

International Conference On Applied Economics (ICOAE) 2012

Unfair commercial practices on marketing - advertising and consumer protection in eu member states

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Abstract

The fight against unfair commercial practices contributes to a high level of consumer protection. It ensures that consumers are not misled or exposed to aggressive marketing and that any claim made by traders in the EU is clear, accurate and substantiated, enabling consumers to make informed and meaningful choices. The Directive aims to ensure, promote and protect fair competition in the area of commercial practices. A number of challenges, especially if one considers the legal impact of full harmonisation in an area characterises national policy, style and enforcement techniques. In order to ensure that both consumers and traders are subject to the same rules across the EU, it is very important that national authorities and courts contribute to the uniform implementation and consistent enforcement of the Directive. This paper aims at developing a common understanding and a convergence of practices when implementing and applying the Directive.

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Keywords: Unfair commercial practices on marketing; advertising; consumer protection

1. Introductory remarks

The Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005⁴ concerning unfair business-to-consumer commercial practices in the internal market was adopted in May 2005. The new rules it details have been applied across the Member States by December 2007.

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In Greece the directive was adopted by the Law 3587/2007.

This legislation defines the unfair commercial practices which are prohibited in the European Union (EU) Member States. It thus protects the economic interests of consumers who conclude commercial transactions with traders (Bently, Davis and Ginsburg, 2008).

Unfair commercial practices are those which (Grassie, 2006):

- do not comply with the principle of professional diligence,⁵
- may influence consumers' transactional decisions⁶.

Certain population groups must be particularly protected due to their vulnerability or credulity, because of their age (children or the elderly) or because of mental or physical infirmity. The same legislation integrates provisions from the Directives on misleading advertising, on distance contracts and on the distance marketing of financial services (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011).

Especially:

- This Directive therefore approximates the laws of the Member States on unfair commercial practices (Anagnostaras, 2010), including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors. In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible. It neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders (Collins, 2010); taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so. Nor does this Directive cover or affect the provisions of Directive 84/450/EEC on advertising which misleads business but which is not misleading for consumers and on comparative advertising. Further, this Directive does not affect accepted advertising and marketing practices, such as legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect consumers' perceptions of products and influence their behaviour without impairing the consumer's ability to make an informed decision (Velentzas and Broni, 2010a:487).
- This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. It does not address commercial practices carried out primarily for other purposes, including for example commercial communication aimed at investors, such as annual reports and corporate promotional literature. It does not address legal requirements related to taste and decency which vary widely among the Member States. Commercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons (Collins, 2010). Member States should accordingly be able to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers' freedom of choice.
- This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it.

⁴ 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 L 149, 11.6.2005, p. 22.on Unfair Commercial Practices.

⁵ **Professional diligence:** the standard of special skill and care that a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.

⁶ **Transactional decision:** any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.

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