

## UNFAIR COMMERCIAL PRACTICES DIRECTIVE: IMPLEMENTATION AND APPLICATION CHALLENGES IN THE LITHUANIAN LEGAL SYSTEM

Ieva Navickaitė-Sakalauskiene

Mykolas Romeris University, Faculty of Law,  
Department of International and European Union Law  
Ateities 20, LT-08303 Vilnius, Lithuania  
Telephone (+370 5) 2714 669  
E-mail: navickaite.ieva@gmail.com

Received on 4 April, 2012; accepted on 2 July, 2012

**Abstract.** *The Unfair Commercial Practices Directive (UCPD) seeks to regulate the fairness of business-to-consumer trading practices through reference to a “high level of consumer protection.” As in Lithuania there was no special national legislation, prohibiting unfair commercial practices, infringing economic interests of consumers, an absolutely new regime was brought by the UCPD into the national legal system. The aim of this article is to critically examine the implementation of the UCPD in the Republic of Lithuania, together with highlighting its principal application problems. In order to understand how the UCPD “landed” into the national legal system, in the first part of the article a short overview of regulation available before the transposition of the Directive is provided. The second part of the article deals with analysis of national rules, transposing UCPD. In the third part of the article, relevant case law is analyzed. In conclusion the author notes that Lithuania is not an exception and like other member states faced difficulties when transposing UCPD into the national legal system. Although the growing number of national case law in this field is the best evidence that UCPD and the implementing act are striking developments, influencing the national consumer law, however, the way from core application uncertainties still needs to be found.*

**Keywords:** *EU Consumer Law, Unfair Commercial Practices Directive (UCPD), Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania, implementation problems, national case law.*

## Introduction

Unfair Commercial Practices Directive<sup>1</sup> (hereafter also – UCPD, Directive 2005/29/EC, Directive) came into force on the 11<sup>th</sup> of June, 2005 and like any European Union (hereafter also – EU) directive, it had to be incorporated into national legal systems of EU member states.<sup>2</sup> Member States are free to choose form and methods of implementation, but according to settled case-law it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts.<sup>3</sup>

As is rightly pointed out by the authors of the EC consumer law compendium, the obligation to transpose the directive provisions into national law does not require a verbatim, or “copy-out,” approach to transposition<sup>4</sup> rather, it is for each Member State to decide how the outcomes prescribed by a directive are best attained, using whichever legal concepts and terminology will achieve this.<sup>5</sup> However, it is not the case when talking about total harmonisation directives and UCPD as one of them. Total harmonisation means that the Member States have to adopt provisions replicating exactly the standard set by the directive and to amend or to repeal national provisions that go further than the directive (deregulation). Outside the harmonised field, Member States retain their freedom to regulate, taking into account primary and other secondary EU law.<sup>6</sup>

As before the implementation of UCPD, in Lithuania there was no special national legislation prohibiting unfair business-to-consumer commercial practices, a new law implementing UCPD provisions essentially by using a “copy out” technique was adopted. The adoption of a totally new legal act did not help to avoid implementation

- 1 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] OL L 149/22.
- 2 Article 288 of the Treaty on the Functioning of the European Union (TFEU) (as amended by the Treaty of Lisbon (2007)) [2008] OL C 115/1.
- 3 Case C-365/93 *Commission v. Greece* [1995] ECR I-499. para. 9; Case C-144/99 *Commission v. Netherlands* [2001] ECR I-3541. para.17.
- 4 Case C-59/89 *Commission v. Germany* [1991] ECR I-2607. para. 18
- 5 Case 363/85 *Commission v. Italy* [1987] ECR 1733. para 15; Schulte-Nölke, H.; Twigg-Flesner, C.; Ebers, M. *EC consumer law compendium: the Consumer Acquis and its Transposition in the Member States*. Munich: Sellier, 2008.
- 6 Stuyck, J.; Terryn, E.; Van Dyck, T. Confidence through Fairness? The New Directive on Unfair Business-To-Consumer Commercial Practices in the Internal Market. *Common Market Law Review*. 2006, 43: 116.

problems, which are named and analyzed below. 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.

UCPD implementation into the national legal systems issues have been analyzed by a number of scientists in various member states. As an example (but not as an exhaustive list) we can name: Jules Stuyck, Evelyne Terryn, Bert Keirsbilck (Belgium), Hans-W. Micklitz, Hans Schulte-Nölke, Christoph Busch (Germany), Geraint Howells, Christian Twigg-Flesner, Annette Nordhausen, Deborah Parry, Alan Barron (UK), Thomas Wilhelmsson (Finland), Paul Edgar Micallef (Malta), Lisa Alexandridou (Greece), etc. In Lithuania UCPD implementation topic is unfortunately rather untouched by legal scholars.<sup>7</sup>

The *subject* of this article is the legal regulation of unfair commercial practices in Lithuania. The *aim* of the research is to examine the national act implementing UCPD into our national legal system and to reveal core national regulation and application problems. To achieve this objective, the following *tasks* were set: 1) to overview national legal regulation, available before the adoption of UCPD; 2) to analyze national rules, transposing UCPD; 3) to analyze relevant case law examples. Analysis was carried out mainly by applying analytical and comparative methods.

## 1. Legal Framework for Regulating Unfair Commercial Practices in Lithuania

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 21<sup>st</sup> of December, 2007 and came into force on the 1<sup>st</sup> of February, 2008. Thus, UCPD into national law was implemented almost on timely manner<sup>8</sup>, however, not without avoiding implementation problems<sup>9</sup> and, subsequently, application uncertainties as well.

As it was mentioned above, before adopting the Law on Unfair Commercial Practices, there was no prior special national legal act prohibiting unfair commercial practices that impinge on the economic interests of consumers. Legal acts, regulating fair competition issues were in force,<sup>10</sup> whereas consumers for claims against unfairly

7 Except some aspects touched by scholars in analysing advertising, unfair competition and/or intellectual property law issues. See e.g.: Markauskas, L. *Reklamos teisinis reglamentavimas: teorija ir praktika*. Vilnius: Mokesčių srutas, 2008; Birštonas, R., et al. *Intelektinės nuosavybės teisė*. Vilnius: Registrų centras, 2010, etc.

8 The deadline for transposition was 12 June 2007; implementing measures had to be applied starting from 12 December 2007.

9 It should be noted that the majority of Member States faced implementation problems. See eg.: Keirsbilck, B. *The New European Law of Unfair Commercial Practices and Competition Law*. Oxford and Portland, Oregon: Hart Publishing, 2011, *inter alia* analysing how UCPD was implemented in English, German, Dutch, Belgian, French law systems.

10 See e.g. Art. 46 of Constitution of the Republic of Lithuania *inter alia* stating that *the law shall protect freedom of fair competition*. Also Law on Competition, as a special act, setting the general prohibition of

acting businesses had to rely only on the Civil code's general fairness provisions, tort law norms or several consumer contract law norms. According to Van Dam and Budaite, before the implementation of UCPD in Lithuania, commercial fairness was regulated by the help of general contract law or tort law provisions.<sup>11</sup> The situation slightly changed in the year 2007, after amendment of the Law on Consumer Protection of the Republic of Lithuania. Article 6 of Draft Law amending the Law on Consumer Rights Protection set forth the principle of fair business practice and stated that *when offering to purchase and supplying goods and services to consumers, sellers and service suppliers must adhere to the fair business practice. Goods and services must be offered in such a way that a consumer would be aware of a commercial character of an offer.*<sup>12</sup> Certainly it was only a general norm, having no special enforcement mechanism that could guarantee its effectiveness and frequent application in practice.

Thus, currently legal basis, regulating commercial fairness in Lithuania consists of Law on Unfair Commercial Practices and Law on Advertising as legal acts transposing UCPD; Law on Consumer Rights Protection, establishing general fair business practices principle and recently amended Article 6.350 of Civil Code, establishing the general prohibition of unfair commercial practices together with making reference to the special legal acts regulating unfair commercial practices.<sup>13</sup> Hence we may conclude that the main legal act, transposing UCPD provisions into national legal system is Law on Unfair Commercial Practices, however, it is important to note that when talking about advertising, Law on Advertising is applied as the basic legal source regulating advertising and at the same time making it practically impossible in Lithuania to talk about one single legal act meant for regulating unfair commercial practices. Together it should be noted that the list of national transposition measures is published and regularly updated on the European Commission website, but unfortunately no text of the acts, implementing UCPD into Lithuanian legal system, has been provided yet.<sup>14</sup>

Further a brief overview of the implementation of the UCPD into Lithuanian law will be given, together analyzing the provisions of the Law on Unfair Commercial

---

unfair competition acts, exemplary list of unfair competition practices, as well as regulating responsibility issues. Some protection against unfair competition aspects are covered by Civil Code, Law on Advertising, Law on the Provision of Information to the Public, Administrative Code and Penal Code.

- 11 Van Dam, C.; Budaite, E. *An analysis of the existing national laws on unfair commercial practices between business and consumers in the new Member States*. London: British Institute of International and Comparative Law, 2005 [interactive]. [accessed on 15-03-2012]. <[http://www.biiic.org/files/883\\_national\\_reports\\_unfair\\_commercial\\_practices\\_new\\_member\\_states%5Bwith\\_dir\\_table\\_and\\_new\\_logo%5D.pdf](http://www.biiic.org/files/883_national_reports_unfair_commercial_practices_new_member_states%5Bwith_dir_table_and_new_logo%5D.pdf)>; Van Dam, C.; Budaite, E. The Statutory Frameworks and General Rules on Unfair Commercial Practices in the 25 EU Member States on the Eve of Harmonisation. *The Yearbook of Consumer Law 2008*. Aldershot: Ashgate publishing, 2008.
- 12 Law on Consumer Protection of the Republic of Lithuania. *Official Gazette*. 2007, No. 12-488.
- 13 Law on Amending Civil Code of the Republic of Lithuania. *Official Gazette*. 2011, No. 129-6108. The Amendment came into force on 01.12.2011. Article 6.350 3 Part states that *it is prohibited for the trader to exercise to the buyer unfair commercial practices. Unfair commercial practices kinds and cases are set by laws*.
- 14 Unfair Commercial Practices [interactive]. [accessed on 29-03-2012]. <[http://ec.europa.eu/consumers/rights/index\\_en.htm](http://ec.europa.eu/consumers/rights/index_en.htm)>; <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.showCountry&countryID=LT>>.

Practices and highlighting the author's opinion on the main transposition difficulties and discrepancies in comparison with the Directive 2005/29/EC.<sup>15</sup>

## 2. Overviewing the Law on Unfair Commercial Practices: Transposition Difficulties

### 2.1. Core Definitions

Having in mind that UCPD, as other consumer protection instruments, regulates business-to-consumer legal relationships, therefore *consumer* and *trader* definitions are of crucial importance when determining its personal scope of application. The Directive's definition of *consumer* was intended to reproduce the standard definition, found in several consumer protection directives,<sup>16</sup> defining *consumer* as *any natural person who, in commercial practices is acting for purposes which are outside his trade, business, craft or profession*.<sup>17</sup> When comparing this definition with the one, provided in the national implementing act, it should be noted that the national *definition* does not entirely correspond with that, provided by the Directive. According to the Law on Unfair Commercial Practices, a *consumer* is defined as a *natural person, who takes a decision to buy, buys and uses a product to meet his own personal, family or household needs not related to his business or profession*.<sup>18</sup> It should be noted that in the Directive, a consumer's activity is defined by using the more general term "*acting*," while the national text limits this activity to buying and using a product. That is not precise enough, having in mind that the Directive covers business-to-consumer activity, before, during or after a transaction, which means that it is applicable to promotion, negotiation, conclusion, performance and enforcement of the contract. Thus, a consumer is not only taking a decision to buy, buying or using a product, he can take any transactional decision concerning, for example, whether to make payment in whole or in part, retain or dispose of a product, exercise a contractual right in relation to the product, act or to refrain from acting, etc.<sup>19</sup>

Even more problematic is a definition of a *trader*, set in the implementing act. As it is known, Directive provides that a *trader* means *any natural or legal person who, in commercial practices is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader*.<sup>20</sup> When analyzing

15 The full text of *Law on Unfair Commercial Practices* could be found at the webpage of the Seimas of the Republic of Lithuania. [interactive]. [accessed on 29-03-2012]. <[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=315866](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=315866)>.

16 Explanatory Memorandum of the Commission's proposal for a UCPD. COM (2003) 356 final [interactive]. [accessed on 29-03-2012]. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0356:FIN:en:PDFproposal>>. Para. 34.

17 Article 2(a) of UCPD.

18 Article 2 Part 12 of Law on Unfair Commercial Practices.

19 See also "*transactional decision*" definition set in Article 2(k) of UCPD.

20 Article 2(b) of UCPD.

the definition stated in the implementing act, first of all it should be noted that a *trader* is named as a *commercial operator*. On the one hand a different name does not determine the erroneous transposition, however, that does not contribute to the safeguarding of legal certainty as well. Secondly, a *commercial operator* is defined as *a person who, in commercial practices, is engaged in trade or pursuing professional activities*.<sup>21</sup> It is obvious that national definition does not correspond with the one provided by the Directive as it does not involve persons *acting in the name of or on behalf of a trader*. That prevents the possibility to extend the responsibility to agents or providers of advertising services, having in mind that more and more often unfair practices are being performed by third parties which have contractual links to a trader.

According to the norm, defining its material scope of application, UCPD is applied to unfair business-to-consumer *commercial practices* before, during and after a commercial transaction in relation to a *product*.<sup>22</sup>

Since UCPD is a total harmonisation directive, the definition of the *commercial practice* is crucial, because the scope does not merely determine the area in which Member States are obliged to implement the Directive and create sufficient consumer protection rules with the help of positive national legislation. It also designates the field in which the Member States are not allowed to improve consumer protection by national provisions that would go further than the Directive.<sup>23</sup> Directive *business-to-consumer commercial practices (commercial practices)* are defined as *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*.<sup>24</sup> Thus commercial practices definition illustrates that the regime set by UCPD regulates the sheer range of activities within any given transaction.<sup>25</sup> Whereas in implementing act it is stated that *commercial practice* is *any act, omission, course of conduct or representation, including advertising and marketing, by a commercial operator, directly connected with the promotion, sale or supply of a product to consumers*.<sup>26</sup> From first sight it can be presumed that this definition corresponds to the Directive's definition. On the other hand it is not entirely clear why in national definition alongside with *act, omission, course of conduct* and *representation commercial communication* is not mentioned, excluding it from the wording of commercial practices definition. It should be noted that in legal literature it is agreed that *commercial communication* is the broader concept, encompassing both *advertising and marketing*,<sup>27</sup> that is why it can be assumed that national definition does

---

21 Article 2 Part 5 of Law on Unfair Commercial Practices.

22 Article 3(1) of UCPD.

23 Howells, G.; Micklitz, H. W.; Wilhelmsson, T. *European Fair Trading Law: The Unfair Commercial Practices Directive*. Aldershot: Ashgate publishing, 2007, p. 50; Stuyck, J.; Terry, E.; Van Dyck, T., *supra* note 3, p. 116.

24 Article 2 (d) of UCPD.

25 See also Willet, C. Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive. *Journal of Consumer Policy*. 2010, 33: 249.

26 Article 2 Part 4 of Law on Unfair Commercial Practices.

27 Keirsbilck, B., *supra* note 6, p. 228.

not entirely encompass that of the Directive and may lead to a too narrow understanding of *commercial communication* concept.

When analysing the material scope of application together it should be noted that a *product* in the implementing act is defined as *any goods or service (the activity and/or its result) including immovable property, rights and obligations*.<sup>28</sup> This definition corresponds to that of the Directive.<sup>29</sup>

Eventually, attention should be drawn to the fact that in the national implementing act, the concept of regulated profession<sup>30</sup> is missing, while it contains surplus concept of means of information communication,<sup>31</sup> which cannot be found in the text of the Directive.

When summarizing it should be noted that *consumer, commercial operator and business-to-consumer commercial practices* definitions should be amended in order to comply with the text of Directive, together with including *regulated profession* definition and deleting the surplus concept of *means of information communication*.

## 2.2. The Threefold Structure of the Unfairness Test

The fairness of a concrete commercial practice according to the Directive 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.

When analyzing how the above mentioned *threefold structure* was transposed into the national legal system, it should be noted that a *general prohibition of unfair commercial practices*<sup>32</sup> as well as rules on *misleading commercial practices*<sup>33</sup> and on *aggressive commercial practices*,<sup>34</sup> except for a few inaccuracies,<sup>35</sup> have been implemented correctly in Lithuania.

---

28 Article 2 Part 8 of Law on Unfair Commercial Practices.

29 Article 2(c) of UCPD.

30 Article 2(l) of UCPD.

31 Article 2 Part 2 of Law on Unfair Commercial Practices, stating that “means of information communication” shall mean any means through which information about the products is communicated to a consumer (television and radio advertisements, announcements in the press, SMS, flyers, etc.).

32 Provisions on general prohibition of unfair commercial practices stated in Article 3 Part 1 and Part 2 of Law on Unfair Commercial Practices. See respectively Articles 5(1) and 5(2) of UCPD.

33 Provisions on misleading actions and misleading omissions stated in Articles 5 and 6 of Law on Unfair Commercial Practices. See respectively Articles 6 and 7 of UCPD.

34 Provisions on aggressive commercial practices stated in Article 8 of Law on Unfair Commercial Practices. See respectively Articles 8 and 9 of UCPD.

35 See e.g. Article 7(5) of UCPD stating that *information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material*. Whereas Article 6 Part 4 of Law on Unfair Commercial Practices states that *where it is established by legal acts that any other information must be provided when performing commercial practice, such information shall be regarded as material*. It should be noted that national implementing provision is not precise enough and from its wording it is not clear whether it makes reference to EU information requirements or does not. Implementing provision does not make reference to Annex II either.

The benchmark for assessing the fairness of a commercial practice, set by UCPD is the *average consumer* standard. As it is known, the average consumer concept is not defined in the Directive itself, although the Recitals<sup>36</sup> provide (in accordance with ECJ rulings<sup>37</sup>) that this is an ordinarily a consumer who is *reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors*. The fact that the definition of the average consumer has been deleted from the original Proposal of the Directive and has been moved to its Preamble, is interpreted as the intention of the drafters of the UCPD to allow national courts to a more realistic understanding of the capabilities of the average consumer, taking into account also “social, cultural and linguistic factors, as interpreted by the Court of Justice.”<sup>38</sup> However, it seems that this perception was not supported by Lithuanian legislators, because the average consumer standard was implemented by placing this concept alongside other definitions, what is more, by making no reference to the ECJ practice.<sup>39</sup> It does not necessarily mean that the average consumer benchmark has been implemented incorrectly. However, having in mind that average consumer concept is solely European Union law definition, this can cause future application difficulties and/or prevent future development of this concept in the national case-law.

Eventually, when analyzing how the threefold structure of the unfairness test was implemented into the national legal system, it should be noted that Annex to the Directive holding 31 specific practices that are deemed to be *per se* unfair, despite some grammatical discrepancies has been transposed correctly. Together attention should be drawn to the fact that Law on Unfair Commercial Practices does not include separate blacklist, respectively situating *per se* misleading commercial practices in Article 7 and aggressive commercial practices in Article 8 Part 3 of Law on Unfair Commercial Practices.

### 2.3. Enforcement Mechanism

According to UCPD, Member States have an obligation to ensure that adequate and effective means exist to combat unfair commercial practices.<sup>40</sup> However, it is acknowledged that different Member States use different enforcement mechanisms.<sup>41</sup> Further, within the scope of this article, the core enforcement of the Law on Unfair Commercial Practices aspects will be discussed.<sup>42</sup>

36 Recital 18 of UCPD.

37 E.g. Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v. Mars* [1995] ECR I-1923; Case C-220/98 *Estée Lauder* [2000] ECR I-117; Case C-210/96 *Gut Springenheide and Tuský* [1998] ECR I-4657; Case C-44/01 *Pippig Augenoptik* [2003] ECR I-3095, etc.

38 See e.g. Keirsbilck, B., *supra* note 6, p. 282.

39 Article 2 Part 13 of Law on Unfair Commercial Practices, stating that *average consumer shall mean a consumer who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors*.

40 Article 11(1) of UCPD.

41 Article 11(2) of UCPD.

42 See also: Unfair Commercial Practices [interactive]. [accessed on 29-03-2012]. <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.showCountry&countryID=LT>>.

In Lithuania the general enforcement of the Law on Unfair Commercial Practices (except the provisions concerning misleading and comparative advertising)<sup>43</sup> is handled by the State Consumer Protection Authority (hereafter Authority) which controls the compliance with the provisions of implementing law.<sup>44</sup>

The right to apply to the Authority concerning infringements of Law on Unfair Commercial Practices is granted to: 1) the consumers; 2) the state and municipal institutions and agencies; 3) the consumer associations.<sup>45</sup> The Authority has the right to initiate investigation procedure on the infringements of Law on Unfair Commercial Practices on its own initiative as well.<sup>46</sup>

The UCPD provides that Member States shall lay down penalties for infringements of national provisions adopted in application of UCPD and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.<sup>47</sup>

When analyzing the provisions of the implementing act, it should be noted that for the breach of Law on Unfair Commercial Practices administrative sanctions can be imposed by the Authority. Under Law on Unfair Commercial Practices the Authority, within its competence, may impose a fine of LTL 1 000 to LTL 30 000 to commercial operators for unfair commercial practices, if this fine does not exceed 3% of the annual income of a commercial operator during the previous financial year. Where infringements were committed under aggravating circumstances, a larger fine, up to LTL 120 000, may be imposed to commercial operators, if this fine does not exceed 3% of the annual income of a commercial operator during the previous financial year. Where an infringement is minor and no substantial damage to the consumers' interests protected by this Law is made, the Authority, in compliance with the criteria of fairness and reasonableness, may impose the following penalty to commercial operators for unfair commercial practices, a warning without imposing a fine.<sup>48</sup>

At the same time attention is drawn to the fact that in Lithuania enforcement through competent administrative authorities exists together with the enforcement through court actions. Firstly, commercial operators who do not agree with the decisions of the Authority or the Competition Council on imposition of fines or warnings, have the right to appeal in the Administrative Courts according to the procedures established in the Law on Administrative Procedures. Secondly, although Law on Unfair Commercial Practices does not contain provisions concerning civil sanctions, this does not exclude the possibility to file a general claim for civil damages before the competent civil courts.

---

43 The enforcement of the provisions concerning misleading and comparative advertising regulated in Law on Unfair Commercial Practices and Law on Advertising is handled by the Competition Council of the Republic of Lithuania. However, in practice delimitation of competence between State Consumer Protection Authority and Competition Council of the Republic of Lithuania when dealing with misleading advertising, directed at consumers, is not that obvious, as these cases are mostly examined by Authority.

44 Article 9 Part 1 of Law on Unfair Commercial Practices.

45 Article 15 Part 1 of Law on Unfair Commercial Practices.

46 Article 15 Parts 2, 3 of Law on Unfair Commercial Practices.

47 Article 13 of UCPD.

48 Article 13 Part 1 of Law on Unfair Commercial Practices.

### 3. Principal Interpretative Problems in the Case-Law Context

The application and enforcement duty of UCPD as of any other body of consumer law falls to the national courts. The courts are obliged to adopt an interpretation of the national legislation that conforms to the directive which it implements, with the possibility of seeking guidance from the European Court of Justice on the interpretation of the relevant EU rules.<sup>49</sup>

As already mentioned above, the Authority is the main administrative authority, assessing fairness of business-to-consumer commercial practices in regard to Law on Unfair Commercial Practices. When analyzing recent Authority decisions, first of all the examples of the blacklisted commercial practices will be provided, subsequently analyzing what difficulties are faced when applying clauses on misleading and aggressive commercial practices as well as general prohibition in practice.

The practice of Authority reveals that practices, when companies sell their products by means of organizing special promotional presentations in restaurants or hotels are still common in Lithuania. Consumers, who possibly could be interested in the offered production were invited to such event and after the presentation of a product (service) were pressured to conclude a contract and to make a payment, usually by creating an (deceptive) impression that advertised products are available for a special price only at the day of presentation.

The Authority, after assessing such kind of commercial practices, has stated that inducing consumers to conclude contracts on purchasing offered goods<sup>50</sup> or accommodation services<sup>51</sup> during (or immediately after) the presentation and pressing

49 Twigg-Flesner, C. Time to Do the Job Properly—The Case for a New Approach to EU Consumer Legislation. *Journal of Consumer Policy*. 2010, 33: 358.

50 State Consumer Rights Protection Authority 2011-07-21 ruling *V. B. et al v. UAB “Bauer International”* (case No. 12NKV-29). Authority concluded that *although consumers had a possibility to conclude contracts for the purchase of goods later, however, it was urged that they conclude them during the presentation. In order to succeed immediate conclusion of a contract, additional gifts (blankets, shampoo, etc.) were offered for consumers. In addition, customers were also given the opportunity to win a trip, which was granted only after purchase of goods and took place at end of the presentation. Because of that consumers had no possibility to think over and to postpone the purchase of offered goods for the other day.*

51 State Consumer Rights Protection Authority 2011-08-11 ruling *State Consumer Rights Protection Authority v. UAB “Amber Promotions”* (case No. 12NKV-35). *The company “Amber Promotions” advertised accommodation services in foreign countries. The price for the services had to be paid immediately (at the day of presentation). It was claimed that the minimum price of the service was offered only when money was paid on the day of concluding a contract, whereas when the price was paid within 3 days from the conclusion of a contract, double price had to be paid, accordingly if it was paid in 3-7 days time, the price was triplicated. Authority concluded that having in mind these circumstances it was natural that consumers chose to make the payment on the day of concluding a contract. Moreover consumers were under pressure to take a decision and had no opportunity to ascertain, whether the company’s assertions (about especially low prices of the trips they offer) were correct.*

State Consumer Rights Protection Authority 2011-08-25 ruling *State Consumer Rights Protection Authority v. UAB “Atostogų sandėlis”* (case No. 12NKV-41). *The company “Atostogų sandėlis” advertised accommodation services in hotels of Malta and Spain. As in the ruling stated above, the Authority concluded that consumers were under pressure to make up their mind and to conclude contracts as soon as possible, in such a way reducing their ability to properly assess the terms of the proposal. Consumers were unable to ascertain whether the statements of the company’s representatives were true. Moreover they were convinced*

to pay allegedly exceptionally low cost of a contract at the day of presentation, when the price for the goods (services) during all presentations was the same fell under the blacklist and was *per se* unfair, i.e. violated Article 7 Part 7 of Law on Unfair Commercial Practices.<sup>52</sup>

As a more recent example of blacklisted practices we can present cases on pyramid selling schemes. Particular advertising campaigns were organized by companies, the main activity of which was providing small loans. The aim of the aforesaid campaign was to encourage registered users to recommend the borrowing service to their friends, after each registration of a new client getting a payment in return. The companies in such a way pursued to attract new clients into the service distribution system.<sup>53</sup> The Authority, after assessing such kind of commercial practices, has stated that they fell under the blacklist as violating Article 7 Part 22 of Law on Unfair Commercial Practices.<sup>54</sup>

However, the attention should be drawn to the fact that when analyzing national practice on application of *misleading* and *aggressive* commercial practice tests, as well as on *general unfairness clause* it is not entirely clear how these different levels of prohibitions interact.

As an example we can quote a recent cases, dealing with proposals to purchase occasional coins and medals distributed by mail.<sup>55</sup> Supreme Administrative Court of Lithuania (hereafter also—Court) after analysing advertorial material provided by UAB

---

*that supposedly the lowest price of the service was valid only on the day of presentation and had no reason to believe that the price of the services during all presentations was the same.*

52 Article 7 Part 7 of Law on Unfair Commercial Practices stating that *false claiming that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice* falls under the blacklist. Respectively see Annex I, Part 7 of UCPD.

53 State Consumer Rights Protection Authority 2011-07-28 ruling *State Consumer Rights Protection Authority v. UAB “SMScredit.lt”* (case No. 12NKV-31). *On the web site <www.smscredit.lt> an action was announced offering to earn money (bonus Litas) for inviting other consumers to sign in the aforesaid web site. It was announced that a person, who registered in a website <www.smscredit.lt> (filled out a registration form and paid the 0.01 Lt registration fee) and by SMS or e-mail invited to register his friends (to the appropriate field in the web site entered another person’s mobile phone number or email address and sent an invitation) for every friend, who registered after receiving the invitation will get from UAB SMScredit.lt “bonus Litas” — the sum of 20 Litas to be transferred to the personal bank account. This was a promotional action intended to induce consumers to recommend borrowing service to the others. According to Authority it was more likely that recipients of the advertisement can sign in the web site <www.smscredit.lt> not in order to obtain a loan in the future but trying to help a friend to get the promised reward without taking into account the possible consequences.*

State Consumer Rights Protection Authority 2011-11-21 ruling *State Consumer Rights Protection Authority v. UAB “Nordecum”* (case No. 12NKV-57). The factual circumstances and the arguments of the Authority almost identical like in the above mentioned ruling.

54 Article 7 Part 22 of Law on Unfair Commercial Practices stating that *establishing, operating or promoting a pyramid scheme of distribution of goods where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.* Respectively see Annex I, Part 14 of UCPD.

55 Supreme Administrative Court of Lithuania 2012-02-20 decision *UAB “Monetų namai” v. State Consumer Rights Protection Authority* (case No. A<sup>525</sup>-284/2012). Consumers got advertorial material into their mailboxes with the proposal to purchase occasional coins and medals. After ordering one of the proposed silver coins and paying for it, subsequently other coins were sent to the consumer’s mailbox with the requirement to pay, despite the fact that consumer did not subscribe them. In such a way the ability of a client to stop the sending of occasional coins was encumbered.

“Monetų namai” concluded that this material did not involve unambiguous and clear information regarding supply and delivery conditions. It was not clear that the proposed product is a collection of coins and that after buying the first coin a consumer becomes obliged to buy other coins, included in the collection. It was noted that when offering a consumer to buy not just one particular coin, but a periodically sent set of coins, the seller must provide with the essential information regarding the collection, i.e. how many coins are included in the collection, its final price, definite delivery terms, etc. Hereby the Court stated that UAB “Monetų namai” by omitting material information (i.e. providing it in an unclear and unintelligible manner) materially distorted the economic behaviour of the average consumer with regard to the product and was in breach of Article 6 Part 1 Paragraph 2 (misleading omissions) of Law on Unfair Commercial Practices.

Furthermore, the Court stated that actions when after explicitly stated refusal by the consumer the delivery of goods was not stopped, together sending threatening debt reminders and warnings about possible transfer of the case for the debt collecting company, should be qualified under Article 8 Part 1 (aggressive commercial practices) of Law on Unfair Commercial Practices.

Eventually, it was concluded that medals and coins were sent to consumers’ mailboxes together with the demand to pay for them, when there was no guarantee that consumers really received the goods. Such kind of behaviour was assessed as not meeting the professional diligence requirements, materially distorting the economic behaviour of an average consumer, i.e. violating Article 3 Part 2 Paragraph 1 (general prohibition of unfair commercial practices) of Law on Unfair Commercial Practices.

It must be agreed that the text of the Directive does not provide the answer how these different levels of prohibitions should interact, whether they are exceptional or cumulative. Although in the mean time in principle it is up to the national legislators, courts and enforcement authorities to decide whether the general clause has relevance in the interpretation of the conditions of application of the small general clauses (misleading and aggressive commercial practices), it should be agreed with B. Keirsbilck and a number of other scholars stating that the structure of the UCPD (and the implementing act respectively) should be seen as an “inverted pyramid.” Any application would have to start with the question whether the practice is prohibited under the blacklist and, if not, whether it is misleading or aggressive. Only if a commercial practice does not fall within the scope of any of the small general clauses, the grand general clause should be applied (cascade reasoning). General prohibition is a remedy of last resort which applies only to particularly unusual circumstances.<sup>56</sup>

## Conclusions

1. The analysis of the implementing act provisions, as well as of the relevant case law, has proved that Lithuania is not an exception, and as many other Member

---

<sup>56</sup> Keirsbilck, B., *supra* note 6, p. 294.

States has faced Unfair Commercial Practices Directive implementation and application difficulties.

2. Attention should be drawn to the fact that national definitions of consumer, commercial operator, business-to-consumer commercial practices should be amended, as not corresponding with those provided by the Directive. Together a definition of regulated profession should be included and a surplus concept of means of information communication should be deleted. The author also raises a question, whether the average consumer concept was properly implemented by placing it alongside other definitions, what is more – making no reference to the ECJ practice.

3. In Lithuania enforcement of the Law on Unfair Commercial Practices is handled by State Consumer Protection Authority or Competition Council. However, in practice the delimitation of competence between these administrative authorities is not that obvious, especially when dealing with misleading advertising. The decisions of competent authorities can be appealed to the Administrative Courts, or a general claim for civil damages can be claimed before the civil courts.

4. The analysis of State Consumer Protection Authority practice reveals that as the recent examples of unfair commercial practices could be named practices, when companies sell their products (goods or accommodation services) by means of organizing special promotional presentations in restaurants or hotels and pyramid selling schemes by companies providing small loans.

5. As one of the principal interpretative problems when applying the Directive and implementing act provisions in national practice is the uncertainty how different levels of unfairness set in the Directive interact. It is agreed with the authors, stating that a model of cascade reasoning should be applied by national competent administrative authorities and courts.

## References

- Birštonas, R., et al. *Intelektinės nuosavybės teisė*. Vilnius: Registrų centras, 2010.
- Case 363/85 *Commission v. Italy* [1987] ECR 1733.
- Case C-59/89 *Commission v. Germany* [1991] ECR I-2607.
- Case C-365/93 *Commission v. Greece* [1995] ECR I-499.
- Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v. Mars* [1995] ECR I-1923.
- Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657.
- Case C-220/98 *Estée Lauder* [2000] ECR I-117.
- Case C-144/99 *Commission v. Netherlands* [2001] ECR I-3541.
- Case C-44/01 *Pippig Augenoptik* [2003] ECR I-3095.
- Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, No. 74-2262; No. 77; No. 80; No. 82.
- Constitution of the Republic of Lithuania. *Official Gazette*. 1992, No. 33-1014.
- 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.
- Howells, G.; Micklitz, H. W.; Wilhelmsson, T. *European Fair Trading Law: The Unfair Commercial Practices Directive*. Aldershot: Ashgate publishing, 2007.
- Keirsbilck, B. *The New European Law of Unfair Commercial Practices and Competition Law*. Oxford and Portland, Oregon: Hart Publishing, 2011.
- Law on Advertising of the Republic of Lithuania. *Official Gazette*. 2000, No. 64-1937.
- Law on Competition of the Republic of Lithuania. *Official Gazette*. 1999, No. 30-856.
- Law on Consumer Protection of the Republic of Lithuania. *Official Gazette*. 1994, No. 94-1833, No. 12-488.
- Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania. *Official Gazette*. 2008, No. 6-212.
- Markauskas, L. *Reklamos teisinis reglamentavimas: teorija ir praktika*. Vilnius: Mokesčių srautas, 2008.
- Schulte-Nölke, H.; Twigg-Flesner, C.; Ebers, M. *EC consumer law compendium: the Consumer Acquis and its Transposition in the Member States*. Munich: Sellier, 2008.
- State Consumer Rights Protection Authority 2011-07-21 ruling *V. B. et al v. UAB “Bauer International”* (case No. 12NKV-29).
- State Consumer Rights Protection Authority 2011-07-28 ruling *State Consumer Rights Protection Authority v. UAB “SMScredit.lt”* (case No. 12NKV-31).
- State Consumer Rights Protection Authority 2011-08-11 ruling *State Consumer Rights Protection Authority v. UAB “Amber Promotions”* (case No. 12NKV-35).
- State Consumer Rights Protection Authority 2011-08-25 ruling *State Consumer Rights Protection Authority v. UAB “Atostogų sandėlis”* (case No. 12NKV-41).
- State Consumer Rights Protection Authority 2011-11-21 ruling *State Consumer Rights Protection Authority v. UAB “Nordecum”* (case No. 12NKV-57).
- Stuyck, J.; Terry, E.; Van Dyck, T. Confidence through Fairness? The New Directive on Unfair Business-To-Consumer Commercial Practices in the Internal Market. *Common Market Law Review*. 2006, 43: 107–152.
- Supreme Administrative Court of Lithuania 2012-02-20 decision *UAB “Monetų namai.” v. State Consumer Rights Protection Authority* (case No. A<sup>525</sup>-284/2012).
- The Unfair Commercial Practices Directive [interactive]. [accessed on 15-03-2012]. <[http://ec.europa.eu/consumers/rights/index\\_en.htm](http://ec.europa.eu/consumers/rights/index_en.htm)>.
- Treaty on the Functioning of the European Union (TFEU) (as amended by the Treaty of Lisbon (2007)) [2008] OL C 115/1.
- Twigg-Flesner, C. Time to Do the Job Properly—The Case for a New Approach to EU Consumer Legislation. *Journal of Consumer Policy*. 2010, 33: 355–375.
- Van Dam, C.; Budaite, E. The Statutory Frameworks and General Rules on Unfair Commercial Practices in the 25 EU Member States on the Eve of Harmonisation. *The Yearbook of Consumer Law 2008*. Aldershot: Ashgate publishing, 2008.
- Van Dam, C.; Budaite, E. *An analysis of the existing national laws on unfair commercial practices between business and consumers in the new Member States*. London: British Institute of International and Comparative Law, 2005 [interactive]. [accessed on 15-03-2012]. <[http://www.biicl.org/files/883\\_national\\_reports\\_unfair\\_commercial\\_practices\\_newmember\\_states%5Bwith\\_dir\\_table\\_and\\_new\\_logo%5D.pdf](http://www.biicl.org/files/883_national_reports_unfair_commercial_practices_newmember_states%5Bwith_dir_table_and_new_logo%5D.pdf)>.
- Willet, C. Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive. *Journal of Consumer Policy*. 2010, 33: 247–273.

## NESĄŽININGOS KOMERCINĖS VEIKLOS DIREKTYVA: PERKĖLIMO IR TAIKymo IŠŠŪKIAI LIETUVOS TEISINĖJE SISTEMOJE

Ieva Navickaitė-Sakalauskiene

Mykolo Romerio universitetas, Lietuva

**Santrauka.** *Nesąžiningos komercinės veiklos direktyva (toliau ir – Direktyva) siekiama reglamentuoti komercinės veiklos vartotojų atžvilgiu sąžiningumą, kartu prisidedant prie aukšto lygio vartotojų apsaugos užtikrinimo. Kadangi Lietuvoje specialaus teisinio reguliavimo, įtvirtinančio nesąžiningos komercinės veiklos, pažeidžiančios vartotojų ekonominius interesus, draudimą, nebuvo, priėmus Nesąžiningos komercinės veiklos direktyvą, naujas teisinis reguliavimas turėjo būti perkeltas į nacionalinę teisinę sistemą. Šio straipsnio tikslas – kritiškai išanalizuoti, kaip Nesąžiningos komercinės veiklos direktyva buvo įgyvendinta Lietuvoje, kartu išryškinant pagrindines jos nuostatų taikymo praktikoje problemas. Siekiant suprasti, kaip Nesąžiningos komercinės veiklos direktyva „įsiliejo“ į nacionalinę teisinę sistemą, pirmoje straipsnio dalyje apžvelgiamas nacionalinis teisinis reglamentavimas, buvęs iki direktyvos priėmimo. Straipsnio antroji dalis skirta nacionalinio teisės akto, perkeliančio Direktyvos nuostatas, analizei. Trečiojoje straipsnio dalyje analizuojama aktuali nesąžiningos komercinės veiklos draudimo taisyklių taikymo praktika. Apibendrinant pažymima, kad Lietuva nėra išimtis ir kaip didžioji dauguma kitų valstybių narių susidūrė su Direktyvos perkėlimo į nacionalinę teisinę sistemą sunkumais. Ir nors vis didėjanti nacionalinė praktika minėtoje srityje byloja, kad tiek Direktyva, tiek ir ją perkeliančiu įstatymu įgyvendinti ryškūs pokyčiai, pozityviai veikiantys nacionalinę vartotojų teisę, į daugelį klausimų, kylančių taikant šiuos teisinius instrumentus, vis dar lieka neatsakyta.*

**Reikšminiai žodžiai:** *ES vartotojų teisė, Nesąžiningos komercinės veiklos direktyva, Nesąžiningos komercinės veiklos vartotojams draudimo įstatymas, perkėlimo problemos, nacionalinė praktika.*

---

**Ieva Navickaitė-Sakalauskiene**, Mykolo Romerio universiteto Teisės fakulteto Tarptautinės ir Europos Sąjungos teisės katedros doktorantė. Mokslinių tyrimų kryptys: Europos Sąjungos materialinė teisė, vartotojų teisių apsauga, Europos Sąjungos sutarčių teisė.

**Ieva Navickaitė-Sakalauskiene**, Mykolas Romeris University, Faculty of Law, Department of International and European Union Law, Doctoral Student. Research interests: European Union Law (free movement), consumer protection law, European Union contract law.

