

OFFICIAL STATE GAZETTE

I. GENERAL PROVISIONS

THE HEAD OF STATE

21162 *Law 29/2009 of 30 December 2009 amending the statutory regime of unfair competition and advertising in order to enhance protection afforded to consumers and users.*

JUAN CARLOS I

KING OF SPAIN

To all those who may have knowledge of these presents:

Be it known the Cortes have passed and I have ratified the following Act:

PREAMBLE

I

Regulatory initiatives on the part of the European Union have brought about significant changes in different but very interrelated areas of the internal market such as, pertaining to this Act, unfair competition, advertising, consumer protection and retail trade.

Some of these changes have been brought about, first of all, by 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').

And secondly by Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, codifying the amendments to Directive 84/450/EC.

The incorporation of these Directives into the Spanish legal system by means of this Act has entailed significant amendment of several laws: the Unfair Competition Act, Law 3/1991 of 10 January 1991 bringing this subject under a single regulation; the consolidated text of the General Consumer and User Protection Act and other supplementary laws passed by Legislative Royal Decree 1/2007 of 16 November 2007 bringing this protection within the scope of the preceding Law; the Retail Trade Act, Law 7/1996 of 15 January 1996 and the General Advertising Act, Law 34/1988 of 11 November 1988.

II

Directive 2005/29/EC regulates a series of conducts which can be listed under the heading of unfair competition, stressing their undesirable effects on consumers. The overarching purpose of this Act was to consistently integrate consumer protection legislation into market regulation, enshrined here in the Unfair Competition Act, as a way to make the said protection as effective as possible while keeping market regulation intact.

The rules protecting free competition or prohibiting unfair competition protect consumers to the same degree that they protect market operation and the interests of economic operators. That is why this Act provides for consumer protection while taking

account of the demands of the market itself and the legitimate interests of economic operators.

The amendments to the Unfair Competition Act first of all consider the impact of another important piece of EU legislation, i.e. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) whereby any reference to its territorial scope may be eliminated.

The general clause has been amended to clarify that, in relations between entrepreneurs or professionals and consumers, the unfairness of an act is determined by two concurrent elements: that the entrepreneur or professional does not behave with the professional diligence required of him in his relations with consumers and that such behaviour is liable to significantly distort the economic behaviour of the average consumer (the latter being the average consumer or user) or average member of the target group of the practice in question.

The "average consumer" notion was first used in the case law of the Court of Justice of the European Communities and is not related to statistics but rather refers to the typical reaction of the generally informed consumer who is reasonably alert and perceptive, taking social, cultural and linguistic factors into consideration. It is therefore not a term which the law needs to define but is rather up to the courts to specify its meaning in each case.

The fact that the typical reaction of the average consumer is the yardstick against which a kind of behaviour is judged does not, however, mean that more vulnerable groups of consumers are left unprotected as long as the law requires consideration of the typical reaction of the average consumer targeted by the practice in question, or the typical reaction of the average consumer of an especially vulnerable group when the act of competition is only liable to alter the economic behaviour of a concrete group of consumers which are especially vulnerable for personal or social reasons.

A unitary legal system has been established on the unfairness of misleading and aggressive acts, in which the same degree of accuracy is required regardless of whether consumers or entrepreneurs are targeted, thus abolishing the distinction traditionally drawn between unfair acts and the outlawing of advertising that is misleading or unfair.

It is important to underscore the decision to uphold the General Advertising Act as more than a merely contractual regulation. The influence that advertising has on citizens' decision-making is increasingly important and transcends the limits of consumer affairs or competition. An all-purpose regulation is therefore indispensable as long as it respects the harmonisation objectives of the European directives which this Act incorporates into our legal system.

Therefore, the survival of the notion of unlawful advertising within the context of the General Advertising Act takes on special meaning as a guarantee of the actions and remedies for its suppression, especially in the case of advertising that is an affront to personal dignity or that violates rights and values recognised in the Constitution, especially in the case of children, youth and women.

Problems sometimes arise from overlapping of the General Advertising Act with the Unfair Competition Act, prompting a need for coordination mechanisms as noted in the relevant Case Law. In this connection, the General Advertising Act has been amended with a view to furnishing a single set of actions and remedies against all commercial practices harmful to the economic interests of consumers but without renouncing the specific regulation of advertising and without detracting from the special legal force of the General Advertising Act contrary to unlawful advertising stemming from the degrading or discriminatory use of images of women.

Accordingly, Title IV of the regulation, which is now pointless, is hereby revoked.

Also, an entire chapter of the Act has been devoted to the regulation of acts of unfair competition that, while also affecting competitors, are only judged as damaging those affected by them when the latter are consumers and users. This is the case of misleading omissions or practices which the Community regulation deems unfair in any case and under any circumstance.

A new chapter is introduced for the purpose of regulating codes of conduct which, while fully respecting competition rules, help to raise the degree of protection afforded to consumers and users by providing access to effective systems for extra-judicial settlement of claims which comply with the requirements laid down by the Community regulation currently contained in European Commission Recommendations 98/257/EC and 2001/310/EC and, as such, reported to the European Commission in accordance with the provisions of the Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes or any other equivalent provision. This Regulation includes the institution of actions against entrepreneurs who, having publicly undertaken to abide by codes of conduct, infringe the obligations that they had freely assumed or who incur in acts of unfair competition, and against those responsible for such codes when these encourage unfair acts.

And lastly, the chapter of the Unfair Competition Act devoted to procedural rules has been amended to incorporate the burden of proof rules regarding the veracity and accuracy of factual claims made by entrepreneurs or professionals and to incorporate injunctions against unfair practices damaging the economic interests of consumers and, in line with the regulation adopted on codes of conduct, injunctions against entrepreneurs who, having publicly undertaken to abide by codes of conduct, infringe the obligations that they had freely assumed or who incur in acts of unfair competition, and against those responsible for such codes when these encourage unfair acts.

III

The consolidated text of the General Consumer and User Protection Act and other supplementary laws has been amended in order to clearly establish that, in accordance with the pre-eminence of Community Law, the commercial practices of entrepreneurs vis-à-vis consumers are governed exclusively by the terms of the Unfair Competition Act and the consolidated text of the General Consumer and User Protection Act itself and other supplementary laws. No other obligations, demands or prohibitions, other than those provided for in the said regulations may be imposed on entrepreneurs or professionals, the overarching objective of the latter being the protection of consumers' legitimate economic interests.

Having established this general rule, the Act clarifies, in the terms laid down in the Community regulation, the compatibility of this system with the specific regulation enacted for reasons other than the protection of consumers' legitimate economic interests, with the specific rules regulating commercial practices in the laws transposing Community directives on consumer and user protection issues and, lastly, with the most protective provisions enacted in connection with financial services or real estate.

Obligations concerning consumer information in those commercial practices that include information on the characteristics of the good or service are likewise incorporated into the consolidated text of the General Consumer and User Protection Act and other supplementary laws thus enabling the consumer or user to take a decision on the purchase.

The contractual regulation on price information is also amended to better adapt it to the requirements of the regulation regarding the information which must be provided in commercial practices and includes a general procedure regarding the obligation to provide consumers with a preliminary estimate for those services where the final price can only be established in that way, a receipt of deposit when the service engaged requires deposit of the asset and a supporting document attesting to the

delivery of the product so that consumers may exercise their rights in the event that they are dissatisfied.

In addition, unfair commercial practices are classified as an infringement of consumer rights, but this does not entail attributing or amending the administrative powers vouchsafed by the national or regional regulation to other sectoral public administrations.

The Retail Trade Act is amended with a view to adapting the regulation regarding sales promotions to the provisions of the Directive while maintaining the substantive regulation on commercial activity and specifically remitting to the Unfair Competition Act to deal with its impingement on the legitimate economic interests of consumers.

IV

Having regard to the territorial distribution of powers, matters of unfair competition are reserved for the national government in accordance with the provisions of Article 149(1), Rules 6, 8 and 13 of the Constitution giving the national government exclusive authority in matters of commercial law, basic contractual obligations and the basic rules and coordination of general economic planning.

The remaining provisions of the Law concerning the regulation of acts arising from unfair competition and the common procedure concerning the basic rights of consumers and infractions and penalties are enacted in accordance with the powers exclusively vouchsafed to the State concerning matters of procedural law, the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and the fulfilment of their constitutional duties and the basic rules and coordination of general economic planning in accordance with Article 149(1) numbers 1, 6 and 13 of the Constitution.

Article one. *Amendment of the Unfair Competition Act, Law 3/1991 of 10 January 1991.*

Articles 1, 2, 3, 4, 5, 6, 7, 8, 10, 11 are amended, Chapters III and IV are re-drafted and Article 18 is transferred to Chapter II of the Unfair Competition Act, Law 3/1991 of 10 January 1991, to which a new Chapter V is added. A single additional provision is likewise introduced.

One. Article 1 is amended to read as follows:

"The object of this Act is the protection of competition for the benefit of all those who participate in the market and, to this end it prohibits acts of unfair competition, including unlawful advertising in the terms laid down in the General Advertising Act."

Two. Article 2 is amended with the addition of a new paragraph 3 as follows:

"3. The Act shall apply to any act of unfair competition committed before, during or after a commercial transaction or contract, regardless of whether the latter is finally entered into or not."

Three. Article 3.1 shall read as follows:

"1. The Act shall apply to entrepreneurs, professionals and to any other natural or legal persons engaging in the market."

Four. Article 4, included under Chapter II, shall read as follows:

"Article 4. *General clause.*

1. Any behaviour that objectively fails to abide by the requirements of good faith shall be deemed unfair.

In relations with consumers and users, entrepreneurs or professionals shall be deemed to be in breach of the requirements of good faith where their conduct is in breach of professional diligence, the latter meaning the standard of special skill and care which an entrepreneur may reasonably be expected to exercise towards consumers, commensurate with honest market practice, and significantly distorts or could significantly distort the economic behaviour of the average consumer or of the average member of the target group of the practice in question if the latter is a commercial practice targeting a particular group of consumers.

For the purposes of this Act, economic behaviour of consumers or users shall mean any decision taken by the latter to act or refrain from acting having regard to:

- a) The selection of an offer or offeror.
- b) The engagement of a good or service and, if relevant, the way in which and under what conditions it is engaged.
- c) Payment of the price, total or partial, or any other form of payment.
- d) The conservation of the good or service.
- e) The exercise of contractual rights having regard to goods and services.

Also, for the purposes of this Act, significantly distorting the economic behaviour of the average consumer means using a commercial practice to appreciably impair consumers' capacity to adopt an informed decision thus causing them to make a decision on their economic behaviour which they otherwise would not have made.

2. In assessing behaviours which target consumers, the yardstick shall be the average consumer.

3. Commercial practices that, while targeting consumers or users in general, are only liable to significantly distort, in a way which the entrepreneur or professional can reasonably foresee, the economic behaviour of a clearly identifiable group of consumers or users who are especially vulnerable to these practices or to the good or service to which they refer, due to a disability, to a weakened capacity for understanding, to their age or to their gullibility, shall be evaluated from the perspective of the average member of such a group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally."

Five. Article 5 shall read as follows:

"Article 5. *Misleading acts.*

1. Any conduct entailing false information or information that although true, by virtue of its content or presentation, leads or could lead its targets to an error in judgement and is liable to alter their economic

behaviour is considered misleading and hence unfair, provided that it has an impact on one of the following aspects:

- a) The existence or nature of the good or service.
- b) The main characteristics of the good or service, such as its availability, benefits, risks, execution, composition, accessories, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and essential features of tests or checks carried out on the good or service.
- c) After-sale customer assistance and complaint handling.
- d) The extent of the entrepreneur's or professional's commitments, the motives for the commercial practice and the nature of the commercial transaction or contract and any statement or symbol in relation to direct or indirect sponsorship or approval of the entrepreneur or professional or the good or service.
- e) The price or the manner in which the price is calculated, or the existence of a specific price advantage.
- f) The need for a service, part, replacement or repair and the modification of the initially stated price, unless there is a subsequent agreement between the parties accepting such modification.
- g) The nature, attributes and rights of the entrepreneur or professional or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.
- h) The consumer's legal or conventional rights or the risks he may face.

2. When the entrepreneur or professional indicates in a commercial practice that the latter is linked to a code of conduct, failure to adhere to the commitments assumed in that code is considered unfair, provided that the commitment is firm and can be verified and, in its factual context, this conduct is liable to significantly distort the economic behaviour of its targets."

Six. Article 7 shall read as follows:

"Article 7. *Misleading omissions.*

1. The omission or concealment of information necessary for the recipient to adopt or be able to adopt a prior informed decision having to do with his economic behaviour is considered unfair. It is likewise unfair if the information furnished is unclear, unintelligible, ambiguous, is not offered at the right time or the commercial purpose of that practice is not revealed when it is not evident from the context.

2. The factual context of acts, taking account of all of their characteristics and circumstances and the limitations of the media employed, shall be considered in determining the misleading nature of the acts referred to in the preceding paragraph.

In assessing the existence of an omission of information when the media used imposes space or time limitations, such limitations shall be taken into account along with all the steps taken by the entrepreneur

or professional to convey the necessary information through other channels.

Seven. Article 8 is amended to read as follows:

"Article 8. *Aggressive practices.*

1. Any conduct which by virtue of its characteristics and circumstances is likely to significantly impair the target's freedom of choice or conduct with regard to the good or service by means of harassment, coercion, including the use of physical force, or undue influence, and thereby affects or could affect their economic behaviour, shall be regarded as unfair.

In this connection, undue influence shall mean the use of a position of authority over the target to exert pressure, even in the absence of physical force or the threat of physical force.

2. In determining whether a behaviour involves harassment, coercion or undue influence, account shall be taken of:

a) Its timing, location, nature or persistence.

b) The use of threatening or abusive language or behaviour.

c) The exploitation by the entrepreneur or professional of any specific misfortune or circumstance, of such gravity as to impair the judgement of the target, of which the entrepreneur or professional is aware, in order to influence the decision with regard to the good or service.

d) Any onerous or disproportionate non-contractual barriers imposed by the entrepreneur or professional when the other party wishes to exercise legal or contractual rights, including any manner of terminating a contract or switching to another product or supplier.

e) The conveyance of a threat to take any action that cannot legally be taken."

Eight. Article 10 shall read as follows:

"Article 10. *Acts of comparison.*

Public comparison, including comparative advertising by means of an explicit or implicit reference to a competitor, is allowed if the following requirements are met:

a) The goods or services compared are intended for the same purpose or meet the same needs.

b) An objective comparison is made between one or more material, relevant, verifiable and representative features of those goods and services, which may include price.

c) In the case of products protected by a designation of origin or a geographical indication, specific denomination or guaranteed traditional speciality, the comparison may only be made with products of the same denomination.

d) Goods or services may not be presented as imitations or replicas of goods or services bearing a protected trade mark or trade name.

e) The comparison may not infringe the provisions of Articles 5, 7, 9, 12 or 20 regarding misleading and denigrating acts and exploitation of another's reputation."

Nine. Article 11 is amended to read as follows:

"Article 11. *Acts of imitation.*

1. Imitation of the business or professional services and initiatives of others is freely allowed unless these are protected by an exclusive right granted by law.

2. However, the imitation of services of a third party shall be deemed unfair if it is likely to lead consumers to associate the imitation with the third party's service or entails undue utilisation of another's reputation or effort.

A practice shall not be considered unfair if the said risks of association or of the use of another's reputation are unavoidable.

3. The systematic imitation of a competitor's business or professional services and initiatives shall likewise be deemed unfair when such a strategy is directly intended to prevent or hinder his establishment in the market and exceeds what could in the given circumstances be conceived as a natural market response."

Ten. Article 18 shall read as follows:

"Article 18. *Unlawful advertising.*

Advertising considered unlawful under the General Advertising Act shall be deemed unfair."

Eleven. Chapters III and IV are amended to read as follows:

"CHAPTER III

Commercial practices involving consumers or users

Article 19. *Unfair commercial practices affecting consumers.*

1. Without prejudice to the terms of Article 19 and 20 of the consolidated text of the General Consumer and User Protection Act and other supplementary laws, only practices identified in this Chapter and in Articles 4, 5, 7 and 8 of this Act shall be considered unfair commercial practices to consumers and users.

2. The commercial practices regulated in Articles 21 to 31, both inclusive, are unfair commercial practices to consumers in all cases and under all circumstances.

Article 20. *Misleading practices causing confusion among consumers.*

Commercial practices affecting consumers and users, including comparative advertising shall be deemed unfair if, in their factual context

and taking account of all their features and circumstances, they may create confusion, including the risk of association, with any goods or services, registered trademarks, trade names or other distinctive marks of a competitor, provided that they are liable to affect the economic behaviour of consumers and users.

Article 21. Misleading practices concerning codes of conduct or other quality marks.

1. Commercial practices falsely claiming the following shall be deemed misleading and hence unfair:

a) That the entrepreneur or professional is a signatory of a code of conduct.

b) That a code of conduct has the endorsement of a public organisation or any other type of accreditation.

c) That an entrepreneur or professional, the latter's commercial practices or a good or service has been approved, endorsed or authorised by a public or private body or making such a claim but failing to comply with the terms of the approval, endorsement or authorisation.

2. The display of a trust mark, quality mark or equivalent without having obtained the necessary authorisation is also misleading and hence unfair in all cases.

Article 22. Bait advertising and misleading promotional practices.

The following shall be considered misleading and hence unfair:

1. Making an invitation to purchase goods or services at a specified price without disclosing any reasonable grounds the entrepreneur or professional may have for believing that he will not be able to offer the said good or service or equivalent ones at that offered price for long enough and in quantities that are reasonable given the type of good or service, the scale of advertising and the price offered.

2. Making a commercial offer of goods or services at a certain price then subsequently, in order to promote a different good or service, refusing to display the good or service offered, refusing to take orders or requests for its supply or to deliver it within a reasonable period of time, displaying a defective sample of the good or service promoted or discrediting it.

3. Commercial practices involving closing-down sales when the entrepreneur or professional is not in fact in the circumstances described in Article 30(1) of the Retail Trade Act, Law 7/1996 of 15 January 1996 or when, under any other circumstances, the entrepreneur or professional falsely claims to be about to close down or move business activities elsewhere.

4. Commercial practices whereby a prize is offered, automatically or through a competition or draw but the prizes described or others of equivalent quality and value are not awarded.

5. Description of a good or service as "free", "a gift", "at no expense" or using any similar formula if the consumer or user has to make a payment for anything other than the inevitable cost of the response to the commercial practice and the collection of the product or payment for its delivery.

6. Creating the false impression, including by means of aggressive practices, that the consumer or user has won, will win or will be awarded a prize or any other similar advantage if he carries out some specific act when the truth is that:

- a) There is no prize or similar advantage.
- b) Or the action that the consumer or user is invited to take in order to obtain the prize or similar advantage is subject to an obligation to make some payment or incur some expense.

Article 23. Misleading practices relating to the nature and properties of goods or services, their availability and after-sales services.

The following shall be deemed misleading and hence unfair:

1. Falsely claiming or using some other means to create the impression that a good or service can be legally placed on the market.

2. Claiming that the goods or services can help in winning prizes in games of chance.

3. Falsely claiming that a good or service can cure diseases, dysfunctions or malformations.

4. Falsely claiming that the good or service will only be available during a very limited period of time or that it will only be available under certain conditions during a very limited period of time for the purpose of inducing the consumer or user to make a hasty decision and hence prevent him from having the chance or adequate time to make an informed choice.

5. Undertaking to provide a post-sales service to consumers or users without clearly warning them beforehand that this service is provided in a language other than the one used in the commercial operation.

6. Creating the false impression that the post-sales service for the good or service under promotion is available in a Member State other than the one where its supply was engaged.

Article 24. Pyramid sales practices.

Creating, directing or promoting a pyramid sales scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers or users into the scheme rather than from the sale or supply of products is considered misleading and hence unfair in all circumstances.

Article 25. Misleading practices creating confusion.

Promotion of a good or service similar to one marketed by another entrepreneur or professional to deliberately dupe the consumer or user into believing that the good or service is provided by that entrepreneur or professional when this is not the case shall be deemed misleading and hence unfair.

Article 26. Covert commercial practices.

Payment by entrepreneurs or professionals to include promotional communications of goods or services as information in the media without clearly specifying in the content or by means of images and sounds clearly indicating to consumers or users that this is an advertisement, shall be considered misleading and hence unfair.

Article 27. Other misleading practices.

Also considered misleading and hence unfair are practices that:

1. Present as a distinctive feature of the entrepreneur or professional's offer rights to which consumers or users are entitled by law.

2. Make materially inaccurate or false claims concerning the nature and extent of the risk to the personal security of the consumer and user or his family if the consumer does not purchase the product.

3. Pass on inaccurate or false information on market conditions or on the possibility of finding the good or service with the intention of inducing the consumer or user to acquire it in conditions less favourable than normal market conditions.

4. Include in marketing material an invoice or similar payment document which gives the consumer or user the impression that he has agreed to acquire the marketed good or service without having asked for it.

5. Falsely claim or create the impression that the entrepreneur or professional is not acting for purposes relating to his business or professional activity or falsely present him as a consumer or user.

Article 28. Aggressive practices using coercion

Commercial practices leading consumers or users to believe that they cannot leave the entrepreneur or professional's establishment or the place of business where commercial practices are undertaken until they have made a purchase shall be deemed aggressive and hence unfair, unless the said act constitutes a criminal offence.

Article 29. Aggressive practices using harassment.

1. Personal visits to the consumer or user's home, ignoring the latter's request that the entrepreneur or professional leave and not return, shall be considered aggressive and hence unfair.

2. Making unsolicited and reiterated proposals by telephone, fax, e-mail or by other remote media, except in circumstances and to the extent legally justified to comply with a contractual obligation, shall likewise be deemed unfair.

In these circumstances, the entrepreneur or professional must use systems that enable the consumer to voice his opposition to receiving reiterated commercial proposals from the said entrepreneur or professional.

To enable the consumer or user to exercise his right to voice opposition to receiving unwanted commercial proposals, when these are made over the telephone the calls must be made from an identifiable telephone number.

The foregoing is without prejudice to the provisions laid down in regulations currently in force on personal data protection, information

society services, telecommunications and distance contracting with consumers or users, including the distance contracting of financial services.

Article 30. *Aggressive practices and minors.*

Inclusion in an advertisement of a direct exhortation to children to purchase goods or use services or to persuade their parents or other adults to acquire the advertised goods or services shall be deemed aggressive and hence unfair.

Article 31. *Other aggressive practices.*

The following shall be considered aggressive and hence unfair:

1. Requiring a consumer who wishes to claim on an insurance policy, be he the policy holder, beneficiary or injured third party, to produce documents which cannot reasonably be considered necessary to determine whether the claim was valid or the amount of damage sustained as the case may be, or failing systematically to respond to pertinent correspondence in order to dissuade a consumer from exercising his rights.

2. Demanding immediate or deferred payment for or the return or safekeeping of goods or services supplied by the trader but not solicited by the consumer or user, except where the good or service is a substitute supplied in conformity with applicable laws on distance contracts with consumers and users.

3. Explicitly informing the consumer or user that if he does not buy the good or service, the entrepreneur or professional's employment or livelihood will be in jeopardy.

CHAPTER IV

Actions arising from unfair competition

Article 32. *Actions.*

1. The following actions may be taken against acts of unfair competition, including unlawful advertising:

1. Declaratory action for bad faith.

2. Injunction against the unfair conduct or prohibition of its continued practice. An injunction may also be brought to forestall the practice before it occurs.

3. Action to counter the effect produced by the unfair practice.

4. Action to rectify misleading, incorrect or false information.

5. Action to compensate damages sustained though unfair practice in the event of fraud or fault on the part of the agent.

6. Action against unjust enrichment, which shall only apply when the unfair practice prejudices a legal position protected by an exclusive right or some other of similar economic content.

2. In favourable rulings regarding the actions envisaged in the foregoing subsections 1 to 4 the court may, at the defendant's cost,

order the complete or partial publication of the judgment or, if the repercussions of the infraction are liable to be enduring, of a rectifying statement.

Article 33. *Active legal capacity.*

1. Any natural or legal person taking part in the market whose economic interests are directly injured or threatened by unfair practice is entitled to take the action envisaged in Article 32(1), numbers 1 to 5.

In the case of unlawful advertising, any natural or legal person affected and, in general anyone with a subjective right or legitimate interest, is entitled to take the action envisaged in Article 32(1), numbers 1 to 5.

Legal action for compensation of damages sustained from unfair practice may likewise be taken by those so authorised in accordance with the provisions of Article 11(2) of the Civil Procedure Act, Law 1/2000 of 7 January 2000.

Action against unjust enrichment may only be taken by the holder of the violated legal position.

2. The actions provided for in Article 32(1), numbers 1 to 4 may also be taken by associations, professional corporations or representatives of economic interests when the interests of their members are affected.

3. The following are actively entitled to take the action envisaged in Article 32(1), numbers 1 to 4 in defence of the general, collective or diffuse interests of consumers and users:

a) The National Institute of Consumer Affairs and its counterparts in the Autonomous Communities and Local Governments with competence in the protection of consumers and users;

b) Consumer and user associations meeting the requirements laid down in the consolidated text of the General Consumer and User Protection Act or, as the case may be, in regional legislation on consumer and user protection matters.

c) Organisations from other European Community Member States constituted for the protection of the collective and the diffuse interests of consumers and users and authorised by virtue of their inclusion in the list published for that purpose in the *Official Journal of the European Communities*.

4. The Public Prosecutor may order injunctions in defence of the general, collective or diffuse interests of consumers and users.

Article 34. *Passive legal capacity.*

1. The actions envisaged in Article 32 may be brought against any person participating in or ordering the unfair practice in question or who has cooperated in its performance. However, in the case of unjust enrichment, action may only be taken against the beneficiary of the enrichment.

2. If the unfair practice is performed by workers or other collaborators in the discharge of their contractual duties and obligations, the actions envisaged in Article 32(1), numbers 1 to 4 must be taken against the main party. Civil Law provisions shall prevail as regards compensation for damages and unjust enrichment.

Article 35. *Time bar.*

The actions against unfair competition laid down in Article 32 lapse one year after the person entitled to take action discovered who was responsible for the act of unfair competition and, in any case, three years as from the time that such conduct ceased.

The time bar for legal action in defence of the general, collective or diffuse interests of consumers and users is governed by the terms of Article 56 of the consolidated text of the General Consumer and User Protection Act and other supplementary laws.

Article 36. *Judicial investigation.*

1. Anyone intending to file suit for unfair competition may ask the court to initiate a judicial investigation to verify facts which are objectively indispensable in preparing the hearing.

2. Such investigation shall take the form laid down in Article 129 to 132 of the Patent Act, Law 11/1986 of 20 March 1986 and may be extended to all of the internal workings of the company."

Twelve. A new Chapter (V) has been added to the Unfair Competition Act and shall read as follows:

"CHAPTER V

Codes of conduct

Article 37. *Promotion of codes of conduct.*

1. Trade, professional and consumer corporations, associations or organisations may draw up codes of conduct on business-to-consumer trade practices for voluntary adhesion by entrepreneurs or professionals, with a view to raising the level of consumer protection and guaranteeing the participation of consumer organisations in their drafting.

2. Codes of conduct shall respect the protection of competition regulations and shall be sufficiently publicised to bring them to the attention of target groups.

3. Public authorities shall promote the participation of business and professional organisations in the drafting of codes of conduct for the same purpose at Community level.

4. Self-regulation systems shall be provided with independent control bodies to ensure that the signatory companies effectively comply with their commitments. Their codes of conduct may include, inter alia, prior individual or collective self-check measures on advertising content. They must set up effective extra-judicial settlement systems which meet the requirements laid down in the Community regulation and as such must be communicated to the European Commission as provided in the Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes or any other equivalent provision.

5. Recourse to code-of-conduct control bodies shall in no case preclude the institution of legal actions as provided for in Article 32.

Article 38. *Action with regard to codes of conduct.*

1. Legal action in the form of injunctions and rectifications provided for in Article 32(1) numbers 1, 2 and 4 may be taken in response to codes of conduct that recommend, foster or encourage unfair or unlawful conduct.

2. Before taking the action provided for in the preceding paragraph against persons responsible for codes of conduct meeting the requirements laid down in Article 37(4), the person responsible for the said code must be required to abandon or rectify the unfair recommendation and to undertake to refrain from making it if it has not already been done.

This request must be made in such a way as to leave a record of its content and date of reception.

The person responsible for the code of conduct shall be under obligation to issue a statement within 15 days as from the presentation of the request and during that time the party that initiated the preliminary measure may not initiate legal proceedings.

If the complainant has not received notice of the decision or this is unsatisfactory or has not been complied with in the allotted time, legal proceedings may be initiated.

Article 39. *Preliminary actions taken against entrepreneurs and professionals who are signatories of codes of conduct*

1. When the action is grounded in the causes envisaged in Article 5(2), before taking the actions provided for in Article 32(1) numbers 2 and 4, persons publicly adhering to the code of conduct shall be urged, through the code of conduct control body, to cease to engage in or rectify the act or trade practice and to undertake to refrain from it in future if it has not yet engaged therein.

The control body shall be under obligation to issue a statement within 15 days as from the presentation of the request and during that time the party that initiated the preliminary proceeding measure may not initiate legal proceedings.

If the complainant has not received notice of the decision or this is unsatisfactory or has not been complied with in the allotted time, legal proceedings may be initiated.

2. In all other cases of legal action intended to terminate or rectify unfair conduct by persons who publicly adhere to codes of conduct meeting the requirements laid down in Article 37(4), the preliminary action before the control body provided for in the preceding paragraph shall be discretionary.

Thirteen. A transitional provision is added and shall read as follows:

"Sole additional provision. *Definition of advertising.*

For the purposes of this Act, advertising shall mean the activity so defined in Article 2 of the General Advertising Act, Law 34/1988 of 11 November 1988."

Article two. *Amendment of the General Advertising Act, Law 34/1988 of 11 November 1988.*

One. Article 1 and Title II of the General Advertising Act, Law 34/1988 of 11 November 1988 are amended and shall read as follows:

"Article 1. *Aim.*

Advertising shall be governed by this Act, by the Unfair Competition Act and by the special rules regulating certain advertising activities."

"TITLE II

Concerning unlawful advertising and actions to put an end to it

Article 3. *Unlawful advertising.*

The following is unlawful:

a) Advertising that is an affront to personal dignity or that violates constitutionally recognised values and rights, particularly those referred to in Articles 14, 18 and 20(4).

Included in the foregoing are advertisements that portray women in a degrading or discriminatory fashion, either by specifically and directly using their bodies or parts thereof as mere objects unrelated to the product being promoted, or their image associated with stereotyped behaviours which violate the basis of our legal system while contributing to generate the sort of violence referred to in Organic Law 1/2004 of 28 December 2004 on comprehensive protection measures against gender-based violence.

b) Advertising aimed at minors which incites them to purchase a good or service by exploiting their inexperience or gullibility or where they appear persuading parents or guardians to make the purchase for them. Children may not be portrayed in dangerous situations without good reason. Consumers must not be misled with regard to the characteristics of products or their safety, nor about the capacities and aptitudes a child needs to use them without harming himself or others.

c) Subliminal advertising.

d) Advertising infringing the provisions of the regulation governing advertising of certain products, goods, activities or services.

e) Misleading advertising, unfair advertising and aggressive advertising considered acts of unfair competition in the terms laid down in the Unfair Competition Act.

Article 4. *Subliminal advertising.*

For the purposes of this Act, subliminal advertising is that which, using techniques that produce stimuli of an intensity just beyond the threshold of sensory perception or other analogous techniques, can have an effect on the target population without consciously being perceived.

Article 5. *Advertising of certain goods or services.*

1. Advertising of health materials or products and others subject to technical-health regulation, advertising of products, goods, activities

and services liable to endanger the health or safety of individuals or their property and advertising of games of chance, may be regulated by special rules or be subject to the system of prior administrative authorisation. That system may also apply as required for the protection of constitutionally recognised values and rights.

2. The regulations implementing the provisions of the preceding number and those that, in regulating a product or service, contain rules regarding their advertising, shall specify:

a) The nature and characteristics of the products, goods, activities and services whose advertising is being regulated. These regulations shall establish the requirement that advertising of these products reflect the risks associated with their normal use (if applicable).

b) The manner and conditions of broadcasting the advertising messages.

c) The authorisation requirements and, where appropriate, registration of advertising when subject to prior administrative authorisation.

The procedure for the drafting of these regulations must include a hearing of the sector's representative business organisations, associations of advertising agencies and advertisers and of consumer and user associations through the latter's institutional representative bodies, as the case may be.

3. The granting of authorisations must respect the principles of free competition to avoid prejudice to other competitors.

Denial of authorisation applications must be reasoned.

Once the deadline established in the special rules for authorisation applications has passed, authorisation shall be assumed granted by virtue of administrative silence.

4. Narcotic and psychotropic products and medicines intended for human and animal consumption may only be advertised in the cases, forms and conditions laid down in the special regulations applying thereto.

5. Television advertising of beverages whose alcoholic strength exceeds 20% is prohibited.

Alcoholic beverages may not be advertised in locations where their sale or consumption is prohibited.

The form, content and conditions to which advertising of alcoholic beverages must conform shall be limited by regulation in order to protect personal health and safety taking account of the target audience, taking care not to directly or indirectly encourage indiscriminate consumption and with due regard for the areas of education, health and sport.

With the same aim as the above paragraph the Government may regulate to extend the prohibition envisaged therein to beverages whose alcoholic strength is under 20%.

6. Breach of the special regulations governing advertising of the products, goods, activities and services referred to in the preceding paragraphs shall be considered an infringement of the provisions of the General Consumer and User Protection Act and the General Health-care Act.

Article 6. Action with regard to unlawful advertising.

1. The actions which can be taken against unlawful advertising shall be those established generally for actions arising from unfair competition under Chapter IV of the Unfair Competition Act, Law 3/1991 of 10 January 1991.

2. Additionally, in the case of unlawful advertising using images of women in a discriminatory or degrading way, the following are authorised to take the actions provided for under Article 32(1), numbers 1 to 4 of the Unfair Competition Act:

- a) The Government Delegation for gender-based violence.
- b) The Women's Institute or its equivalent at regional level.
- c) Legally constituted associations whose sole aim is the defence of women's interests and which have no for-profit legal persons associated with them.
- d) The Public Prosecution Service."

Two. Articles 9 to 24 of Title III are re-numbered as Articles 7 to 22.

Article three. *Amendment of the consolidated text of the General Consumer and User Protection Act and other supplementary laws, passed by Legislative Royal Decree 1/2007 of 16 November 2007.*

Articles 8, 18, 19, 20, 47(3), 49(1), 60, 63 and 123 of the consolidated text of the General Consumer and User Protection Act and other supplementary laws, passed by Legislative Royal Decree 1/2007 of 16 November 2007 are amended as follows:

One. Article 8 b) is amended to read as follows:

"b) Protection of their legitimate economic and social interests, particularly from unfair commercial practices and the inclusion of abusive clauses in contracts."

Two. Paragraph 4 of Article 18 is eliminated.

Three. Article 19 is amended to read as follows:

"Article 19. *General principle and commercial practices.*

1. The legitimate economic and social interests of consumers and users must be respected in the terms laid down in this instrument while also applying the provisions of civil and commercial rules and any other applicable Community, State and Regional instruments.

2. Without prejudice to the provisions of the following paragraphs, in the interest of protecting the legitimate economic and social interests of consumers and users, commercial practices employed by entrepreneurs targeting consumers and users are subject to the provisions of this Act, the Unfair Competition Act and the Retail Trade Act.

For these purposes, commercial practices employed by entrepreneurs targeting consumers and users shall mean any act, omission, conduct, statement or commercial communication, including advertising and marketing, directly related to the promotion, sale or supply of a good or service to consumers and users regardless of whether this occurs before, during or after a commercial transaction.

Relations of a contractual nature, governed by the provisions of Article 59, shall not be considered commercial practices.

3. The provisions of the preceding paragraph do not preclude the enforcement of:

a) Rules regulating commercial practices which could affect the health and safety of consumers and users, including those regarding the safety of goods and services.

b) Rules governing the certification and level of purity of objects made with precious metals.

4. In the event of conflict regarding the general law applicable to unfair commercial practices, the applicable rules shall be the ones envisaged in this Act governing commercial practices and those regulating commercial practices having regard to medicines, labelling, presentation and advertising of products, display of prices, timesharing, consumer credit, distance marketing of consumer and user financial services, electronic commerce, collective investment in transferable securities, rules of conduct on investment, public offering or introduction to securities and insurance market services, including mediation, and any other rules governing specific aspects of unfair commercial practices provided for in Community regulations.

5. Having regard to commercial practices related to financial and real estate services, legal rules or regulations providing a greater degree of protection to consumers and users may be established."

Four. Article 20 is amended to read as follows:

"Article 20. *Information required in a commercial offer of goods and services.*

1. Commercial practices which, in a manner suited to the media used, include information on the characteristics of the good or service and its price thus enabling the consumer or user to decide whether to purchase it or not, must contain the following minimum information if the latter cannot clearly be inferred from the context:

a) The name, trade name and complete legal domicile of the entrepreneur responsible for the commercial offer and, where applicable, the name, trade name and full address of the entrepreneur acting on the former's behalf.

b) The essential characteristics of the good or service in a manner suited to its nature and the media used.

c) The full price to be paid, inclusive of tax, where applicable breaking down the amount of surcharges or discounts applicable to the offer and any additional costs passed on to the consumer or user.

In all other cases where, owing to the nature of the good or service, an exact price cannot be put on the commercial offer, information must be provided on the basis of the calculation to enable the consumer or user to estimate the price. Likewise, when additional costs passed on to consumers or users cannot, for objective reasons, be calculated beforehand, the existence of these additional costs must be stated and, if known, their estimated amount.

d) Payment procedures, delivery deadlines and performance of the contract and the system for the handling of claims when these diverge from professional diligence standards as defined in Article 4(1) of the Unfair Competition Act.

e) Where appropriate, existence of the right of withdrawal.

2. Infringement of the terms of the foregoing section or the provisions of Article 19(4) shall, in any case, be considered misleading and hence unfair in the same terms as described in Article 21(2) of the Unfair Competition Act."

Five. Article 47.3 is amended to read as follows:

"3. The competent authorities in consumer affairs shall likewise sanction actions classified as infractions in consumer and user protection matters undertaken by entrepreneurs in sectors with specific regulations and unfair business-to-consumer or user commercial practices."

Six. Article 49(1) is amended, rewording section l) and adding two new sections, m) and n), as follows:

"l) The use of unfair business-to-consumer or user commercial practices.

m) Discriminatory actions in access to goods and the rendering of services, particularly those described as such in Organic Law 3/2007 of 22 March 2007 safeguarding effective equality between women and men.

n) Failure to comply with the requirements, obligations or prohibitions laid down in this regulation or its implementing provisions in the terms provided in applicable regional legislation."

Seven. Article 123 is amended by adding a new paragraph 3 and re-numbering existing paragraphs 3 and 4 as 4 and 5, to read as follows:

"3. The trader is obliged to provide the consumer or user who exercises his right to repair or replacement with supporting documents attesting to the surrender of the product and showing the date of surrender and the complaint giving rise to the exercise of this right.

Likewise, together with the repaired or replaced product, the trader shall provide the consumer or user with supporting documents attesting to the delivery showing the date and, where appropriate, the repair made."

Article four. *Amendment of the Retail Trade Act, Law 7/1996 of 15 January 1996.*

Articles 18, 22, 23 and 32 of the Retail Trade Act, Law 7/1996 of 15 January 1996 are amended to read as follows:

One. Article 18 is amended with the addition of a new paragraph 3 to read as follows:

"3. The use of the denominations referred to above in breach of the regulation established respectively for each of the sales promotion activities addressed in this Act shall be deemed unfair in the circumstances described in Article 5 of the Unfair Competition Act."

Two. Article 22 is amended to read as follows:

"Article 22. *Multi-level marketing.*

1. Multi-level marketing is a special form of trade whereby a manufacturer or wholesale trader markets his goods or services through a network of traders and/or independent distribution agents who are, however, coordinated within the same commercial network and whose economic benefits are obtained through a single margin on the retail price distributed by means of variable percentages of the total turnover generated by all of the vendors forming part of the commercial network and proportionate to the business volume created by each component. For the purposes of this Article, traders and independent distribution agents shall, in any case, be presumed entrepreneurs for the purposes of the consolidated text of the General Consumer and User Protection Act and other supplementary laws.

2. Organisation of the marketing of goods and services is hereby prohibited when:

a) It constitutes an unfair business-to-consumer act within the meaning of Article 26 of the Unfair Competition Act, Law 3/1991 of 10 January 1991.

b) It fails to adequately guarantee that distributors are legally employed or meet the legal requirements for the performance of a commercial activity.

c) New vendors are obliged to purchase a minimum quantity of the distributed products without a buy-back agreement on the same terms.

4. Under no circumstances may the manufacturer or wholesaler who owns the network make network access contingent upon payment of a quota or entrance fee which is not commensurate with the promotional, informational or training products delivered at a price similar to that of other comparable ones in the marketplace, and which may not exceed the amount laid down in the regulation.

In cases where a buy-back arrangement is made, return products must be accepted as long as they are in a condition that is clearly not an impediment to their subsequent sale."

Three. Article 23 is amended to read as follows:

"Article 23. *Prohibition of pyramid sales.*

Pyramid sales practices are those described in Article 24 of the Unfair Competition Act, Law 3/1991 of 10 January 1991. Contractual conditions in breach of the provisions of that Act are automatically considered null and void.

Four. Chapter VI of Title II and Article 32 are amended to read as follows:

"CHAPTER VI

Sales accompanied by gifts or bonuses

Article 32. *Concept.*

1. Sales accompanied by gifts are those that offer a prize of any sort with a view to boosting sales, either automatically or through participation in a draw or competition.

Sales accompanied by bonuses are those offering any incentive or advantage linked to the acquisition of a good or service.

2. When the incentive takes the form of a draw, the terms of this Act shall apply without prejudice to the relevant sectoral legislation.

3. Sales accompanied by a prize or bonus shall be deemed unfair in the cases described in the Unfair Competition Act."

Sole additional provision.

For the purpose of this Act, account shall be taken of the rights of persons with disabilities in accordance with the Convention on the Rights of Persons with Disabilities, done at New York on 13 December 2006.

Sole Transitional Provision.

Any entrepreneur or professional who makes commercial proposals by telephone, fax, electronic mail or via other means of distance communication shall have a period of two months, as from the entry into force of this Act, within which to have in place suitable systems as required by Article 29(2) to enable consumers to express their objection to receiving any further commercial proposals from the said entrepreneur or professional.

Sole repeal provision. *Repeal of Regulations.*

1. The following provisions are hereby repealed:

a) Title IV and the Additional Provision of the General Advertising Act, Law 34/1988 of 11 November 1988.

b) Article 59(2) of the Regulation of the Law on objects manufactured using precious metals approved by Royal Decree 197/1988 of 22 February 1988.

c) Article 8(1) and (2) of Royal Decree 58/1988 of 29 January 1988 on the protection of consumer rights having regard to the repair of domestic appliances.

d) Article 12(1) of Royal Decree 1457/1986 of 10 January 1986 regulating industrial activity and the rendering of services at garages engaging in the repair of automobiles, their equipment and components.

e) Article 4 of Royal Decree 1453/1987 of 27 November 1987 approving the regulation governing the cleaning, maintenance and colouring of textile, leather, fur and synthetic products.

2. All provisions of equal or lower rank than and conflicting with the terms of this Act are likewise hereby repealed.

First final provision. *Amendment of the Code of Civil Procedure, Law 1/2000 of 7 January 2000.*

A new paragraph has been introduced in Article 15(1) which reads as follows:

"The Public Prosecution Service shall be party in these proceedings when so warranted by reason of social justice. Courts hearing any of these proceedings shall communicate their initiation to the Public Prosecution Service so that it can consider the possibility of taking part."

Second final provision. *Constitutional authority.*

1. Articles 1, 3(7) and 4 constitute commercial law, procedural law and the basis for contractual obligations enacted by the State by virtue of Article 149(1), numbers 6 and 8 of the Constitution.

2. Article 2(2) constitutes commercial law enacted by the State by virtue of Article 149(1) number 6 of the Constitution.

3. Article 3 paragraphs (1-4) are basic in nature and are enacted by virtue of the State's authority regarding the bases and coordination of the general planning of economic activity under Article 149(1) number 13 of the Constitution.

4. Article 3 paragraphs (5-6) are enacted by virtue of the State's authority to regulate the basic conditions guaranteeing equality for all Spaniards in the exercise of their rights and fulfilment of constitutional duties under Article 149(1) number 1 of the Constitution and by virtue of the State's authority regarding the bases and coordination of the general planning of economic activity under Article 149(1) number 13 of the Constitution

Third final provision. *The incorporation of European Union law.*

This Act incorporates 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, into the Spanish legal system.

Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising is likewise incorporated into this Act.

Fourth final provision. Compliance.

Any competent public administrations which, in the discharge of their duties, fail to uphold the provisions of this Act or related Community law, resulting in the sanctioning of the Kingdom of Spain by the European institutions, shall be held liable for the part of such infringement attributable to them. The proceedings whereby liability is apportioned shall in all cases guarantee a hearing to the administration affected, which may make good the sum by subtracting it from the transfers of funds that it receives.

Fifth final provision. Entry into force

This Law shall enter into force on the day following its publication in the "Official State Gazette".

Wherefore, I order all Spaniards, whether individuals or authorities, to abide by this Law and ensure that it is observed.

Madrid, 30 December 2009.

JUAN CARLOS R.

The President of the Government

JOSÉ LUIS RODRÍGUEZ ZAPATERO

