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Act of 25 September 2008 bringing Volumes 3 and 6 of the Civil Code and other Acts into line with the Directive concerning unfair business-to-consumer commercial practices in the internal market

We Beatrix, by the Grace of God Queen of the Netherlands, Princess of Orange-Nassau, etc. etc. etc.
Greetings to all those who shall see or hear these presents! Be it known that:
Whereas we have considered that Volumes 3 and 6 of the Civil Code and other acts should be brought into line with 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 (OJ EU L 149);
We, therefore, having heard the Council of State, and in consultation with the States-General, have approved and decreed as we hereby approve and decree:

ARTICLE I

Article 305d of Volume 3 of the Civil Code shall read as follows:

Article 305d

1. The Court in The Hague may, at the request of:
 - a. the consumer authority;
 - b. the Financial Markets Authority, or
 - c. a foundation or association with full legal authorisation to protect the equivalent rights of other persons which has this as its main task pursuant to its constitution,order the cessation of any infringement, within the meaning of Article 1.1k of the *Wet handhaving consumentenbescherming* (Consumer Protection (Enforcement) Act), of the statutory provisions referred to in part a of the Annex to the *Wet handhaving consumentenbescherming*.
2. The Court may also order, at their request, that any code of conduct promoting an action at odds with Articles 193a to 193i of Volume 6 be amended by the owner thereof, within the meaning of Article 193a (i) of Volume 6.
3. The Court may also be requested to compel the party committing the infringement, or the owner of the code of conduct at odds with Articles 193a to 193i of Volume 6, to publish or have published any measure pursuant to points 1. and 2. above. In the case of a misleading commercial practice, within the meaning of Articles 193c to 193g of Volume 6, the Court may, upon request, order the party concerned to rectify the information. This publication or rectification shall be performed in a manner to be determined by the Court and at the cost of the party or parties indicated by the Court.
4. Article 305a (2) shall apply *mutatis mutandis* if a request pursuant to 1., 2. or 3. above is submitted by a foundation or association with full legal authorisation which, by virtue of its standing rules, has the task of protecting the collective interests of persons.
5. The Court shall deal with such a request without delay.
6. Any disputes regarding the interpretation of rulings pursuant to 1., 2. or 3. above or any order to pay damages, if imposed, shall be ruled upon exclusively by the Court in The Hague.

ARTICLE II

Volume 6 of the Civil Code shall be amended as follows:

A

After Section 3 of Title 3, a new section shall be introduced, with the following wording:

“SECTION 3A. UNFAIR COMMERCIAL PRACTICES

Article 193a

1. In this Section, the following definitions apply:

- a. consumer: a natural person not acting in the exercise of an occupation or running a business;
- b. trader: a natural or legal person acting in the exercise of an occupation or running a business, or their agent;
- c. product: a product, including electricity, or service;
- d. commercial practice: any action, omission, behaviour, presentation of goods or commercial communication, including advertising and marketing, performed by a trader, directly associated with promoting sales, selling or delivering products to consumers;
- e. purchase decision: a decision made by a consumer about whether and, if so, how and under what conditions, to purchase a product, to pay for it in full or in part, to keep it or refuse it or to exercise a contractual right associated with the product, regardless of whether the consumer proceeds to act;
- f. professionalism: a normal level of expertise and conscientiousness which can reasonably be expected of a trader towards consumers, in accordance with his responsibilities arising from the applicable professional standards and fair commercial practices;
- g. invitation to purchase: commercial message describing the features and price of a product, adapted to the medium in question, which enables the consumer to make a purchase;
- h. undue influence: exploitation of a position of power compared to the consumer in order to – even in the absence of a physical threat – exert pressure in such a way as to considerably restrict the ability of the consumer to make an informed decision;
- i. code of conduct: rules establishing how traders who have signed up to the code must behave with regard to one or more specific commercial practices or sectors and which are not laid down by law;
- j. originator of a code of conduct: a legal person or group of traders responsible for drawing up and amending a code of conduct or enforcing compliance therewith by those who have signed up to it;
- k. Directive: 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 (OJ EU L 149).

2. In this Section, an "average consumer" shall also be understood to mean:

the average member of a specific group targeted by the trader or the average member of a specific group where the trader can reasonably be expected to realise that, because of their mental or physical limitations, age or credulity, they are particularly susceptible to a particular commercial practice or the associated product.

3. This Section shall not apply to the certification of precious metal goods and the notification of the precious metal content of these goods.

Article 193b

1. A trader shall be deemed to be acting unlawfully if he engages in an unfair commercial practice towards a consumer.

2. A commercial practice shall be considered unfair if the trader:

- a. fails to display the appropriate level of professionalism and
- b. the ability of the average consumer to make an informed decision is significantly restricted, or may be restricted, with the result that the average consumer makes, or may make, a decision that he would otherwise not have made.

3. A commercial practice shall in particular be considered unfair if the trader:

- a. engages in one of the unfair commercial practices listed in Articles 193c to 193g below, or
- b. engages in an aggressive commercial practice, within the meaning of Articles 193h and 193i.

4. Accepted and regular advertising practice, whereby exaggerated claims or claims which should not be taken literally are made, shall not, in itself, make an advertisement unfair.

Article 193c

1. A commercial practice shall be considered unfair if information is provided which is factually untrue or which misleads the average consumer or may mislead them, whether or not by way of the general presentation of the information, with regard to:

- a. the existence or nature of the product;
- b. the main features of the product, such as its availability, benefits, risks, design, composition, accessories, customer service and complaints procedure, manufacture or performance date or procedure, delivery, suitability for use, possible uses, quantity, specifications, geographical or commercial origin, expected results or the results and main features of any tests or inspections carried out;
- c. the obligations of the trader, the reasons for the commercial practice and the nature of the sales process, a declaration or symbol associated with direct or indirect sponsoring or recognition of the trader or of the product;
- d. the price or the way it is calculated, or the existence of a special price;
- e. the need for a service, part, replacement or repair;
- f. the status, characteristics or rights of the trader or his agent, such as his identity, capacities¹, qualifications, status, certifications, affiliations, connections, industrial, commercial or property rights or awards, prizes, or commendations;

¹ Translator's note: Dutch word is "Vermogen", which could mean "[financial] capital", "capacity" or "abilities".

g. the consumer's rights, including the right to repair or replacement of the product supplied or to reduce the price, or any risks borne by the consumer, which leads or may lead the average consumer to make a decision on a purchase that he would otherwise not have made.

2. A commercial practice shall be deemed also misleading if:

a. the marketing of the product, including the use of comparative advertising, causes confusion with regard to the products, trademarks, brands or other distinguishing features of a competitor;

b. the trader does not comply with an obligation in a code of conduct, in so far as:

1°. the obligation is specific and known and

2°. the trader states that he is bound by the code of conduct, which leads or may lead the average consumer to make a decision on a purchase that he would otherwise not have made.

Article 193d

1. A commercial practice shall also be deemed misleading in the case of a misleading omission.

2. A misleading omission is any commercial practice where essential information which the average consumer needs to make an informed decision about a transaction is omitted, which leads or may lead the average consumer to make a decision on a purchase that he would otherwise not have made.

3. A misleading omission refers also to cases where essential information, as referred to in 2. above, is withheld or provided in an unclear, incomprehensible or ambiguous manner or too late, or does not refer to the commercial intent, where this is not already clear from the context, which leads or may lead the average consumer to make a decision on a purchase that he would otherwise not have made.

4. The context, the limitations of the communication medium and any measures taken to provide the information to consumers via other channels shall all be taken into account in the assessment of whether essential information has been withheld or concealed.

Article 193e

In an invitation to purchase, the following information shall be considered essential, within the meaning of the second point of Article 193d, in so far as it is not evident from the context:

a. the main features of the product, in an appropriate way considering the medium and the product;

b. the identity and geographical address of the trader, the trade name and, if relevant, the identity and geographical address of the trader on whose behalf he is acting

c. the price, including taxes, or in the case of a product whose price cannot reasonably be calculated in advance, the manner in which the price is calculated and, if relevant, any additional freight, delivery or postage costs or, if these costs cannot reasonably be calculated in advance, the fact that these additional costs will be charged;

d. the methods of payment, delivery and performance, and the customer complaints procedure, if the requirements of professionalism are not met; and

e. if there is a right to revoke or cancel the contract, the existence of this right.

Article 193f

In commercial communication, including advertising or marketing, the information required under or by virtue of the following Articles is essential, within the meaning of the second point of Article 193d:

a. Article 15d points 1 and 2 and Article 15e point 1 of Volume 3;

b. Article 46c point 1 of Volume 7;

c. Article 48f points 1 and 2 of Volume 7;

d. Article 501 point 1 of Volume 7;

e. Articles 73 to 75 of the *Geneesmiddelenwet* (Medicines Act);

f. Articles 4:20, 4:73 and 5:13 of the *Wet op het financieel toezicht* (Financial Supervision Act);

g. Article 2b of the *Prijzenwet* (Prices Act).

Article 193g

The following commercial practices shall be deemed misleading under any circumstance:

a. claiming to be bound by a code of practice and to act in accordance with it when that is not the case;

b. affixing a commendation, quality mark or similar label without having the permission to do so;

c. claiming that a code of conduct is recognised by a public or other body, when that is not the case;

d. claiming that a trader or product has been recommended, recognised or approved by a public or private body when that is not the case, or making such a claim without the condition for the said recommendation, recognition or approval having been met;

e. offering products for sale at a particular price without stating that there is a reasonable suspicion that it will be impossible to deliver the said products or equivalent at the price stated, or have them delivered by another supplier, for a period and in a quantity which, taking into account the product, the extent of the advertising and the price offered, are reasonable;

f. offering products at a particular price and then:

1°. refusing to show the article to the consumer, or

2°. refusing to accept an order or to deliver the product within a reasonable period, or

3°. demonstrating an example of the article with faults, with the aim of commending another product;

g. falsely claiming that the product is available only for a very limited period or that it will be available under special conditions only for a very limited period in order to persuade the consumer to make an immediate decision and deprive him of the opportunity or sufficient time to make an informed decision;

- h. promising to provide a consumer, who has been approached by the trader before the transaction in a language which is not an official language of the Member State where the trader is established, with customer service and then providing this service only in another language, without clearly informing the consumer of this before the agreement is concluded;
- i. claiming or otherwise creating the impression that a product may be legally sold when this is not the case;
- j. presenting statutory rights of the consumer as a distinguishing feature of the trader's offer;
- k. using media copy for which the trader has paid to advertise the product, without this being clear from the contents of the copy or from images or sounds which are clearly identifiable to the consumer;
- l. making factually untrue claims on the nature and scope of a danger threatening the consumer or his family if the consumer does not buy the product;
- m. promoting a product that resembles another product made by a particular manufacturer in such a way that consumers are deliberately misled into thinking that the product really is produced by this manufacturer when that is not the case;
- n. setting up, operating or promoting a pyramid scheme, whereby consumers, for payment, are enticed by the promise of a reward for the introduction of new consumers to the scheme, rather than the sale or consumption of goods;
- o. claiming that the trader is about to shut up shop or move premises, when that is not the case;
- p. claiming that products can help you win games of chance;
- q. falsely claiming that a product can heal illnesses, complaints or malformations;
- r. providing factually untrue information about the market or the possibility of securing the product, with the aim of persuading the consumer to purchase the product at terms which are less favourable than the normal market terms;
- s. in the context of a commercial practice, claiming that a competition is being organised or prizes are being offered without actually awarding the said prizes or a reasonable alternative;
- t. describing a product as free, for nothing, free-of-charge etc. if the consumer has to pay an amount other than the unavoidable costs of responding to the offer, picking up the product or having it delivered;
- u. providing marketing material together with an invoice or similar document asking for payment, giving consumers the impression that they have already ordered the product being promoted, where this is not the case;
- v. falsely claiming or creating the impression that the trader is not acting in the capacity of his business, company, trade or occupation or pretending to be a consumer;
- w. falsely creating the impression that after-sales service is available for a particular product in a Member State other than that in which it was sold.

Article 193h

1. A commercial practice shall be deemed aggressive in its context, considering all its features and the circumstances, if intimidation, coercion, including the use of physical force, or undue influence is used to significantly restrict the freedom of choice or action of the average consumer with regard to the product, or may potentially restrict these freedoms, which leads or may lead the average consumer to make a decision on a purchase that he would otherwise not have made.
2. In determining whether a particular commercial practice is aggressive, account is taken of the following factors:
 - a. the time, place, nature and tenacity of the practice;
 - b. the use of any threatening behaviour or threatening or foul language;
 - c. the exploitation by the trader of certain misfortunes or circumstances which are so serious that they may adversely affect the consumer's ability to think clearly, where such circumstances are known to the trader, with the aim of influencing the consumer's purchase decision;
 - d. imposing onerous or disproportionate non-contractual restrictions on consumers wishing to exercise their rights arising from the agreement, including the right to end the agreement or choose another product;
 - e. threatening measures which, legally, may not be taken.

Article 193i

The following commercial practices shall be deemed aggressive under any circumstances:

- a. giving the impression that the consumer may not leave the premises before an agreement has been drawn up;
- b. ignoring a consumer's request to leave or to not return, except when and to the extent which is justified by law for the enforcement of a contractual obligation;
- c. tenacious, unsolicited telephone calls, faxes, emails or other telecommunications, except when justified by law for the enforcement of a contractual obligation;
- d. asking a consumer who submits a claim under an insurance policy for documents which cannot reasonably be considered relevant to assess the validity of the claim, or consistently failing to answer correspondence relating thereto in order to prevent the consumer from exercising his contractual rights;
- e. directly inciting children by way of advertisements to buy advertised products or to persuade their parents or other adults to buy products for them;
- f. asking for direct or deferred payment or return or storage of products delivered by a trader which the consumer did not request, unless the product is a replacement item within the meaning of Article 46f point 3 of Volume 7 of the Civil Code;
- g. expressly stating to the customer that, unless he buys the product or service, the trader's job or livelihood will be at risk;

h. falsely creating the impression that the consumer has already won a prize or will win one or, by performing a particular action, will win one or receive another similar benefit if, in reality:

1. there is no prize or similar benefit; or
2. being considered for the prize or similar benefit is dependent on the consumer paying an amount or bearing other costs.

Article 193j

1. If a claim is made or an application made pursuant to Article 305d point 1 of Volume 3 based on Articles 193b to 193i, the burden of proof shall be on the trader to demonstrate the material accuracy and completeness of any information provided, if this is appropriate given the circumstances and taking into account the lawful interests of the trader and any other party involved in the procedure.
2. If, pursuant to Article 193b, the trader has acted unlawfully, he shall be liable for any damage or harm caused, unless he can prove that it was not his fault or his responsibility in any other way.

B

In Article 194, the following phrase shall be added after "unlawfully": "towards another party acting in the exercise of his business".

C

In Article 194a, point 2, under a, the following phrase shall be added after "misleading":
"or a misleading commercial practice within the meaning of Articles 193c to 193g".

ARTICLE IIa

Volume 7 of the Civil Code shall be amended as follows:

In Article 7, point 2, the following shall be added after "request for payment of a price": ", return or storage".

ARTICLE III

The *Wet handhaving consumentenbescherming* (Consumer Protection (Enforcement) Act) shall be amended as follows:

A

Article 1.1e, point 1., shall read as follows:

"1. a financial service, within the meaning of Article 1:1 of the *Wet op het financieel toezicht* and the offering of stocks to the public or having stocks offered for trading on a regulated market located in or operating in the Netherlands, within the meaning of Article 5:2 of the *Wet op het financieel toezicht*";

B

(Deleted)

Ba

Article 2.15 shall be amended as follows:

1. The number "1." shall be placed before the text.
2. A point shall be added, with the following wording.
"2. By way of derogation from point 1. above, the administrative fine for an infringement of Article 8.8 shall not exceed € 450 000".

C

Article 3.2(2) shall read as follows:

"2. Articles 2.4(2) and 2.10 shall apply *mutatis mutandis*".

D

(Deleted)

E

Article 3.4 shall be amended as follows:

1. In points 2 and 5, "2.10" shall be replaced in each case by "2.10(1), 2.11".
2. In point 4. "*inbreuk op*" (violation of) shall be replaced by "*overtreding van*" (infringement of)".

Ea

Article 7.1 shall be amended as follows:

1. The number "1." shall be placed before the text.
2. A point shall be added, with the following wording:
"2. The Attorney General may lodge an appeal with the High Court of the Netherlands to reverse a ruling of the *College van Beroep voor het bedrijfsleven* [Administrative court of the last instance in matters of trade and industry] in the interests of the law for infringement or incorrect application of Article 8.8."

F

Point b shall be changed to c and, after part a of the second point of Article 8.1., a new point b shall be inserted, with the following wording:

"b. trader: natural or legal person acting in the exercise of an occupation or business, or his agent".

G

After Article 8.7, an Article shall be inserted with the following wording:

"Article 8.8

A trader shall take into account the provisions of section 3A of Title 3 of Volume 6 of the Civil Code."

H

In Article 9.9, "3.4(1)" should be replaced by "3.6(1)".

I

Article 10.4 shall be amended as follows:

1. In point e, "2.10" shall be replaced by "2.10(1)".
2. Point f shall read as follows:

"f. Article 3.4(5) shall read as follows:

5. With regard to the application of points 3 and 4, Articles 2.10(1), 2.15, 2.23, 2.24 and 4.3(2) shall apply *mutatis mutandis*."

J

The Annex to the Act shall be amended as follows:

1. At the end of the left-hand column of part b, the following shall be added:
"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') (OJ EU 2005, L 149)".
2. At the end of the right-hand column of part b, the following shall be added:
"Article 8.8 of this Act, in so far as it does not relate to a financial service or activity".
3. At the end of the left-hand column of part d, the following shall be added:
"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') (OJ EU 2005, L 149).

4. At the end of the right-hand column of part d, the following shall be added:
"Article 8.8 of this Act, in so far as it relates to a financial service or activity".

ARTICLE IV

In Article 8 of the *Colportagewet* (Door-to-Door Selling Act), parts b and d shall be deleted and part c shall become part b.

ARTICLE V

In Article 52b of the *Gaswet* (Gas Act), points 1, 6 and 7 shall be deleted, and points 2 to 5 renumbered as points 1 to 4, and points 8 to 12 renumbered as points 5 to 9.

ARTICLE VI

In Article 95m of the *Elektriciteitswet* (Electricity Act) 1998, points 1, 6 and 7 shall be deleted, points 2 to 5 renumbered as 1 to 4, and points 8 to 12 renumbered as points 5 to 9.

ARTICLE VII

Article 6 of the *Wet op de vaste boekenprijs* (Book Pricing Act) shall be amended as follows:

1. Point 2 shall be deleted, and points 3 to 4 renumbered as points 2 to 3.
2. In point 3 (new), "point 3" shall be replaced by "point 2".

ARTICLE VIII

This Act shall enter into force on a date to be determined by Royal Decree, which may be different for the various Articles or parts thereof.

We order and command that this Act shall be published in the Bulletin of Acts, Orders and Decrees (*Staatsblad*), and that all ministerial departments, authorities, bodies and officials whom it may concern shall diligently implement it.

The Hague, 25 September 2008

Beatrix

Minister for Justice,
E. M. H. Hirsch Ballin

Secretary of State for Economic Affairs,
F. Heemskerck

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Minister for Justice,
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