

Policy Department Economic and Scientific Policy

Transposition and Enforcement of the Directive on unfair commercial practices (2005/29/EC) and the Directive concerning misleading and comparative advertising (2006/114/EC)

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Authors: Associated Prof. Mrs. Zita Čeponytė (Lithuanian Consumer Institute)
Prof. Dr. Schulte-Nölke (University of Osnabrück)
Dr. Christoph Busch (University of Osnabrück)

Administrator: Agneta STURESSON
Policy Department Economy and Science
DG Internal Policies
European Parliament
Rue Wiertz 60 - ATR 00L 046
B-1047 Brussels
Tel: +32-2-2831405
Fax: +32-2-2846805
E-mail: agneta.sturesson@europarl.europa.eu

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✉ Rue Wiertz – B-1047 Bruxelles - ☎ 32/2.284.43.74 Fax: 32/2.284.68.05
✉ Palais de l'Europe – F-67000 Strasbourg - ☎ 33/3.88.17.25.56 Fax:
33/3.88.36.92.14
E-mail: poldep-esc@europarl.europa.eu

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Transposition, implementation and enforcement of the Directive concerning misleading and comparative advertising (2006/114/EC) and the Directive on unfair commercial practices (2005/29/EC)

by Prof. Dr. Hans Schulte-Nölke and Dr. Christoph Busch

Executive Summary

1. State of transposition and technical choices. So far, twenty Member States (MS) have notified the transposition of Directive 2005/29/EC. The European Commission has brought action against six MS for failing to adopt or notify transposition measures. The MS have chosen different transposition techniques with regard to this Directive (specific legislation, incorporation into existing laws, e.g. Consumer Codes, Acts against Unfair Competition, Civil Codes). The variety of approaches makes it rather difficult to identify the applicable transposition provisions and this could create obstacles for cross-border enforcement.

As Directive 2006/114/EC mainly codifies earlier amendments to Directive 84/450/EEC many MS only made minor amendments to national laws, if any, in view of earlier legislation transposing Directive 84/450/EEC. However, what can be seen in some MS as a consequence of the transposition is a change in the "regulatory architecture", from a unified approach to a two-track approach.

2. Transposition difficulties. While the transposition of Directive 2006/114/EC mainly raised questions with regard to the regulatory architecture in the MS, certain parts of Directive 2005/29/EC are likely to be subject to more substantial problems. For example, the combination of maximum harmonisation with a general clause using rather vague terms (e.g. "professional diligence") may cause uncertainty which could lead to a sharp increase in requests from national courts for preliminary rulings by the ECJ in view of interpretation guidance. In addition, under the transposition laws of some MS the requirements of professional diligence are to be assessed, contrary to Directive 2005/29/EC, empirically rather than by means of a normative assessment.

Furthermore, Directive 2005/29/EC leaves the regulation of "taste and decency" issues to the MS. Yet it is not always clear which cases fall under the taste and decency exemption and which cases fall under the prohibition of aggressive marketing practices in Article 8 of the Directive (e.g. advertising for funeral services at cemeteries). However, the resulting uncertainty could have the positive effect that in cross-border marketing campaigns businesses refrain from practices that might fall under (diverging) national prohibitions of indecent advertising.

Although Directive 2005/29/EC states that it is "without prejudice to contract law", it is rather likely that there will be interdependencies between the Directive and national rules on pre-contractual information duties. In fact, Directive 2005/29/EC may lead to a "benchmarking effect"; i.e. maximum harmonisation in the field of commercial practices may result in an indirect minimum harmonisation in the field of information duties related to contract law.

The last point concerns the fact that some MS have chosen to disaggregate the black list (Annex II of Directive 2005/29/EC) instead of transposing it *en bloc*. This creates a lack of transparency likely to hamper cross-border enforcement. This problem could be aggravated if the black list were to be updated (e.g. by means of the comitology procedure).

3. Administrative problems and relevant jurisprudence. As the transposition of the Directives was actually due in December 2007, it is still too early to provide a comprehensive assessment of administrative difficulties and relevant jurisprudence with regard to the two Directives. However, it is to be expected that the existing divergences between national enforcement systems (e.g. injunctions, criminal or administrative fines) will create obstacles for cross-border enforcement. In addition, the current framework for cross-border enforcement, in particular Directive 98/27/EC and Regulation (EC) 2004/2006, still has to prove its effectiveness.

A way to overcome these risks could be to establish an EU unfair commercial practices database in order to exchange information between national enforcement authorities and consumer associations.

4. Problematic sectors. As less than a year has passed since the transposition of the two Directives was actually due, it is too early to comprehensively indicate problematic sectors from the point of view of transposition and implementation. However, according to the European Commission there are substantial problems, in particular in the travel sector (e.g. websites selling airline tickets). It is highly desirable that further investigation of this kind will be executed. Possible sectors for such investigation should include those which are of particular relevance for the internal market, e.g. e-shops selling goods, including music and software, and telecommunication services.

Introductory Remark

This briefing paper provides a preliminary analysis of the transposition, implementation and enforcement of the Directive on unfair commercial practices (2005/29/EC) and the Directive concerning misleading and comparative advertising (2006/114/EC). The paper responds to a request by the committee on the Internal Market and Consumer Protection of the European Parliament. The analysis is focused on the transposition process in Austria, France, Germany and the United Kingdom, but also provides examples from other Member States, in particular Belgium, Denmark, Czech Republic, Ireland, Italy, Malta, Portugal, Romania, Slovenia and Sweden.

1. State of the transposition and technical choices

This part provides a brief summary of the state of the transposition of the two Directives. In addition, technical choices undertaken by the Member States to transpose the Directives are described.

a) Directive on unfair commercial practices (2005/29/EC)

Directive 2005/29/EC had to be transposed by 12 June 2007 and transposition measures to be applied by 12 December 2007. As of October 2008, the Directive has been transposed into national law by the majority of Member States.¹

Transposition notified to the European Commission	AT, BE, BG, CY, CZ, DK, EE, FR, GR, IE, IT, LV, MT, PL, PT, RO, SK, SL, SE, UK
No transposition notified to the European Commission	DE, ES, FI, HU, LT, LU, NL

So far, the European Commission has brought action against Germany (C-326/08), Hungary (C-270/08), Luxembourg (C-282/08), the Netherlands (C-283/08), Spain (C-321/08) and the United Kingdom (C-284/08) for failing to adopt or notify transposition measures.²

The Member States have chosen different approaches for the transposition of Directive 2005/29/EC. Some Member States, e.g. PORTUGAL³, ROMANIA⁴, UNITED KINGDOM⁵, have enacted **separate laws** for the transposition of the Directive.

Other Member States have preferred to **integrate the provisions transposing the Directive** into existing legislation. For example, some Member States, which traditionally have regulated marketing practices for business-to-consumers (B2C) and business-to-business (B2B) together in one single act, e.g. AUSTRIA⁶, GERMANY⁷, have chosen to keep to this “unified approach”. Therefore they have incorporated the provisions transposing the Directive into the respective Act against Unfair Competition. Other Member States, e.g. BELGIUM⁸, FRANCE⁹ and ITALY¹⁰, have integrated the provisions transposing the Directive into Consumer Codes or Consumer

¹ See the overview of notified transposition measures on the website of DG SANCO:

http://ec.europa.eu/consumers/rights/index_en.htm.

² Case C-270/08, O.J. 2008 C 209/35; Case C-82/08, O.J. 2008 C 209/36; Case C-283/08, O.J. 2008 C 223/32; Case C-284/08, O.J. 2008 C 223/32; Case C-321/08, O.J. 2008 C 223/38 Case C-326/08, O.J. 2008 C 223/38.

³ Legislative Decree No. 57/2008 of 26 March 2008.

⁴ Act No. 363 of 21 December 2007.

⁵ Consumer Protection from Unfair Trading Regulations 2008, S.I. 1277 of 2008.

⁶ Act against Unfair Competition (as amended by Act No. 79 of 2007), for an assessment of the transposition legislation cf. Lothar Wiltchek and Katharina Majchrzak, *Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht* 2008, pp. 4-13.

⁷ Proposal for an Amendment of the Act against Unfair Competition of 23 May 2008, for a preliminary analysis of this legislative Proposal cf. Olaf Sosnitza, *Wettbewerb in Recht und Praxis* 2008, pp. 1014-1034.

⁸ Chapter VII of the Act of 14 July 1991 on Commercial Practices and the Information and Protection of the Consumer (as amended by the Act of 7 June 2007).

⁹ See in particular Articles L. 120-1, L. 121-1 to L. 121-7 and L. 122-11 to L. 122-15 of the Consumer Code (as amended by Act No. 2008-3 of 3 January 2008 and Act No. 2008-776 of 4 August 2008).

¹⁰ Articles 18 to 27 of the Consumer Code (as amended by Legislative Decree No. 146 of 2 August 2007).

Protection Acts which not only contain rules on marketing practices but also provisions regarding distance selling, off-premises contracts or unfair contract terms. A third approach is currently followed by the CZECH REPUBLIC, which, according to a recent legislative proposal, intends to incorporate several provisions stemming from Directive 2005/29/EC into the Civil Code.¹¹ Thus, based on these examples, among those Member States who have sought to fit the transposition provisions into existing laws, three different transposition techniques can be distinguished.

b) Directive concerning misleading and comparative advertising (2006/114/EC)

Directive 2006/114/EC essentially replaces Directive 84/450/EEC on misleading advertising (without substantially changing the content of the latter) and codifies the amendments made to Directive 84/450/EEC by Directive 97/55/EC on comparative advertising. As the earlier Directives had already been transposed by most Member States, the key question concerning the transposition is not whether Directive 2006/114/EC has been implemented into national law. In fact, in their transposition notifications to the European Commission regarding Directive 2006/114/EC, some Member States simply refer to national legislation which had been enacted already for the transposition of Directives 84/450/EEC and 97/55/EC.¹²

As the substantial requirements of Directive 2006/114/EC are more or less the same as those set up by Directives 84/450/EEC and 97/55/EC the more interesting question is, whether Directive 2006/114/EC had any impact on the "regulatory architecture" in the Member States. In fact, the enactment of Directives 2006/114/EC and 2005/29/EC which both replace Directive 84/450/EEC at EC level means **a change from a "unified approach" to a "two-track approach"**.¹³ Directive 84/450/EEC set up minimum rules protecting both businesses and consumers.

By contrast, the new approach **distinguishes between the protection of businesses and consumers**. Directive 2005/29/EC contains maximum harmonised rules protecting consumers, whereas Directive 2006/114/EC contains minimum rules protecting businesses against misleading advertising and lays down maximum harmonised rules spelling out the conditions under which comparative advertising is permitted.¹⁴

A number of Member States have reorganised their national laws in order to mirror the new regulatory architecture adopted at EC level. For example, the new "**two-track approach**" has been introduced in Ireland, where European Communities (Misleading Advertising) Regulations 1988¹⁵ has been revoked and replaced by separate legislative acts, i.e. the Consumer Protection Act 2007¹⁶ and the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007¹⁷. Similarly, in Italy the new Legislative Decree No. 145 of 2 August 2007 now contains rules on misleading and comparative advertising protecting traders,

¹¹ Sections 2475 et seq. of the draft for a Civil Code prepared by the Working Commission of the Czech Ministry of Justice.

¹² See the overview of transposition notifications in the EUR-LEX database. For example, GERMANY and LATVIA refer to acts which entered into force in the year 2000. LITHUANIA and POLAND have informed the European Commission that they consider national transposition measures unnecessary.

¹³ This policy change has been criticised, cf. Helmut Köhler and Tobias Lettl, *Wettbewerb in Recht und Praxis* 2003, pp. 1019-1057; Frauke Henning-Bodewig, *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 2005, pp. 629-634.

¹⁴ See Article(1) of Directive 2006/114/EC and ECJ, Judgement of 8 April 2003, Case C-44/01 – *Pippig Augenoptik / Hartlauer*.

¹⁵ S.I. No. 134 of 1988.

¹⁶ S.I. No. 19 of 2007.

¹⁷ S.I. No. 774 of 2007.

whereas the provisions protecting consumers have been incorporated into the Consumer Code.¹⁸ Specific legislation which separates marketing regulations protecting consumers from those protecting other traders against unfair commercial practices has also been enacted in the United Kingdom.¹⁹

As mentioned above, those Member States, which traditionally have combined marketing practices rules protecting consumers and businesses in one single act, e.g. Austria²⁰, Germany²¹, have chosen to keep to this "**unified approach**". Therefore, **the legislative architecture of these Member States does not mirror the approach chosen at EC level**. The variety of regulatory arrangements in the Member States has several disadvantages for the full effectiveness of harmonisation in the field of marketing practices law. For instance, as in the course of cross-border enforcement the courts and authorities in charge will often have to apply the law of the Member State where competitive relations or the collective interests of consumers are, or are likely to be, affected,²² the diversity of transposition approaches and the resulting lack of transparency are likely to **create obstacles for efficient cross-border enforcement**. Moreover, in those Member States which have chosen the "unified approach", a single provision of national law may transpose two different EC law provisions – one stemming from Directive 2005/29/EC (maximum harmonisation) the other stemming from Directive 2006/114/EC (minimum harmonisation). In consequence, the meaning of such a provision can vary depending on whether it is applied within the scope of one Directive or the other. Such a situation may lead to **difficulties and uncertainty regarding the interpretation of the national transposition laws**.

¹⁸ Articles 18 to 27 of the Consumer Code (as amended by Legislative Decree No. 146 of 2 August 2007).

¹⁹ See, on the one hand, the Business Protection from Misleading Marketing Regulations 2008, S.I. No. 1276 of 2008, and, on the other hand, the Consumer Protection from Unfair Trading Regulations 2008, S.I. 1277 of 2008.

²⁰ Act against Unfair Competition (as amended by Act No. 79 of 2007).

²¹ Proposal for an Amendment of the Act against Unfair Competition of 23 May 2008.

²² See Article 6(1) of Regulation (EC) 864/2007 on the law applicable to non-contractual obligations ("Rome II").

2. Transposition difficulties

This section provides some examples indicating which parts or articles of the two Directives are most difficult to transpose into the Member States' legislation. Potential problems relate to the legal requirements related to taste and decency (Recital 7 of Directive 2005/29/EC), the interplay with contract law (Article 3(2) of Directive 2005/29/EC), the requirement of professional diligence (Article 2 lit. (h) of 2005/29/EC) reference to information duties in EC law (Article 7(5) of 2005/29/EC) and the transposition of the black list (Annex I of Directive 2005/29/EC). Another issue, which is more difficult to assess at this stage, relates to the combination of maximum harmonisation and the general clause using vague terms which may affect the transposition process.

While the transposition of Directive 2006/114/EC mainly raises questions regarding the "regulatory architecture" in the different Member States (see above), more substantial problems could arise with regard to Directive 2005/29/EC. In particular, the **combination of maximum harmonisation and a general clause using rather open and necessarily vague terms** (e.g. "professional diligence" in Article 5(2)(a) of Directive 2005/29/EC) may be one of main sources for transposition difficulties. In fact, there is a risk **that national courts may keep to their traditional case law** when interpreting the general clause. In such a scenario, full effectiveness of the Directive could only be achieved with the **help of interpretation guidance provided by the European Court of Justice (ECJ)**. This process could take a long time and very much depends on the cooperation between national courts and the ECJ, in particular to what extent national courts refer cases for a preliminary ruling. However, for a validation of this prognosis it is necessary to wait for case law from the Member States. Therefore, the following examples focus on those difficulties which have already become apparent in the course of the legislative transposition.

a) Legal requirements related to taste and decency (Recital 7 of Directive 2005/29/EC)

Directive 2005/29/EC does not address legal requirements related to taste and decency which, for cultural reasons, vary widely among the Member States. Therefore Member States "should be able to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers' freedom of choice" (Recital 7 of Directive 2005/29/EC). Thus, in general, the Directive does not regulate to what extent sexual innuendoes or the use of shocking pictures is permitted as a means of marketing.²³ However, in practice it may be rather difficult to draw a line between matters falling under the "taste and decency" exception and those that are covered by the Directive. The **difficulties in determining the scope of application** of the Directive may be illustrated by a recent case decided by a German Higher Regional Court in January 2008 (see ANNEX 1).²⁴

²³ Recital 7 of Directive 2005/29/EC mentions as a further example the admissibility of commercial solicitations in the streets.

²⁴ Higher Regional Court of Munich (Germany), Judgement of 17 January 2008, Case 29 U 4576/07, BeckRS 2008, 03240.

The relevance of this issue is shown by a recent request for a preliminary ruling, the very first concerning Directive 2005/29/EC, submitted by the German Federal Supreme Court regarding a national provision which states that a commercial practice, whereby the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods, is in principle unlawful, irrespective of whether, in any particular case, the advertising in question affects consumers' interests.²⁵

b) Interplay with contract law (Article 3(2) of Directive 2005/29/EC)

The relationship between Directive 2005/29/EC and national contract law is only mentioned incidentally in the Directive. Article 3(2) merely states that the Directive is "without prejudice to contract law". However, it would be misleading to assume that there will be no interplay between national contract law and legislation implementing Directive 2005/29/EC.²⁶ **Interdependencies are to be expected, especially in the field of pre-contractual information duties.**

Recital 15 of Directive 2005/29/EC states that "Member States will be able to retain or add information requirements relating to contract law and having contract law consequences where this is allowed by the minimum clauses in the existing Community law instruments". Nevertheless, in practice the Member States' freedom to regulate information requirements relating to contract law will be limited as a result of Directive 2005/29/EC. In particular, Article 7(4) of the Directive setting out a list of material information which must not be omitted in case of an "invitation to purchase"²⁷ is likely to have an impact on contract law. While Recital 15 of the Directive underlines that Directive 2005/29/EC does not define an upper limit or "ceiling" for information duties under contract law, Article 7(4) of the Directive will in practice define a lower limit or "floor" for such duties. In other words: information which is considered so material that it must be disclosed under Article 7(4) in case of an "invitation to purchase" may, also from a contract law point of view, not be concealed before the conclusion of a contract.²⁸

The following example may illustrate the connection between contract law and unfair commercial practices law: Under the German Act against Unfair Competition, a seller of high quality consumer electronics is obliged to disclose in an advertisement the fact that the advertised product is a discontinued model.²⁹ However, such a statement is considered necessary only once the successor product is available on the market. Several German courts have transposed this line of argument to the field of contract law.³⁰ Thus, they denied consumers a contract law claim for damages in cases where the seller had not informed the other party about the introduction of a new model, which was imminent but not yet implemented. If now the ECJ was to consider that

²⁵ Reference for a preliminary Ruling from the Federal Supreme Court lodged on 9 July 2008, Case C-304/08 – *Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. / Plus Warenhandelsgesellschaft mbH*.

²⁶ See *Simon Whittaker*, The Relationship of the Unfair Practices Directive to European and National Contract Laws, in: Stephen Weatherill and Ulf Bernitz (ed.), *The Regulation of Unfair Commercial Practices Under EC Directive 2005/29*, (Hart Publishing), Oxford 2007, pp. 139 et seq.

²⁷ For a definition of this term see Article 2 lit. (i) of Directive 2005/29/EC.

²⁸ See also Article II.-3:102(2) of the Draft Common Frame of Reference (DCFR). This provision which defines what kind of information a business has to provide to a consumer in a commercial communication is modelled on Article 7(4) of Directive 2005/29/EC. A violation of this rule is sanctioned by contract law remedies under Article II.-3:107 DCFR, e.g. damages or an adjustment of the business's obligations under the contract. See also Articles 2:202 and 2:207 of the Acquis Principles (ACQP).

²⁹ Federal Supreme Court, Judgement of 3 December 1998, Case I ZR 63/96 - "Auslaufmodelle I", *Neue Juristische Wochenschrift* 1999, p. 2190.

³⁰ Higher Regional Court of Celle, Judgement of 11 July 2001, Case 7 U 72/00 *OLG-Report* 2001, p. 223; Higher Regional Court of Cologne, Judgement of 16 July 2002, Case 3 U 8/02, *OLG-Report* 2002, p. 404.

Article 7(4) of Directive 2005/29/EC requires a business to disclose an imminent model change, national courts in order to avoid inconsistencies would most likely also raise the level of information duties under contract law.

In consequence, Directive 2005/29/EC may lead to a sort of "**benchmarking effect**": Maximum harmonisation in the field of commercial practices may thus lead to an **indirect minimum harmonisation** in the field of information duties related to contract law.³¹

c) The requirement of professional diligence (Article 2 lit. (h) of Directive 2005/29/EC)

The Directive 2005/29/EC refers several times to the criterion of "professional diligence". Thus, the Directive's general clause requires national courts and marketing authorities to assess whether a commercial practice is "contrary to the requirements of professional diligence" in order to determine if such practice is to be considered unfair (cf. Article 5(2) lit. (a)). Similarly, Article 7(4) lit. (d) stipulates that a trader must provide information about any arrangements for payment, delivery, performance and its complaint handling policy, "if they depart from the requirements of professional diligence".

According to the definition in Article 2 lit. (h) "professional diligence" means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity. This definition makes clear that **the Directive defines a normative standard of professional diligence**. A number of Member States use the term "professional diligence" in their transposition laws and use the same definition as the directive, e.g. Austria³², Belgium³³, Ireland³⁴, Italy³⁵, Malta³⁶, Portugal³⁷, Romania³⁸, Slovenia³⁹, United Kingdom⁴⁰. **However, in some Member States, e.g. France⁴¹ and Denmark⁴², the provisions transposing art. 7(4) lit. (d) of Directive 2005/29/EC refer to an empirical standard** (see ANNEX 2).

Using an empirical standard, as the wording of the French Consumer Code suggests, would have the unwelcome consequence that a business is not obliged to inform the consumer about a complaint handling policy deviating from the requirements of professional diligence (e.g. excessively high charges for a complaint hotline) provided that such malpractice is commonplace in the relevant industry.

³¹ For further details see Busch, *Zeitschrift für Gemeinschaftsprivatrecht* 2008, pp. 158-164.

³² § 2(6) No. 5 Act against unfair competition.

³³ Art. 94/7 § 4 No. 4 Act of 14 July 1991 on Commercial Practices and the Information and Protection of the Consumer (as amended by the Act of 7 June 2007)

³⁴ Sec. 46(3)(e) Consumer Protection Act 2007.

³⁵ Art. 22(4)(d) Consumer Code (as amended by Legislative Decree No. 146 of 2 August 2007).

³⁶ Sec. 51D(3)(d) Consumer Affairs Act 1994 (as amended by Act No. II of 29 January 2008).

³⁷ Art. 10(d) Act No. 57/2008 of 26 March 2008.

³⁸ Art. 7(4)(d) Act No. 363/2007 of 21 December 2007 against unfair commercial practices.

³⁹ Art. 6(4) Act No. 53/2007 of 15 June 2007 on the protection of consumers against unfair commercial practices.

⁴⁰ Regulation 6(4)(f) Consumer Protection from Unfair Trading Regulations 2008.

⁴¹ Art. 121-1 (2) 2nd sentence, No. 4 of the Consumer Code.

⁴² § 12a No. 3 Act No. 1389 of 21 December 2005 on marketing practices ("*i det omfang disse forhold afviger fra, hvad der er sædvanligt i branchen*").

d) Reference to information duties in EC law (Article 7(5) Directive 2005/29/EC)

According to Article 7(5) of Directive 2005/29/EC information requirements established by Community law in relation to commercial communication including advertising or marketing are regarded as "material" in the sense of Article 7(1) of the Directive.⁴³ Annex II of Directive 2005/29/EC contains a non-exhaustive list of EC legislation setting up such information requirements. Member States have chosen different approaches for the transposition of Article 7(5) of the Directive. In some Member States, the list from Annex II has been incorporated directly into the transposition law, e.g. PORTUGAL⁴⁴.

In other Member States, the transposition law simply contains a global reference to "information requirements established by Community law in relation to commercial communication" without giving any indication which EC Directives or Regulations are referred to, e.g. Austria⁴⁵, Belgium⁴⁶, Germany⁴⁷, Italy⁴⁸. This approach makes it **extremely difficult for consumers and businesses alike to obtain a clear picture of the applicable information duties**. As the "information requirements established by Community law" are subject to progressive change, in particular in the course of the current review of the Consumer Acquis, the transposition laws contain a reference to a "moving target". It is therefore rather questionable whether this transposition technique is compatible with the transparency requirements set up by the ECJ for national transposition measures.⁴⁹ The situation does not become clearer if Annex II of the Directive 2005/29/EC (or the respective national transposition measures) are incorporated into the *travaux préparatoires* of the transposition law, as is the case e.g. in GERMANY⁵⁰.

e) Transposition of the black list (Annex I of Directive 2005/29/EC)

Further difficulties may arise regarding the transposition of the so called black list, in particular, with regard to the interplay between the black list and existing national marketing practices provisions. Some Member States have chosen to **transpose the black list en bloc** without any material changes, be it directly in the transposition law, e.g. Italy⁵¹, Portugal,⁵² or in a schedule annexed to the law, e.g. Austria⁵³, Denmark⁵⁴, Malta⁵⁵, Romania⁵⁶, United Kingdom⁵⁷. At least

⁴³ For more details on the interplay between Directive 2005/29/EC and other EC law information requirements see Hans Schulte-Nölke / Christoph Busch, *Zeitschrift für Europäisches Privatrecht* 2004, p. 99-117.

⁴⁴ See Art. 9(4) Decree-Law 57/2008.

⁴⁵ See § 2(5) Act against Unfair Competition (as amended by Act No. 79 of 2007).

⁴⁶ See Art. 94/7 § 5 Act of 14 July 1991 on Commercial Practices and the Information and Protection of the Consumer (as amended by the Act of 7 June 2007) which contains a reference to Annex II of Directive 2005/29/EC.

⁴⁷ See § 5a(4) of the Proposal for an Amendment of the Act against Unfair Competition of 23 May 2008.

⁴⁸ See Art. 22(5) Consumer Code.

⁴⁹ See ECJ, Judgement of 20 March 1997, Case C-96/95 - *Commission of the European Communities v Federal Republic of Germany*.

⁵⁰ See Proposal for an Amendment of the Act against Unfair Competition of 23 May 2008, *BR-Drucksache* 345/08, pp. 52-55. As the information provided in the *travaux préparatoires* will be outdated very soon as a result of legislative activity at the European level, this transposition technique also does not meet the transparency requirements set up in ECJ, Judgement of 7 May 2002, Case C-478/99 - *Commission of the European Communities v Kingdom of Sweden*.

⁵¹ See Art. 23 and 26 of the Consumer Code (as amended by Legislative Decree No. 146 of 2 August 2007).

⁵² See Art. 8 and 12 of the Legislative Decree No. 57/2008 of 26 March 2008.

⁵³ See Annex to § 1a(3) and § 2(2) of the Act against Unfair Competition (as amended by Act No. 79 of 2007).

⁵⁴ See Notification of 14 September 2007 by the Consumer Ministry.

⁵⁵ See First Schedule to Art. 51B(4) of the Consumer Affairs Act (as amended by Act No. II of 29 January 2008).

⁵⁶ See Annex No. 1 to Act No. 363 of 21 December 2007.

at a mere legislative level, these Member States **facilitate the locating of the relevant provisions**, e.g. for the purpose of cross-border enforcement.

By contrast, other Member States have **disaggregated the black list**. For example, in FRANCE most of the provisions from the black list have been implemented in Article L. 121-1-1 of the Consumer Code (misleading practices) and Article L. 122-11-1 of the Consumer Code (aggressive practices). However, the Article L. 121-1-1 does not contain a provision prohibiting pyramid promotional schemes (No. 14 of Annex I to Directive 2005/29/EC) as such practices had already been prohibited under a different provision of the Consumer Code which now serves as a transposition measure.⁵⁸ Similarly, in GERMANY, the legislative proposal for the transposition of the Directive provides that the prohibition of persistent and unwanted solicitations by telephone, fax or e-mail (No. 26 of Annex I to the Directive 2005/29/EC) should not be part of the black list to be added to the Act against Unfair Competition. Instead, in order to avoid overlaps and inconsistencies with existing national law this provision of the Directive's black list shall be transposed by means of an amendment to § 7(2) No. 2 of the Act against Unfair Competition.⁵⁹

The disaggregation of the black list results in a **lack of legislative transparency**. The purpose of the black list is to provide businesses with clear guidance as to which practices are prohibited under all circumstances across the European Union.⁶⁰ If, however, the black lists in the different Member States deviate from each other this is likely to create **obstacles for cross-border enforcement**. This problem could be aggravated if the black list were to be updated (e.g. by means of a comitology procedure as it could be provided by the planned horizontal directive on consumer contractual rights for the list of unfair terms from Directive 1993/93/EC).

⁵⁷ See Schedule to Regulation 3(4)(d) of the Consumer Protection from Unfair Trading Regulations 2008, S.I. No. 1277 of 2008.

⁵⁸ See Art. L 122-6 of the Consumer Code (as amended by Act No. 2008-3 of 3 January 2008 and Act No. 2008-776 of 4 August 2008). Similarly, in BELGIUM the prohibition of pyramid promotional schemes has been removed from the black list and transposed in an article specifically prohibiting such promotional practices, see Art. 84 and Art. 94/8 of the Act of 14 July 1991 on Commercial Practices and the Information and Protection of the Consumer (as amended by the Act of 7 June 2007). In contrast, in MALTA, the prohibition of pyramid promotional schemes is expressed both in Article 52A of the Consumer Affairs Act as well as in the black list annexed to this act, cf. No. 14 of the First Schedule to Article 51B(4) of the Consumer Affairs Act (as amended by Act No. II of 29 January 2008

⁵⁹ See the Proposal for an Amendment of the Act against Unfair Competition of 23 May 2008. This transposition technique has been criticised by the *Bundesrat* in its opinion of 4 July 2008.

⁶⁰ See Fezer: „Such fundamental prohibitions require transparency and precision“.

3. Administrative problems and relevant jurisprudence

In the following section the main administrative problems in the implementation of the Directives will be addressed. In addition, the section provides some examples of relevant case law regarding the implementation of the rules of transposition of the Directives.

As several Member States have only transposed the Directives 2005/29/EC and 2006/114/EC in the course of the year 2008 (and some others have not yet transposed them at all), it is still too early to provide an accurate picture of main administrative problems in the implementation of the Directive. In addition, the availability of administrative decisions and case law based on the new Directives depends very much on the enforcement system and the national "publication culture" which varies considerably among the Member States.

In those Member States, where injunctions prohibiting unfair practices *pro futuro* are the main instrument for enforcing marketing practices law, e.g. AUSTRIA, GERMANY, courts immediately apply the new Directives to pending decisions, even if the national legislator has not yet enacted any transposition laws (see ANNEX 3). In other Member States, where unfair commercial practices are mainly sanctioned *ex post* by criminal or administrative fines, there is a certain time lag until cases concerning the newly introduced Directive 2005/29/EC are dealt with by enforcement authorities or heard in courts.⁶¹ Nevertheless, already at this present stage it is possible to indicate some of the **structural problems which may create administrative obstacles** for the implementation of the two Directives. Such obstacles are mainly due to the multifaceted architecture of national enforcement mechanisms and are **aggravated by specific difficulties relating to cross-border enforcement**.⁶²

a) Multifaceted architecture of national enforcement mechanisms

Directive 2005/29/EC gives much leeway to Member States with regard to sanctions for misleading actions or omissions. According to Article 11(1) of the Directive Member States shall ensure that adequate and effective means exist to combat unfair commercial practices and for the compliance with the provisions of the Directive. Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices may take legal action or bring such practices before a competent administrative authority. It is thus left to the Member States to decide who is granted a right of action. The Directive is also reticent with regard to the choice of sanctions. Its Article 11(2) only states that Member States shall confer upon the courts or administrative authorities the powers enabling them to order the cessation of unfair commercial practices.

Member States' laws show a broad variety of enforcement regimes for commercial practices law. In several Member States, enforcement is carried out mainly by public authorities such as consumer ombudsmen, e.g. DENMARK, FINLAND, SWEDEN, or other public authorities, e.g. IRELAND (*National Consumer Agency*), ITALY (*Autorità garante della concorrenza e del mercato*), MALTA (*Director of Consumer Affairs*), PORTUGAL (*Direcção-Geral do*

⁶¹ For example, in ITALY the decisions of the *Autorità garante della concorrenza e del mercato* in the year 2008 seem to concern exclusively cases falling still under the law applicable before the entry into force of the Legislative Decree No. 146 of 2 August 2007 which transposes Directive 2005/29/EC.

⁶² For a detailed analysis of national enforcement mechanisms cf. *Thomas M.J. Möllers and Andreas Heinemann* (ed.), *The Enforcement of Competition Law in Europe* (Cambridge University Press), Cambridge 2007.

Consumidor), ROMANIA (*Autoritatea Națională pentru Protecția Consumatorilor*), UNITED KINGDOM (*Office of Fair Trading*). In other Member States, the emphasis is on **private enforcement by competitors or consumer organisations**, e.g. AUSTRIA, BELGIUM, FRANCE, GERMANY, the NETHERLANDS. However, most **enforcement systems combine elements of both public and private enforcement**.

Likewise, sanctions for contraventions against the prohibition of misleading actions and omissions range from **injunction orders** and **damages** to **administrative fines** and **criminal sanctions** (for some examples from Member States see ANNEX 4).

b) Difficulties in cross-border enforcement

Directive 2005/29/EC contains no particular rules for enforcement in cross-border cases but it refers to two other pieces of EC legislation which set up the institutional framework for cross-border enforcement, i.e. Directive 98/27/EC on injunctions and Regulation (EC) 2006/2004 on consumer protection cooperation.⁶³

The main purpose of Directive 98/27/EC is to enable so-called "qualified entities" (usually consumer organisations)⁶⁴ from one Member State to file actions for injunctions in the courts of another Member State. So far, however, it is less than clear whether Directive 98/27/EC has really been successful in facilitating cross-border enforcement. Not only does the **number of "qualified entities" vary widely from one Member State to another**,⁶⁵ but also is there is **no convincing evidence** that the number of cross-border injunctions has increased significantly since the entry into force of Directive 98/27/EC.⁶⁶

Regulation (EC) 2006/2004 on consumer protection cooperation has set up an **EU-wide network of national enforcement authorities** (the so-called Consumer Protection Cooperation Network).⁶⁷ Within the network, each national authority is able to call on other members of the network for assistance in investigating possible breaches of consumer laws and in taking enforcement action. Considering the fact that the network was only officially launched in February 2007 on the occasion of the first meeting of EU enforcement authorities it is currently still too early for a solid assessment of the network's effectiveness with regard to Directive 2005/29/EC (which has not yet been transposed by all Member States). However, a first impression of how the Consumer Protection Cooperation Network could improve cross-border enforcement was provided by two **joint market surveillance and enforcement exercises** carried out by authorities from several Member States and EEA countries in September 2007 and June 2008. These joint exercises referred to as "**Sweep**", are a new kind of EU investigation and enforcement action. Member States carry out simultaneous coordinated checks of webpages for breaches in consumer law (not limited to Directive 2005/29/EC) in a particular sector. They contact operators with alleged irregularities and ask them to clarify their position and take corrective action.

⁶³ Article 16 of Directive 2005/29/EC.

⁶⁴ See Commission communication concerning Article 4(3) of Directive 98/27/EC, concerning the entities qualified to bring an action under Article 2 of this Directive.

⁶⁵ The number of qualified entities varies between one (e.g. the NETHERLANDS, ROMANIA) and more than 70 (e.g. GERMANY, GREECE).

⁶⁶ For a detailed analysis of obstacles for cross-border injunctions cf. Hans W. Micklitz, *Transborder Law Enforcement – Does it Exist?*, in: Stephen Weatherill / Ulf Bernitz (ed.), *The Regulation of Unfair Commercial Practices Under EC Directive 2005/29*, Hart Publishing 2007, pp. 235 et seq.

⁶⁷ For details see http://ec.europa.eu/consumers/enforcement/index_en.htm.

The first internet inquiry referred to as “AirlineSweep” (which was still based on Directive 84/450/EEC) was targeted websites selling airline tickets (see further data on this below in Part 4). While the joint operation shows that the network is working in practice, the European Commission underlined in its mid-term report of 30 April 2008 that it was “disappointing to see that so far the enforcement via the Enforcement Network is taking longer than expected.”⁶⁸ The second Sweep which took place in June 2008 targeted websites offering mobile phone services such as ring-tones and wallpapers. So far, only preliminary findings have been published by the European Commission, which seem to confirm the outcome of the “Airline Sweep”.⁶⁹

A more profound assessment of difficulties in the practical work of the Consumer Protection Cooperation Network will be possible once the Commission has made available the reports to be prepared by the Member States every two years from the date of entry into force of Regulation (EC) 2006/2004.⁷⁰ In addition, a useful tool for the exchange of information between national enforcement authorities and consumer associations from different Member States could be the **establishment of an EU unfair commercial practices database**, as intended by the European Commission.⁷¹

⁶⁸ Commission Report "Can you trust air ticket selling sites? An internet sweep by the Enforcement network", 30 April 2008, p. 4, available online: http://ec.europa.eu/consumers/enforcement/sweep/sweep_report2008.pdf

⁶⁹ See Commission press release of 17 July 2008: "EU clampdown on ring-tone scams", IP/08/1169.

⁷⁰ See Article 21(2) of Regulation 2006/2004.

⁷¹ See TED Contract notice 2008/S 116-153995.

4. Problematic sectors

The following part discusses the question whether it is already possible to identify sectors or areas which are most problematic from the point of view of the transposition and implementation of the two Directives.

As the transposition of the Directives was actually due in December 2007, less than one year has passed since. Thus, until now no annual reports of national enforcement authorities are known which allow for comparison with the situation before the transposition of the directives. The very few court cases which already apply the transposed directives are too coincidental (e.g. marketing of goods with the help of a prize competition in a recent reference of a case to the ECJ for a preliminary ruling under Directive 2005/29/EC)⁷². On this rather thin basis, it is too early to reliably identify problematic sectors, but it might be worth to include into further investigation such sectors which are of particular relevance for the internal market, e.g. e-shops selling goods, including music and software, and telecommunication services.

It is anyway not very probable that the situation in the market will immediately change as a consequence of the transposition. The Directives do not install a completely new market regime in fields where no regulation was already in force. By contrast, the Directives only harmonise the pre-existing rules on commercial practices with a view to improving the internal market. Thus, it is more likely that market conditions will gradually change when businesses get used to the new law and dare to run Europe-wide marketing campaigns on the basis of the harmonised rules.

The efforts of the Commission to monitor the European consumer market with the help of the so called Consumer Market Scoreboard did not reveal data on particular problematic sectors under the new Directives.⁷³ The same is true with regard to the Consumer Protection Cooperation Network of national enforcement bodies formed on the basis of Regulation (EC) 2006/2004 on Consumer Protection Cooperation.⁷⁴ The only data available is for 2007, i.e. mainly before the Directives were transposed. In 2007, the network only dealt with about 130 cases, many of them in the field of travel, health and miscellaneous goods and services. An eye-catching finding is that certain sectors where the network took action deliver very few or no cases at all. Such sectors are housing, water, electricity, gas and other fuels, clothing and footwear, education, communication, alcoholic beverages and tobacco, food and non-alcoholic beverages, furnishing, household equipment and routine household maintenance.⁷⁵ The reason may partially be that there is not much cross-border marketing in these sectors. It should be noted in particular that the figures of the Consumer Protection Cooperation Network for 2007 include the findings of the so called EU "sweep" against misleading advertising and unfair practices on websites selling airline tickets.⁷⁶ The operation referred to as "AirlineSweep" was a systematic check of more than 400 websites, carried out simultaneously and in a co-ordinated way in different Member States to investigate

⁷² Reference for a preliminary Ruling from the Federal Supreme Court lodged on 9 July 2008, Case C-304/08 – *Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. / Plus Warenhandelsgesellschaft mbH*, O.J. 2008, C 247/06; for further examples of court cases cf. ANNEX 3.

⁷³ See Communication from the Commission "Monitoring consumer outcomes in the Single Market: the Consumer Markets Scoreboard", COM (2008)31 final of 29 January 2008, available online: http://ec.europa.eu/consumers/strategy/sec_2008_87_en.pdf.

⁷⁴ As to the network see above, part 3b)

⁷⁵ Data taken from the Commission's Communication "Monitoring consumer outcomes in the Single Market: the Consumer Markets Scoreboard", COM (2008)31 final of 29 January 2008, figure 41, p. 50.

⁷⁶ See RAPID press release IP/07/1694 of 14 November 2007.

breaches of consumer protection law. It found that 50% of airline ticket websites showed irregularities, in particular relating to price indications, contract terms and clarity of proposed conditions. More than 60 cases were handed over to the Consumer Protection Cooperation Network. These figures indicate that there is a substantial problem in this industry, but they do not exclude the fact that other sectors would deliver similar results. It is highly desirable that further investigation of this kind will be executed in the future. In June 2008, the European Commission has extended its investigation and enforcement actions to websites offering mobile phone services such as ring-tones and wallpapers.⁷⁷ Furthermore, the Commission is currently executing further market research in the travel sector (taxes and fees for air transportation, package travel).⁷⁸ Possible other sectors for such investigation could be e-shops selling goods, including music and software, and telecommunication services.

⁷⁷ See Commission press release of 17 July 2008: „EU clampdown on ring-tone scams“, IP/08/1169.

⁷⁸ See http://ec.europa.eu/consumers/tenders/information/grants/ex_post_publication.pdf.

ANNEX 1

1. Higher Regional Court of Munich (Germany), Judgement of 17 January 2008, Case 29 U 4576/07, BeckRS 2008, 03240.

The court had to decide whether it constitutes an unfair commercial practice under § 7(1) of the German Act against Unfair Competition if a funeral company's van displaying a large advertisement is parked on the premises of a cemetery while the workers of the company are carrying out work at the cemetery (see picture). The court held that the annoyance to the public caused by such behaviour was not "unacceptable" provided that the van is necessary for carrying out the works and that the van is not parked in the vicinity of a recent grave.

On the one hand, one could argue that such a case falls under the "taste and decency" exception thus leaving it to the Member States to decide the admissibility of such practices. On the other hand, it could be argued that a funeral company's advertising at a cemetery is exerting "undue influence" which could therefore be considered an "aggressive marketing practice" prohibited under Article 8 of Directive 2005/29/EC. In any case, the Directive is not an *acte clair* leaving no doubt about the scope of the intended full harmonisation.



(Source: Beck-Online, BeckRS 2008, 03240)

ANNEX 2

Transposition of Article 7(4) lit. (d) of Directive 2005/29/EC in France

Directive 2005/29/EC	Transposition
Article 7(4) lit. (d) of Directive 2005/29/EC	Lors d'une invitation à l'achat, sont considérées comme substantielles, dès lors qu'elles ne ressortent pas déjà du contexte, les informations suivantes: [...] d) les modalités de paiement, de livraison, d'exécution et de traitement des réclamations, <u>si elles diffèrent des conditions de la diligence professionnelle</u> ; [...]
Article 121-1 (2), 2 nd sentence, No. 4 French Consumer Code	Dans toute communication commerciale constituant une invitation à l'achat et destinée au consommateur mentionnant le prix et les caractéristiques du bien ou du service proposé, sont considérées comme substantielles les informations suivantes: [...] 4° Les modalités de paiement, de livraison, d'exécution et de traitement des réclamations des consommateurs, <u>dès lors qu'elles sont différentes de celles habituellement pratiquées dans le domaine d'activité professionnelle concerné</u> ;

ANNEX 3

Examples of national case law referring to Directive 2005/29/EC

AUSTRIA

Judgement	Reference to Directive 2005/29/EC	Sector
Supreme Court, 11 March 2008, Case 4Ob225/07b	Article 2 lit. (d)	Tourism
Supreme Court, 8 April 2008, Case 4 Ob 42/08t	Articles 5(2), 6(1) lit. (b)	Producer of pianos
Supreme Court, 20 May 2008, Case 4Ob18/08p	Article 6	Telecommunications

GERMANY

Judgement	Reference to Directive 2005/29/EC	Sector
Federal Supreme Court, 5 June 2008, Case I ZR 4/06	Article 5(2)	Supermarket (advertising with prize competition or lottery)
Higher Regional Court Berlin, 25 January 2008, Case 5 W 344/07	Articles 2 lit. (d), 2 lit. (e), 2 lit. (k), 3(1), 5(1), 19	Mail order business
Higher Regional Court Hamm, 11 March 2008, Case 4 U 193/07	Article 7(5)	Retail shop (advertising for washing machine)
Higher Regional Court Berlin, 11 April 2008, 5 W 41/08	Articles 7(5), 19	Internet shop
Higher Regional Court Cologne, 16 May 2008, 6 U 26/08	Article 19	Internet shop

ANNEX 4

Examples of enforcement regimes for commercial practices law

Member State	Outline of enforcement regime
BELGIUM	The most common sanction for unfair commercial practices is an injunction order issued by the president of the commercial court. ⁷⁹ Such a cease and desist order can be requested e.g. by those consumers and businesses having a legitimate interest, the competent Ministers as well as consumer associations. ⁸⁰ In addition, any violation of the prohibition of misleading actions or omissions is a criminal offence which can be sanctioned by a fine ranging from 250 to 10.000 EUR. ⁸¹
DENMARK	The Consumer Ombudsman (<i>forbrugerombudsman</i>) is responsible for ensuring compliance with marketing practices law. ⁸² The central remedy for violation against marketing practices law is the prohibition order (injunction), issued subject to the penalty of a fine upon further violation (<i>forbud</i>). ⁸³ In addition, action for damages can be brought to court by businesses and consumers.
FRANCE	Misleading advertising by action or omission may result in criminal sanctions (imprisonment or fines). ⁸⁴ In addition, competitors may claim damages according to general civil tort law. ⁸⁵
GERMANY	The main sanction for a contravention against the prohibition of misleading advertising are injunctions, which can be applied for by competitors, business associations and consumer associations. ⁸⁶ In contrast, damages, skimming of profits and criminal sanctions play a minor role in marketing practices law. ⁸⁷ From a contract law perspective the non-disclosure of material information may also result in a damages claim for <i>culpa in contrahendo</i> . ⁸⁸

⁷⁹ Article 95 Act of 14 July 1991 on Commercial Practices and the Information and Protection of the Consumer (as amended by the Act of 7 June 2007).

⁸⁰ Article 98 Act of 14 July 1991.

⁸¹ Article 102 No. 8 Act of 14 July 1991. For further details see Jules Stuyck, in: Reto M. Hilty / Frauke Henning-Bodewig (ed.), *Law Against Unfair Competition*, (Springer) Heidelberg 2007, pp. pp. 139-150.

⁸² § 22 Act No. 1389 of 21 December 2005 on marketing practices.

⁸³ § 27 Act No. 1389 of 21 December 2005.

⁸⁴ Article L 121-6 and L 213-1 Consumer Code.

⁸⁵ Article 1382, 1383 Civil Code and Art. L 121-14 Consumer Code.

⁸⁶ § 8 Act on Unfair Competition.

⁸⁷ §§ 9, 10, 16 Act on unfair competition.

⁸⁸ §§ 241(2), 311(2) Civil Code.

ITALY	The Competition Authority (<i>Autorità garante della concorrenza e del mercato</i>) may investigate irregular commercial practices and misleading and comparative advertising following a complaint by any interested party or <i>ex officio</i> . ⁸⁹ The Competition Authority may order the business to stop any unfair commercial practices, request rectifying statements to be published and impose administrative fines. ⁹⁰ In addition, acts of unfair competition (<i>atti di concorrenza sleale</i>), in the sense of Article 2598 of the Civil Code interested parties may request a court injunction (Article 2599 Civil Code) or, in case of intentional or negligent acts, demand damages (Article 2600 Civil Code).
MALTA	The director of Consumer Affairs is in charge of the implementation of commercial practices rules. He may issue compliance orders in case of infringements and impose administrative fines <i>ex officio</i> or upon request of registered consumer organisations. ⁹¹
PORTUGAL	The Directorate General of Consumer Affairs (<i>Direcção-Geral do Consumidor</i>) and several other public authorities are in charge of the implementation of Act 57/2008 of 26 March 2008. Any person having a legitimate interest may submit a complaint to the competent public authority. ⁹² The administrative authority may issue cease and desist orders and impose fines. ⁹³

⁸⁹ Article 27(2) Consumer Code.

⁹⁰ Article 27(2) and (4) Consumer Code.

⁹¹ Sec. 106 Consumer Affairs Act 2008.

⁹² Article 20(1) Legislative Decree No. 57/2008 of 26 March 2008.

⁹³ Article 20(2) and 21 Legislative Decree No. 57/2008 of 26 March 2008.

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Transposition and Enforcement of the Directive on unfair commercial practices (2005/29/EC) and the Directive concerning misleading and comparative advertising (2006/114/EC)

by Associated Prof. Zita Ceponyte

Executive Summary

The Directive on unfair commercial practices (2005/29/EC) has been transposed in the Baltic States in the following ways: **separate laws** on prohibition of unfair business-to-consumer commercial practices (in Latvia and Lithuania) or **amendments** to the Consumer Protection Act and the Law on Obligations Act (in Estonia).

Supervision of the laws regulating unfair commercial practices in the Baltic States is **delegated to the State institutions**, protecting consumer rights, which may impose administrative penalties for the infringements of the laws¹.

The majority of the investigated infringement cases relate to **misleading omissions and misleading actions**.² Most infringements have been detected in the fields of **telecommunications, travel packages, air transportation and financial services**, which therefore can be seen as the most problematic sectors in regard to transposition and implementation.

Despite a successful transposition of the Directive on unfair commercial practices (2005/29/EC), there remain some problematic aspects of the legal concepts “professional diligence” and “vulnerable consumer” as well as the interpretation of the so called blacklist³ of unfair commercial practices.

With a view to achieving more efficient enforcement, it is necessary to organise training of employees of the bodies that monitor the law and judges, and to create an information system within the EU to accumulate information about enforcement and provide the relevant information of the Consumers Markets Scoreboard⁴.

In all three Baltic countries the Directive concerning misleading and comparative advertising (2006/114/EC) has been transposed into the Laws on Advertising, amending them, supplementing them or adopting revised versions. Notwithstanding the fact that the said laws regulate the requirements concerning misleading and comparative advertising in order to protect traders from misleading advertising and unfair competition, in certain cases there is a chance for consumers to also lodge their claims concerning misleading advertising. This may introduce an element of confusion when cases concerning misleading advertising and unfair commercial practices (misleading omissions or misleading actions) are being investigated, thus impeding effective implementation of the legislation at both the national and EU level.

¹ In Lithuania this concerns the State Consumer Rights Protection Authority as well the Competition Council of the Republic of Lithuania; in Latvia — the Consumer Rights Protection Centre, Health Inspectorate (in the field of medicinal products), Food and Veterinary Service (in the field of veterinary medicinal products); and in Estonia the Consumer Protection Board.

² Article 6 and Article 7 of the Directive on unfair commercial practices (2005/29/EC).

³ Annex 1 of the Directive on unfair commercial practices (2005/29 EC).

⁴ Communication from the Commission – Monitoring consumer outcomes in the Single Market: the Consumers Markets Scoreboard – COM (2008) 31 final of 29/1/2008.

1. Introduction

The adoption of the Directive on unfair commercial practices (2005/29/EC) was a highly important step in the field of protection of consumer rights and legitimate interests, removal of barriers to the free movement of goods and services arising from national differences in the regulation of unfair commercial practices and the reduction of the costs and complexity of cross-border trading for businesses.

The Directive concerning misleading and comparative advertising (2006/114/EC) sets business-to-business rules in the sphere of misleading and comparative advertising and seeks to ensure fair competition in the internal market and consumers' freedom of choice.

The transposition and enforcement of the Directive on unfair commercial practices (2005/29/EC) and the Directive concerning misleading and comparative advertising (2006/114/EC) will be considered by the examples of the Baltic States, namely **Latvia**, **Estonia** and **Lithuania**. In this briefing note we will focus more on regulation of business-to-consumer unfair commercial practices, since this is the more problematic area, and quite a new one in the above-mentioned countries.

2. Transposition of the Directive on unfair commercial practices (2005/29/EC)

The Directive on unfair commercial practices (2005/29/EC) stipulates that its provisions must be transposed into national law by 12 June 2007 and become effective as of 12 December 2007. For the purposes of transposition of provisions of the Directive on unfair commercial practices (2005/29/EC), **Lithuania and Latvia** chose to **pass separate laws** on prohibition of unfair business-to-consumer commercial practices, whereas **Estonia** transposed a part of the provisions into the Consumer Protection Act, and another part into the Law of Obligations Act. In Estonia, the above-mentioned legislation came into force on 12 December 2007, in Latvia on 1 January 2008 and in Lithuania on 1 February 2008. As can be seen from the data submitted, only in Estonia did laws on regulating unfair commercial practices come in to force on schedule, as envisaged by the Directive on unfair commercial practices (2005/29/EC).

Having regard to the fact that earlier not one of the Baltic countries had regulated unfair commercial practices⁵, the transposition of the Directive on unfair commercial practices (2005/29/EC) into national law will help ensure a high level of consumer protection and consumer confidence. Clearly, with only ten months having transpired the coming into force of the national legislation, it is still difficult to evaluate the effect on business and consumers, however the first results (both positive and negative) can now be discussed.

⁵ See 'Unfair commercial practices: An analysis of the existing national laws on unfair commercial practices between business and consumers in the new Member States'. Coordinated by Professor Dr Cees van Dam, Erika Budaite BA in Law (Estonia). British Institute of International and Comparative Law, London.
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3. Enforcement of the Directive on unfair commercial practices (2005/29/EC)

3.1. Institutional framework

In the Baltic States, supervision of legal acts on unfair commercial practices has been delegated to existing State consumer protection bodies: in **Lithuania** this concerns the State Consumer Rights Protection Authority as well the Competition Council of the Republic of **Lithuania**; in Latvia, the Consumer Rights Protection Centre, Health Inspectorate, Food and Veterinary service; and in **Estonia**, the Consumer Protection Board.

On the one hand, assigning the control function for unfair commercial practices to already functioning institutions that have experience in investigating the cases of misleading and comparative advertising and consumer complaints, which can be successfully used in the investigation of cases of unfair commercial practices, will help to more effectively implement the above-mentioned legislation. Furthermore, it should be emphasised that all the above-mentioned institutions are members of the Consumer Protection Cooperation Network⁶; therefore this will undoubtedly be significant for the effective enforcement of legislation regulating unfair commercial practices at the EU-wide level.

On the other hand, having regard to the fact that earlier not one of the Baltic countries had regulated unfair commercial practices, the personnel of the above-mentioned consumer rights protection institutions will lack specific experience and information when it comes to applying legislation regulating unfair commercial practices.

3.2. Administrative liability for infringements of prohibition of unfair commercial practices

Application concerning infringements of the law. In the countries studied, the right to appeal to the authorities exercising control of unfair commercial practices is vested in different groups of persons. In the Baltic countries, consumers, consumer associations, State and Local Government institutions and likewise institutions that oversee the implementation of legislation may appeal against the infringements of the legislation regulating unfair commercial practices at their own initiative⁷.

It is believed that by giving such a wide range of entities the right to report unfair commercial practices will have a positive effect in reducing the cost of unfair commercial practices to consumers and business at both the national and EU levels.

Infringement cases concerning unfair commercial practices. Having considered the decisions adopted in respect of infringements of the prohibition of unfair commercial practices, we easily notice that their number is still small.

⁶ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. OJ L 364/1, 9.12.2004.

⁷ In **Lithuania**, consumers, State and municipal institutions as well as agencies and associations of consumers may refer to the State Consumer Rights Protection Authority in respect of infringements of the law regulating prohibition of unfair commercial practices. The State Consumer Rights Protection Authority also has the right to initiate consideration of a case.

In **Latvia** consumers and institutions are entitled to have recourse to the Consumer Rights Protection Centre regarding infringements of law, and this Centre may also initiate a case at its own discretion.

In **Estonia**, the right of recourse regarding infringements of the law is granted to consumers, consumer associations and State institutions. The Consumer Protection Board also has the right to initiate consideration of a case at its own discretion.

Latvia has adopted 11 decisions stating that traders have infringed the prohibition of unfair commercial practices, in **Estonia**, there have been 15 such cases, and in **Lithuania** 2. The nature of the adopted decisions varies: to warn the infringer, to place the infringer under the obligation of discontinuing the infringement, to impose fines. It can be noted that in the investigated cases, most infringements have been detected in relation to **misleading actions** and **misleading omissions**.⁸

Unfair commercial practices are most frequently identified in the fields of **telecommunications, travel packages, financial services, air transportation and electronic commerce services**. Health claims, provision of incomplete information about a product or service, claims regarding the limited timing of sales, etc. are frequently recognised as unfair commercial practices. These areas can therefore be understood as the most problematic ones in view of the transposition and implementation of the Directives.

Given that the majority of infringements are detected in the fields of **misleading actions** and **misleading omissions**, a conclusion can be easily drawn that institutions have accumulated sufficient experience while investigating the infringements concerning misleading advertising and made use of it when adopting decisions on unfair commercial practices. Meanwhile, the provisions of the Directive on unfair commercial practices (2005/29/EC), for instance, the ones regulating the blacklist of unfair commercial practices and placing emphasis on vulnerable consumers, have not yet been applied. We believe that a relatively small number of cases arise because the legal provisions on prohibition of unfair commercial practices that have recently become effective are little known to potential claimants such as consumers, State institutions and consumer organisations, whereas the implementing authorities lack financial and human resources as well as the knowledge needed to be able to initiate investigations of unfair commercial practices themselves.

⁸ Article 6 and Article 7 of the Directive on unfair commercial practices (2005/29/EC) .

4. Problematic aspects of the enforcement of the Directive on unfair commercial practices (2005/29/EC)

The Directive on unfair commercial practices (2005/29/EC) devotes considerable attention to codes of conduct, in which traders are supposed to specify appropriate commitments and comply with them. However, none of the codes of conduct of the Baltic countries under consideration can be characterised by deeply rooted traditions of adoption⁹ and compliance, hence **assessment and control** of unfair commercial practices in this field is an issue for the future. Such a situation will complicate adoption of cross-border decisions concerning infringements of prohibition of unfair commercial practices in the internal market. Therefore, it is necessary to encourage entrepreneurs in individual Member States¹⁰ to adopt codes of conduct and to act in compliance with these codes, also to inform consumers of their importance when pursuing commercial activity.

Fears regarding the **legal concepts** which the majority of consumer law specialists and experts¹¹ considered as likely to raise problems when used in practice, due to their vagueness have proved to be justified. In a research¹² done in connection with the preparation of this briefing note, some institutions raised questions about some of the unclear and very broad legal concepts used and the problems of applying them in practice. This primarily concerns such legal concepts as **“professional diligence”** and **“vulnerable consumers”**.

“Professional diligence” is defined in Article 2(j) of Directive 2005/29/EC as “the measure of special care and skill exercised by a trader commensurate with the requirements of normal market practice towards consumers in his field of activity in the internal market”. Therefore, on the basis of the definition of the concept of “professional diligence”, we can draw the conclusion that different fields of activity should be subject to different standards. This would mean that one type of standard of “professional diligence” would apply in the field of telecommunications, and another in the field of financial services. Moreover, they would be different in different EU Member States. Thus, such a **multi-layer of the legal concept** might in practice, particularly when hearing cases, give rise to numerous interpretations, which will not serve the purpose of consumer protection. It might even turn out that having such a range of meanings of the concept may be more beneficial to traders than to consumers.

Both the Directive on unfair commercial practices (2005/29/EC) and national legal acts provide that unfair commercial practices which reach the generality of consumers, but are likely to materially distort the economic behaviour only of a group of consumers who are particularly vulnerable to the practice or the underlying product because of their credulity, age, mental or physical infirmity, shall be assessed from the perspective of the average member of that group. It remains unclear whether the group of **vulnerable consumers** will be protected in the case when commercial practices are assessed using the criterion of the “average consumer”, who is “reasonably well informed and reasonably observant and circumspect”.

⁹ See Consumer scene by countries (http://ec.europa.eu/consumers/strategy/scene_en.htm) Documents submitted to the European Commission in 2006 show that in Estonia there were no self-regulation bodies, while Latvia and Lithuania had two each.

¹⁰ In order to encourage the development of a Code of Conduct, the Law of the Republic of Lithuania on unfair commercial practices provides that commercial entities must inform the State Consumer Rights Protection Authority that they support the Code of Conduct and must nominate a Contact Person to be responsible for the Code of Code of Conduct.

¹¹ See Geraint Howells, Hans Micklitz, Thomas Wilhelmsson European Fair Trading law: the unfair commercial practices directive (Markets and the Law), Ashgate 2006.

¹² During the research a questionnaire survey of consumer rights defence organisations was arranged.

Annex¹³ of the Directive on unfair commercial practices (2005/29/EC), as well as legislation in the Baltic countries, present a list of commercial practices which are deemed to always restrict the capacity of consumers to make an informed decision and are always unfair. It is to be noted that some of the unfair commercial practices included in **the blacklist are very abstract** and therefore cause numerous interpretation problems. For example, the blacklist¹⁴ includes an activity described as “making persistent and unwanted solicitations by telephone, fax, e-mail ...”. When this activity is examined, a subjective understanding of the preceding formula is possible. What are “persistent solicitations”? When can it be said that solicitations are wanted, and when do they become unwanted?

As early as pending adoption of the Directive on unfair commercial practices (2005/29/EC), fears¹⁵ were voiced that the State institutions to be assigned supervision of the laws regulating unfair commercial practices would encounter difficulties in performing the new functions due to the **lack of personnel and competence**. Having regard to the fact that laws regulating unfair commercial practices are very new, and the number of cases is still relatively small, it may be considered that the personnel lack specific knowledge and skills or competence to apply the laws in practice at the national as well as the EU level.

Seeking greater efficiency in enforcement of the Directive on unfair commercial practices (2005/29/EC), it is necessary to undertake the measures by addressing the enforcement authorities and other institutions such as judges, consumer associations and the business entities that are entitled under the law to report infringements to the administrative authorities. In our opinion, the enforcement authorities require measures such as **training and organisation of conferences, during which information and expertise could be exchanged**.

In their annual activity reports, European Consumer Centres¹⁶ should focus on the presentation of information about instances of unfair commercial practices, which would enhance the possibilities of exchanging information and expertise. Moreover, this topic should be given considerable attention in the Consumers Markets Scoreboard¹⁷, which would present detailed data on the situation in the Member States regarding enforcement of the Directive on unfair commercial practices (2005/29/EC) as well as survey results.

One efficient measure could be the **development of an information system**¹⁸ to accumulate the information relating to issues of unfair commercial practices across the EU. This system should include national legislation, decisions of administrative authorities, judicial practice, rulings of the Court of Justice of the European Communities, references to legal literature on the issues of unfair commercial practices and information on cooperation of the EU-wide network of national enforcement authorities (alerts, requests for investigation and requests to take enforcement measures and coordinated action at the EU level)¹⁹. A similar information system was created when implementing Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

¹³ Annex 1 of the Directive on unfair commercial practices (2005/29/EC).

¹⁴ Comments from the Insurance Supervisory Commission of the Republic of Lithuania, made in the Seimas (Parliament) during consideration of the Republic of Lithuania Law on the prohibition of unfair commercial practices.

¹⁵ Unfair Commercial Practice and the New Member States. British Institute of International and Comparative Law.

http://www.biicel.org/files/882_general_report_unfair_commercial_practices_new_member_states%5Bwith_dir_t able_and_new_logo%5D.pdf.

¹⁶ See http://ec.europa.eu/consumers/redress_cons/index_en.htm

¹⁷ Communication from the Commission – Monitoring consumer outcomes in the Single Market: the Consumers Markets Scoreboard – COM(2008) 31 Final of 29/1/2008.

¹⁸ The European Commission has announced a tender for the creation of a database on unfair commercial practices in the EU.

¹⁹ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. OJ L 364/1, 9.12.2004.

5. Transposition and enforcement of the Directive concerning misleading and comparative advertising (2006/114/EC)

In each of the three Baltic countries, the Directive concerning misleading and comparative advertising (2006/114/EC) has been transposed into the Laws on Advertising, amending them, supplementing them or adopting revised versions.

Amendments and supplements to the Law on Advertising entered into force in Latvia on 1 January 2008 and in Lithuania on 1 February 2008. In Estonia, a new revised Law on Advertising was passed on 2 March 2008 and it will come into force in November this year.

Article 1 of the Directive concerning misleading and comparative advertising (2006/114/EC) states that the aim of the Directive is to protect traders against misleading advertising and the unfair consequences thereof. Article 1 of the Directive on unfair commercial practices (2005/29/EC) declares that the aim of the Directive is to assist the appropriate operation of the internal market and to achieve a high level of consumer protection by coordinating Member States laws and other legislation on unfair commercial practices that are detrimental to the interests of consumers. Therefore, the conclusion may be drawn that there is a transition in EU law towards two-track approach legal régimes that regulate marketing activity (practice) – business-to-business (B2B) and business-to-consumer (B2C).

In the Baltic countries, the Laws on Advertising establish the general requirements for the use of advertising, the responsibilities of participants in the advertising industry and the legal basis for control of the use of advertising, and they regulate misleading and comparative advertising. An analysis of the above-mentioned laws, which have certain limitations in that if other laws stipulate otherwise than the Law on Advertising, the provisions of the other special laws (e.g. Law on prohibition of unfair commercial practices and similar) shall be applicable, allows the conclusion to be drawn that the above-mentioned two-track approach legal régimes regulating B2B and B2C marketing practices have been firmly established in the national laws of the Baltic countries.

However, it should be noted that in some of the Baltic countries,²⁰ consumer cases may in certain instances, due to erroneous information, be investigated either in accordance with the Law on Advertising, into which the provisions of the Directive concerning misleading and comparative advertising (2006/114/EC) have been transposed, or the Law on unfair commercial practices, into which the provisions of the Directive on unfair commercial practices (2005/29/EC) have been transposed. On the one hand, giving consumers the right to lodge complaints to as many institutions as possible makes it possible to defend their rights better and to achieve a high level of consumer protection. On the other hand, however, some duplication of functions may occur, with consumers becoming uncertain as to which institution is responsible for dealing with which issues.

In the Baltic countries, control over advertising rests with several institutions²¹: these are

²⁰ For example, the Law on advertising of the Republic of Lithuania grants consumers the right to appeal to the Competition Council in regard to misleading advertising, while the Law on unfair commercial practices of the Republic of Lithuania grants consumers the right to appeal to the State Consumer Rights Protection Authority concerning misleading omissions and misleading actions.

²¹ In **Latvia**, advertising is controlled by the Consumer Rights Protection Centre, the Radio and Television Council, and the Food and Veterinary Service of the Health Inspectorate.

In **Lithuania**, control of advertising rests with the State Consumer Rights Protection Authority, the Competition Council, municipalities, the State Tobacco and Alcohol Control Agency and the State Medicines Control Agency.

In **Estonia** advertising is controlled by the Estonian Consumer Protection Board, rural municipalities, city government, the Agency of Medicines, the Financial Services Authority and the Medicinal Inspection.

specialised institutions, which exercise control over advertising at the national, regional or Local Government level. Naturally, specialised institutions are always more effective at solving consumers' and businessmen's problems. Since they operate in the regions or Local Government councils, they better understand the problems of firms or consumers that work or live in that region or municipality. However, when a large number of institutions are involved, there may be problems in terms of suitable coordination of their activities and clear delineation of functions.

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