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Misleading actions vs. misleading omissions under Unfair Commercial Practices Directive. National approach in context

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ABSTRACT

Unfair Commercial Practices Directive remains one of the most ambitious acts of secondary legislation adopted in the field of consumer protection over the past decade. This legal instrument seeks to establish a common European understanding of “unfairness” in business-to-consumer legal relations. Hereby Directive introduced a comprehensive regulatory regime applied to all types of commercial activities that can influence the economic behavior of consumers, covering any business-to-consumer commercial practice before, during and after a transaction, thus including marketing, negotiation, sales practices and after-sales conduct. Unfair Commercial Practices Directive into Lithuanian legal system was transposed by adopting a completely new legal act – Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania. The implementation of the Unfair Commercial Practices Directive in Lithuania led to a split-up between misleading business-to-consumer commercial practices and misleading business-to-business advertising regulation regimes. Implementing act among other rules introduced into the national legal system provisions on the prohibition of misleading commercial practices, ensuring that consumers are not misled, thus enabling them to make informed and reasonable choices. The purpose of this article is to examine the norms of national act, implementing the prohibition of misleading commercial practices into the national legal system in the context of implementing provisions of the other Member States and to reveal core national regulation and application problems. Also, having in mind that in the text of the Directive a distinction between misleading actions and misleading omissions is made, it is analyzed whether the clear line between the application of these rules is made in legal practice. In conclusion authors formulate key recommendations for consumer protection institutions and courts, applying the rules on misleading commercial practices.

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1. Introduction

Unfair Commercial Practices Directive (Directive, 2005/29/EC, 2005) (hereafter also – UCPD, Directive 2005/29/EC, Directive) approximates the laws of the EU Member States on unfair commercial practices, harming consumers' economic interests. After the adoption of this directive, EU consumer protection system was complemented with the

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legal instrument based on total harmonization principle, which can be distinguished by its horizontal character and its combination of principle-based rules with a list of specific prohibitions of certain unfair practices. What is more – Directive 2005/29/EC has a unique threefold structure: according to it, the fairness of a concrete commercial practice is tested in accordance with single, common general prohibition of unfair commercial practices, which is elaborated by prohibitions of misleading and aggressive practices and a blacklist of practices, which are in all circumstances considered as unfair.

As it was mentioned above, according to its provisions UCPD *inter alia* combats misleading commercial practices, which by deceiving consumer prevent him from making an informed and thus efficient choice. Having in mind that right to information is one of the basic consumer rights, a substantial part of the Directive aims namely at ensuring that information on the main characteristics of a product or service, on the price and key conditions are provided to consumers in a truthful, complete and timely manner. This makes it easier for consumers to understand and compare offers and has a direct impact on the marketing and advertising techniques developed by traders. Misleading practices in the text of Directive are further classified into misleading actions (Article 6) and misleading omissions (Article 7).

UCPD implementation issues have been analyzed by a number of legal scholars around the EU. As an example (but not as an exhaustive list) we can name: Jules Stuyck, Evelyne Terryn, Bert Keirsbilck, Hans-W. Micklitz, Hans Schulte-Nölke, Christoph Busch, Geraint Howells, Thomas Wilhelmsson, Willem Van Boom, etc. Whereas in Lithuania UCPD implementation topic is unfortunately rather untouched, except several analysis of the existing national laws on unfair commercial practices, which were carried out before the implementation of UCPD and works of Mantas Rimkevičius, related namely with misleading advertising as one of the possible forms of unfair commercial practices.

Considering that misleading commercial practices are most commonly met in practice, the main *objective* of this article is the prohibition of misleading commercial practices in the Republic of Lithuania in comparison with legal regulation applied in a number of other Member States. The *aim* of the research is to examine the norms of national act, implementing the prohibition of misleading commercial practices into our national legal system and to reveal core national regulation and application problems (mainly focusing on how it is dealt with the distinction between misleading actions and misleading omissions in legal practice). To achieve this objective, the following *tasks* were set: 1) to analyze national rules, establishing prohibition of misleading business-to-consumer commercial practices; 2) to analyze relevant case law examples in this field; 3) to highlight main application and interpretation problems. Together it should be mentioned that two specific prohibitions of misleading business-to-consumer actions, set in Article 6(2) of the UCPD, misleading omissions in the specific situation of an invitation to purchase as well as blacklist of misleading practices, banned in all circumstances, will not be analyzed. Present analysis

was carried out mainly by applying analytical, systematic and comparative methods.

2. Prohibition of misleading commercial practices: implementation inaccuracies

As before the implementation of UCPD, in Lithuania there was no special national legislation, prohibiting unfair business-to-consumer commercial practices (van Dam & Budaite, 2005), a new law implementing UCPD provisions essentially by using a “copy out” technique was adopted. Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania (hereafter also – Law on Unfair Commercial Practices, implementing act) was adopted on the 21st of December 2007 and came into force on the 1st of February 2008 (Republic of Lithuania Law on Prohibition of Unfair Business-to-Consumer Commercial Practices, 2008). Therefore after the transposition of the provisions of UCPD into the national legal system, the protection against unfair commercial practices in Lithuania was based on the special legal norms, establishing the protection in Law on Prohibition of Unfair Business-to-Consumer Commercial Practices together with Law on Advertising (Republic of Lithuania Law on Advertising, 2000) and with general norms included in Law on Consumer Rights Protection (Republic of Lithuania Law on Consumer Rights Protection, 1994) and in Civil Code (Republic of Lithuania Civil Code, 2000). Though the protection was not concentrated in one legal act, the main legal instrument, establishing the protection of the economic interests of consumers against unfair commercial practices undoubtedly became newly adopted Law on Unfair Commercial Practices.³ The implementation of the UCPD in Lithuania led to a split-up between misleading business-to-consumer commercial practices (action and omission) and misleading business-to-business advertising regulation regimes (action and omission). The same kind of practice is observed in the United Kingdom, Belgium and Netherlands (Keirsbilck, 2011, pp. 311–312). However, the adoption of a totally new legal act did not help to avoid implementation problems, no less challenging is applying the provisions of implementing legal act in national legal practice, in particular having in mind the notably wide scope of application and framework character of UCPD (Navickaitė-Sakalauskienė, 2012, pp. 1109–1123). When analyzing how the rules on misleading commercial practices were transposed into the Lithuanian legal system, further it will be stated that they have not been implemented absolutely correctly.

Misleading actions in general sense are prohibited under Article 6(1) UCPD, stating that *a commercial practice shall be regarded as misleading if it contains false*

³ Currently legal basis, regulating commercial fairness in Lithuania consists of Law on Unfair Commercial Practices together with Law on Advertising; Law on Consumer Rights Protection, establishing general fair business practices principle and Article 6.228² (4) of Civil Code, establishing the general prohibition of unfair commercial practices together with making reference to the special legal acts regulating unfair commercial practices.

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