, agency or media."[38] It is provided on a confidential basis since the advertisements in question are submitted before publication, and in many cases are just early drafts of the final ad (scripts, storyboards). The aim of the copy advice is to ensure that the ad will be in compliance with relevant rules. Thus, copy advice is usually accompanied by advice on the amendments necessary to bring a non-complying advertisement in line with the rules and the scrutiny of the ad is expanded to consider all applicable statutory legislation, established practices of the authorities, and the rules of the Hungarian Advertising Code of Ethics. In the course of its procedure, the SRO investigates the veracity of the claims stated in the ad and their substantiation. In some cases a written statement by the advertiser that he holds the necessary evidence may prove sufficient, but usually the SRO evaluates the actual evidence offered by the advertiser to conclude whether or not it is sufficient. It must be stated, however, that the final responsibility lies with the advertiser that any claim stated in the commercial communication is true and well established.

Copy advice is non-binding which means that the advertiser, agency or media organization requesting the SRO's advice is free to disregard it. Equally, in the event of a subsequent complaint, the SRO's complaints committee is not bound by advice previously given. Clearly, however, failure to follow copy advice is virtually certain to result in any subsequent complaint being upheld.

In the practice of the Hungarian SRO, copy advice is given in a written form within a week of the request free of charge for all members. If necessary, the SRO's Secretariat consults via e-mail or phone with the applicant to gather further information or clarification about the planned advertisement.

6.2. Complaint handling

Complaints may be lodged at the ÖRT by the consumer (consumer complaints) or by an advertiser's competitor (competitor's complaint). Consumer complaints are accepted from not only the consumer but also from consumers' organizations. Complaints can arrive from authorities or non-governmental organizations if they determine that the complaint originally submitted to them should be handled by the ÖRT. For example, cross-border complaints are accepted by the EASA and forwarded to the member SRO concerned. According to EASA

[38] Definition by the EASA recommendation of best practice on copy advice.

results, less than 0.01% of all ads lead to a complaint and only about 20% of these complaints result in a breach of the rules.

The joint-adjustment activity with the authority allows the ÖRT to review the content of commercial publications as requested by the submitted complaints.

The procedural rules are basically the same for every kind of complaint, establishing a rapid and effective process for handling such complaints. There are a few characteristics of these procedures that are worth pointing out:

– The independence of the jury

It is a basic requisite of an SRO that it be able to provide a fair and independent opinion about the advertisements submitted to it. The ÖRT organizes a Jury of advertising ethics – composed of independent specialists as well as practicing advertising experts independent from the particular issue.

– Confidentiality issues

There are different secrecy and confidentiality issues distinguishing cases of consumer and competitor complaints, the former with consumer protection in mind, and the latter considering the protection of fair competition. In cases of consumer complaints the data of the complainant is handled confidentially and not disclosed to the entity against whom the complaint has been lodged. However, the trader complained against receives notice of the complaint and has the opportunity to defend itself. And in cases of competitor complaints, the company against which the complaint has been lodged is apprised of the complainant. During the process, testimony and/or evidence submitted confidentially is accepted by the jury. In these cases evidence is evaluated by the jury and its decision must be accepted by both parties.

– Sanctioning

The SRO provides advice (copy advice) and decisions about complaints which may require advertisers to amend their advertising campaign or withdraw it. But since SROs do not have authoritative powers, enforcement can be a problem. To create and operate a self-regulatory system is a voluntary action, as are acceptance and fulfilment of SRO decisions. So it must be emphasized that most of the advice and decisions of the ÖRT are followed voluntarily and promptly. However, in cases of breach of the Code, some actions may be taken by the SRO. There are several possibilities for an SRO to ensure that its decisions are voluntarily accepted and complied with, with the common goal of achieving fair competition and consumer trust in advertising and commercial communication

in general. The so-called "name and shame" instrument and the appeal to the publishing media are just two tools of enforcement, and on those rare occasions where all else fails, SROs may refer the case to the statutory authorities.

6.2.1. Name and shame

This simply means publication of the decision of the SRO naming the trader (advertiser) in breach and stating the facts of the case. This differs from the regular publication of monitoring outcomes and guidelines for reason of naming the trader.

6.2.2. The media as gatekeeper

The SRO may ask the media to refuse to publish/run the campaign found unacceptable. In most cases the media complies as publishing or broadcasting untrue or offensive ads may have an adverse effect on the media itself. Furthermore, the media is also a member of the self-regulatory organization, it is able to invoke contractual stipulations (clauses) in its contract with the advertiser regarding the publishing of the ad setting forth that the SRO's decision can be accepted as lawful cause for not publishing the ad.

6.3. Monitoring

Monitoring is an important activity of the SRO, demonstrating its transparency and the scale to which its objectives have been achieved. Monitoring is the activity that occurs when the SRO reviews advertising appearing in the media for compliance with the advertising code, and takes appropriate steps in cases of non-compliance.[39] On the other hand, monitoring also helps the industry (SRO members: advertisers, agencies and the media) to recognize new public demands and to respond to issues concerning the advertising industry.

Monitoring is always focused on a specified sector of advertising such as alcohol ads, advertisements targeting children, or advertisements published in certain branches of the media. There is a Europe-wide advertisement database with free access for the SROs made available by the EASA to ensure regular and well-founded monitoring. The Hungarian SRO has access to a database created for the Hungarian market for monitoring purposes.

[39] EASA Draft Recommendation of Best Practice Advertising Monitoring.

Monitoring results are published regularly and workshops are held for SRO members to discuss the results. EASA organizes Pan-European compliance-monitoring exercises that scrutinize ads for more controversial goods such as processed foods or alcoholic beverages and show very high compliance rates of 95% and above.[40]

6.4. Guides, Best Practices

The EASA and the ÖRT provide guidelines and best practice recommendations to their members to help them comply with advertising rules. The guidelines cover all laws and regulations (statutory or self-regulatory) of a certain area and are available only to members of the SROs. At this moment there are 14 guidelines available on the homepage,[41] entitled: Alcohol, Cars, Direct Marketing, Language Law, Political Advertisement, AVMS, Children, Foodstuffs, Medicaments, UCP, Biocidal Products, Credits, Gambling, Olympics.

Best-practice is the method of creating and then following standard ways for doing things, in our case for creating and publishing commercial communication and organizing the self-regulatory mechanism. The EASA's best-practice model provides the standard for self-regulatory organizations on how to operate. Thus, the national SROs and the EASA provide best-practice recommendations on advertising issues and the EASA provides best-practice recommendations on the organization of the SROs.

For example, there are best-practice recommendations about direct marketing techniques (DMC or EASA[42] Direct Marketing Communication Best Practice) and about ethical and practical rules of online behavioral advertising (OBA or EASA Best Practice Recommendation on Online Behavioral Advertising).[43] Hungarian versions are available for members of the ÖRT.

The EASA's best-practice recommendations on organizing a self-regulatory system cover all issues from giving copy advice to the funding of the SROs.

40 EASA result published on its website.

41 http://www.ort.hu/en/news/guidelines

42 http://www.easa-alliance.org/binarydata.aspx?type=doc/Full_DMC_report_PRINT_woFEDMAannex_new.pdf/download

43 http://www.easa-alliance.org/binarydata.aspx?type=doc/EASA_BPR_OBA_12_APRIL_2011_CLEAN.pdf/download.http://

6. 5. Closing remarks

Advertising self-regulation is an accepted and effective mechanism operated by the ÖRT in Hungary and the EASA alliance in Europe. Through its systems the consumer benefits from the SRO's decision preventing commercial communication in breach of the regulations from being published, or from stopping the running of a campaign. The advertising industry benefits from the SRO's helping hand in complying with all the rules for certain forms of commercial communication. And the state, or perhaps more precisely put, the taxpayers, benefit from the SRO's services for being free of charge.

There are new issues and concerns emerging in relation to commercial communication every day and self-regulation reacts to these issues promptly and with great flexibility. Nowadays, key issues on the agenda are, for example, online behavioral advertising, portrayal of gender in advertising, environment and sustainability, as well as other topics. But whatever the issues are, the basis of self-regulation remains the same: the recognition that the advertising industry (advertisers, agencies and the media) create advertising that complies with a set of ethical rules, rendering it:

- legal,
- decent,
- honest,
- truthful
- and prepared with a sense of social responsibility to the consumer as well as society as a whole, with due concern to the rules of fair competition.[44]

[44] http://www.easa-alliance.org/About-SR/About-SR/page.aspx/190