

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **A**
ECONOMIC AND SCIENTIFIC POLICY



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Misleading Advertising on the internet

IMCO



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POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

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IP/A/IMCO/ST/2010-05

July 2010

PE 440.289

EN

This document was requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO).

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LINGUISTIC VERSIONS

Original: [EN]
Translation: [DE, FR]

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Manuscript completed in July 2010.
Brussels, © European Parliament, 2010.

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LIST OF ABBREVIATIONS

CMLR Common Market Law Review

EBLR European Business Law Review

CJEU Court of Justice of the European Union

GRUR Int *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil*

RuW *Recht und Wettbewerb*

OFT Office of Fair Trading, UK

UCPD Unfair Commercial Practices Directive

1. MISLEADING ADVERTISING ON THE INTERNET

KEY FINDINGS

- Misleading advertising on the internet exists in various forms. According to enforcement agencies, a majority of cases (still) concern misleading pricing information. No major new trend can be identified.
- New media seem to be used for all sorts of hidden advertisement. However, there are hardly any court decisions available yet.

1.1. Introduction

The Unfair Commercial Practices Directive (UCPD)¹ was adopted in May 2005 and had to be implemented by Member States into national law by 12 June 2007. It was applicable by 12 December 2007. However, some Member States – for example, Spain, Germany and the UK – have been late in implementing the UCPD. At the time of the preparation of this paper all Member States have implemented the Directive.²

1.1.1. Scope of the paper

This briefing paper provides a brief preliminary analysis on misleading advertising on the internet under the UCPD. The paper in particular takes into account the state of the law in Germany, Austria and the United Kingdom and the information provided by enforcement agencies in those countries. In addition, information provided by enforcement agencies³ and/or self-regulatory bodies from Finland, the Netherlands, Italy, Ireland, Spain and Poland has been taken into account.

1.1.2. Misleading advertising on the internet under the UCPD

Advertising on the internet raises multiple legal questions, ranging from keyword advertising⁴ and other questions of copyright infringements to data protection and to the question of applicable law and jurisdiction.⁵ This paper, however, deals only with misleading advertising on the internet under the UCPD.⁶

Advertising is covered by the broad definition of “commercial practice” in Article 2 (d) of the UCPD.⁷ Misleading advertising can therefore qualify as a misleading action (Article 6) or a misleading omission (article 7) or it can be deemed unfair under the general clause of the UCPD (Article 5).

¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council.

² For the scope of the UCPD cf. Briefing Paper on the State of play of the implementation of the provisions on Advertising in the Unfair Commercial Practices legislation, Chapter 1.

³ The term “enforcement agency” is used in a broad sense and applies to (public law) enforcement authorities as well as (private law) organisations enforcing the UCPD.

⁴ Cf. CJEU 23.3.2010, C- C-236/08 bis C-238/08 Google.

⁵ Cf. the opinion of GA Trstenjak, 18.5.2010, C-585/08 (Pammer) and C-144/09 (Hotel Alpenhof).

⁶ Besides the UCPD, other European and national provisions might be applicable as well, cf. e.g. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”).

⁷ Article 2 lit. d UCPD defines business-to-consumer commercial practice as “any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.”

In addition, Annex I lists 23 commercial practices which are considered as misleading – and therefore unfair – under all circumstances.⁸ The UCPD prohibits both untruthful and deceptive advertising and deals with misleading advertisement on the internet as with any other form of misleading advertisement.⁹

1.2. Current developments in misleading advertising on the internet¹⁰

This paper examines three categories of misleading advertisement on the internet (hidden advertisement, misleading quality labels, and misleading pricing information). However, the internet fosters all kind of new and fast-changing marketing techniques, which also involve all kinds of new market players (internet providers, affiliates etc.). It would require further study to examine all possible developments and legal consequences. No final judgment can be made about whether the UCPD will be flexible enough to cover all future developments. However, the general clauses of the UCPD seem to be rather future proof. It also has to be stressed that besides some peculiarities, misleading advertising on the internet has to fulfill the same legal requirements as offline advertising. An advertisement, for example stating that “all” bathroom products are on sale is misleading – no matter if it has been displayed on the internet or in a newspaper or in TV – if some of the bathroom equipment is not included in the promotion and this is not mentioned in the advertisement.¹¹

1.2.1. Hidden advertisement

According to the interviewed enforcement agencies, there is no current “trend” detectable with regard to misleading advertising on the internet. There is said to exist an increase in so-called “hidden advertising” on the internet, especially in the form of product reviews written by employees of the producer of the reviewed product or appraisals of products in blogs or via YouTube by people who seem to be consumers but are paid by the producer to do so (so-called “viral” and “buzz” advertising).¹² However, the interviewed enforcement agencies reported that there are hardly any court decisions on it yet.¹³ It seems that this kind of hidden advertising is very difficult to detect. Even if, for example, a product review looks suspicious, it will be difficult to prove that the reviewer was paid by a business to write the review.

Another form of misleading advertising would be an advertisement which creates the impression that the consumer is getting a personal message. For instance, the Dutch consumer agency reported a case in which teenagers received SMSs for Valentine’s Day.¹⁴ They were told to enter personal details (e.g. their date of birth) in order to find out who had sent them the SMS. By doing so they entered into a contract.¹⁵

⁸ Cf. for misleading unfair commercial practices under the UCPD, see Wilhelmsson, *Misleading Practices*, in Howells/Micklitz/Wilhelmsson (eds.), *European Fair Trading Law. The Unfair Commercial Practices Directive*, 2006, pp. 123-165.

⁹ Misleading advertisement on the internet might be regulated in addition by other Directives, such specific rules prevail, cf. Article 3 no. 4 of the UCPD.

¹⁰ For an overview on German court decisions in the last year, cf. Hoeren/Gräbing, *Entwicklung des Internet- und Multimediarechts im Jahr 2009*, MMR Beilage (supplement) 2010, pp. 1-47, especially pp. 12 et sequ.

¹¹ Cf. a case before the UK self-regulatory body, http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2009/6/BandQ-plc/TF_ADJ_46347.aspx.

¹² Singleton, *The Consumer Protection from Unfair Trading Regulations 2008 and IT/Internet – viral and buzz marketing issues*, 13 (4) *Communications Law* pp. 117-119 (2008).

¹³ But cf. OLG (*Oberlandesgericht*, higher regional court) München 10.12.2009, WRP 2010, 671. The court ruled that advertorial advertisements on the internet have to be considered as unlawful.

¹⁴ http://www.consumumentenautoriteit.nl/English_summary/Press_releases/Press_release_February_8_2010_Consumer_Authority_issues_warning_about_misleading_Valentine_s_messages.

¹⁵ In the Netherlands, this form of so called *viral marketing* (“tell a friend”) has been regulated by OPTA (the telecommunications regulator) and CBP (the data protection authority) with regard to possible problems with the processing of personal data.

Another case reported by the Dutch consumer agency involved the invitation to (costly) photo shoots: Young people were contacted via social network sites and invited to photo shoots. The impression was given that they have been chosen because of their special looks and that they were likely to enter into a modeling career if they came to the photo shoots.¹⁶

Hidden advertisement is prohibited under the UCPD, especially under Annex I no. 11, 21, 22 as well as Article 7 (2) of the UCPD.

1.2.2. Misleading advertising and quality labels

Another form of misleading advertising on the internet (but also in other sales channels) is misleading advertising with quality labels.¹⁷ Different forms of such misleading advertising can be found.

The first group consists of cases in which quality labels were used, though the business was not allowed to use the quality label. The self-regulatory body in Poland reported a case in which a hotel advertised itself as a three star hotel, but in reality was only a two star hotel.¹⁸ The UK Office of Fair Trading (OFT) reported cases in which businesses falsely claimed to be members in trade associations.

The second group consists of cases in which the business used test results which were not false, but were outdated at the time they were used in the advertisement as more tests had been conducted and led to other results.¹⁹

The third group consists of cases in which businesses used labels which created the impression that they fulfilled some special quality requirements and were therefore allowed to use that special quality label. However, the label did not require the fulfillment of specific quality requirements but only legal requirements. An example of that kind of advertising would be a self-created label stating that eggs have been produced under "species-appropriate" circumstances, but the standard of care under which the eggs were produced does not go beyond the legal standard.²⁰

Such misleading advertising with quality labels is prohibited under the UCPD, especially under Annex I no. 2 or 4 and Article 6 and 7 of the UCPD.

1.2.3. Misleading pricing information and "free" offers on the internet

It seems that there are particularly three groups of misleading information about pricing on the internet and that a majority of cases concerning misleading advertisement on the internet still relates to misleading pricing information.²¹

¹⁶http://www.consumentenautoriteit.nl/English_summary/Press_releases/Press_release_February_4_2010_Consumer_Authority_imposes_fine_upon_photographic_studio_for_misleading_recruitment_of_models_via_the_internet

¹⁷ It has to be stressed that all misleading advertising about the features of the advertised product are prohibited under the UCPD as well, e.g. promoting broadband internet with a certain speed which in fact is never reached. Ofcom, the UK telecommunications regulator, has published a voluntary code of practice with regard to broadband speeds, cf. <http://www.ofcom.org.uk/telecoms/ioi/copbb/copbb/>.

¹⁸ In this case, however, it seems that the misleading advertisement was the result of a mistake.

¹⁹ Cf. e.g. OGH (Austrian Supreme Court) 20.4.2010, 4 Ob 159/09z. In this case, no new test was available, but the OGH regarded the test results as too old and the advertisement therefore as misleading.

²⁰ OLG (*Oberlandesgericht*, higher regional court) Oldenburg, 03.06.2010, 1 U 6/10. The label seems to have been used only off-line, but the decision would not have been different, if the label was used in the internet.

²¹ Also recent EU sweeps (on airlines, mobile phones and electronic goods) found that in many cases price information is provided in a misleading way, http://ec.europa.eu/consumers/enforcement/sweep/electronic_goods/index_en.htm. The OFT has commissioned a market study on unfair commercial practices related to prices. The interim report can be found at <http://www.oft.gov.uk/news-and-updates/press/2010/59-10>.

1.2.3.1. Misleading information about the total amount which has to be paid

The first group consists of cases in which the price given on the internet is misleading as it does not show the total amount which has to be paid by the consumer (so called “drip-pricing”). The consumer finds out about some additional fees only after he or she has “clicked the button.” Such misleading practices are said to be used often by airlines. According to Regulation (EC) No. 1008/2008,²² airlines are already obliged to display the total amount which has to be paid from the customer in the advertising. However, a number of enforcement bodies identified the pricing of flights as a source of frequent problems (for example, in relation to credit card fees and speedy boarding charges). Similar practices seem to exist for (mobile) phone contracts. According to the Consumer Ombudsman in Finland, for instance, the price indication of mobile subscriptions is often misleading because the advertisements emphasize a special price for a certain period or only some elements of the price. Similar cases exist in other Member States.²³ The self-regulatory body in Poland reported a case where an hotel advertised a special offer without mentioning that the advertised amount referred to one night only and not to the amount due for the whole stay. These practices are prohibited under the UCPD, especially under Article 6 (1) lit. b, Article 7 (1) lit. d of the UCPD, as well as under Article 7 (4) lit. c of the UCPD.

1.2.3.2. Misleading advertisement of “free” (gratis) offers

The second group of cases concern offers on the internet which are advertised as “free” or “gratis”. Enforcement authorities in Austria,²⁴ Germany, the UK, Finland, the Netherlands, Spain and Italy reported a large number of cases which all have more or less the same background: some sort of service – e.g. music download, sending text messages, horoscopes – are advertised on the internet as free of charge. The consumer, however, has to fill in some personal information in order to receive the service. Only after the consumer has logged in and confirmed that he or she would like to receive the service, the consumer is informed that he or she has concluded a contract for an ongoing supply of services for which he or she has to pay fees. Most of the time the information about the conclusion of a contract is only given after the consumer has provided personal data – misled into doing so by the information that the advertised service was “free” – and, in addition, the information is provided only in very small print. Often the consumer will find out about the contract only when an invoice is sent. In the case the consumer ignores the invoice, he or she will be contacted by a lawyer. Businesses using that sort of misleading advertising are said to act quite aggressively in enforcing payment (“rogue traders”).²⁵

Such commercial practices in the B2C context are prohibited under the UCPD, especially under Annex I No. 20 and Article 6 (1) lit. d of the UCPD as well as under Article 7 (4) lit. c of the UCPD.

²² Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24.9.2008 on common rules for the operation of air services in the Community (Recast). An EU Sweep initiative has been also carried out in September 2007, see http://ec.europa.eu/consumers/enforcement/sweep/index_en.htm.

²³ Cf. e.g. BGH (*Bundesgerichtshof*, German Supreme Court) 17.7.2008, GRUR 2009, 73.

²⁴ Cf. Seidelberger, Fälle von „Internetabzocke“, RuW 2009, pp. 12-13.

²⁵ These practices are also commonly used to target SMEs, see Civic Consulting, Study on Misleading Practices of ‘Directory Companies’ in the context of current and future internal market legislation aimed at the protection of consumers and SMEs, IP/A/IMCO/FWC/2006-058/LOT4/C1/SC6.

1.2.3.3. Price comparison (sites)

Price comparison sites can also contain misleading information, for example the advertised flight is never available at the promoted rate.²⁶ The owner of such sites may also have an incentive to feature companies that pay the most, while users of comparison sites are not informed about the business model of the site.^{27,28}

Price comparisons with a competitor must be based on evidence and must take into account all features that are important for the decision of consumers.²⁹ An advertisement comparing the prices for phones has therefore to inform about the minimum duration of the advertised contract.³⁰ An advertisement claiming that the price is lower than before has to contain details regarding the "before" price.³¹

Such commercial practices are prohibited under the UCPD, especially under Article 6 (1) lit. b and d of the UCPD as well as under Article 7 (4) lit. c of the UCPD.

²⁶ Cf. http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2009/1/Flying-EaglesLtd/TF_ADJ_45579.aspx and <http://www.themoneystop.co.uk/032010/no-code-of-conduct-for-comparison-sites.html>.

²⁷ See a.o. Jan Kabel, 'Van test naar waardering? Vergelijkend warenonderzoek in het internettijdperk in: Dommering-bundel. Opstellen over informatierecht aangeboden aan prof. E.J. Dommering, Otto Cramwinckel Uitgever : Amsterdam 2008, p. 185-186 ; M.Schulz e.a., E-Rating. Betrouwbaarheid en egloofwaardigheid van vergelijkingsites, Utrecht (Berenschot) 10 april 2007.

²⁸ In the UK, financial comparison sites (Tesocompare, Moneysupermarket, Moneyexpert) seem to have problems in developing a code of conduct, cf. <http://www.buzzle.com/articles/uk-comparison-sites-code-of-conduct-cold-shouldered.html>.

²⁹ Cf. e.g. BGH (*Bundesgerichtshof*, German Supreme Court) 19.11.2009, I ZR 141/07; cf. also CJEU 8.4.2003, C-44/01 Pippig; CJEU 19.9.2006, C-356/04 Lidl.

³⁰ OLG (*Oberlandesgericht*, higher regional court) Köln 30.4.2010, 6 U 194/09.

³¹ Cf. e.g. OGH (*Oberster Gerichtshof*, Austrin Supreme Court) 16. 12. 2009, 4 Ob 187/09t.

2. LOOPHOLES IN THE UNFAIR COMMERCIAL PRACTICES LEGISLATION AND ITS ENFORCEMENT

KEY FINDINGS

- It is still too early to give a final answer to the question of whether there are any loopholes in the UCPD. As for now, the general clauses of the UCPD seem to be flexible enough to deal with all kind of unfair commercial practices, including misleading advertisement on the internet. However, the flexibility of the clauses and the vagueness of the terms used lead to uncertainty in the application of the UCPD.
- Whether there are any loopholes also depends on how the CJEU will decide still open questions in the application of the UCPD.
- Whether there are loopholes with regard to enforcement depends largely on the efficiency of the enforcement system in each Member State. The fact that Member States are not bound by the UCPD to introduce a right to redress for individual consumers does constitute a potential loophole.
- It might be regarded as a loophole that the UCPD does not provide for a fully harmonised law of unfair commercial practices due to the discretion left to Member States with regard to some questions and the rather vague terms used.

2.1. Loopholes in the material provisions of the UCPD

2.1.1. Introduction

None of the interviewed stakeholders have reported any concrete loopholes in the UCPD. It seems that the “big” general clause (Article 5) as well as the two “small” general clauses (Articles 6 and 7, and Articles 8 and 9, prohibiting misleading and aggressive commercial practices) are regarded as “future proof”, in other words, as flexible enough to cover future developments of unfair commercial practices. When evaluating this answer, it has to be taken into account that the implementation laws of the UCPD have only been in force for about two years on average (as many Member States have been late in implementing the UCPD). Therefore, many provisions have not been tested sufficiently (or at all) in court yet. In addition, not only implementation laws still have to prove their full efficiency and their compliance with the UCPD, but there are still questions with regard to the meaning of certain provisions of the UCPD to be discussed. For example, different views have been expressed on whether the list of material information required under Article 7 (4) of the UCPD (see below) is exhaustive or not.³² A final interpretation of the questions still open can only be provided by the ECJ.³³

Besides this inevitable caution, one has to agree that the “big” general clause in Article 5 as well as the two “small” general clauses (Articles 6, 7 and Article 8, 9) seem to be appropriate means to deal with unfair commercial practices.

³² Cf. e.g. Wilhelmsson, *Misleading Practices*, in Howells/Micklitz/Wilhelmsson (eds.), *European Fair Trading Law. The Unfair Commercial Practices Directive*, p. 123, p. 155.

³³ Some assistance can be provided by guidance issued by the European Commission, cf. Commission staff working document. *Guidance on the implementation / application of Directive 2005/29/EC on unfair commercial practices*, 3.12.2009, SEC (2009) 1666.

2.1.2. Problems due to different wording in the implementation law – Article 7 (4) of the UCPD as example

The flexibility of the relatively vague terms used in the UCPD may, however, also lead to uncertainty in the application of the UCPD. Member States may interpret the terms used in the UCPD differently and some of the provisions have already been implemented into the national laws with a different wording. The different terms used might not necessarily mean something different. Nevertheless the different terminology used makes it more difficult for consumers, businesses and enforcement agencies to apply – and, in case of businesses, to obey – the law, especially in cross-border situations. Article 7 (4) of the UCPD can be named as an example. Article 7 of the UCPD regulates misleading omissions and seems to be of great importance for advertising on the internet.

According to this provision, in the case of an invitation to purchase, the information mentioned in lit. a-e of Article 7 (4) “shall be regarded as material, if not already apparent from the context.” “Invitation to purchase” is defined in Article 2 lit. i of the UCPD as “commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase.” In the German version of the UCPD “invitation to purchase” is translated with “Aufforderung zum Kauf,” which means “invitation to buy.” It has been argued that “invitation to purchase” has to be understood in a broad sense, including not only sales but also services.³⁴ This opinion is convincing as “product” under Article 2 lit. c of the UCPD means “any goods or service including immovable property, rights and obligations.” It would be contrary to the objective of the UCPD if “invitation to purchase” would encompass only sales. Even though there seems to be some agreement on the broad meaning of the term “invitation to purchase,” the fact that the wording of some implementation laws (e.g. in Austria³⁵ and Italy³⁶) does not take this into account could provide an obstacle to cross-border transactions.

There are further questions open with regard to Article 7 (4) of the UCPD, which are also relevant for misleading advertisement on the internet. In a pending preliminary ruling, the CJEU *inter alia* will have to decide if an invitation to purchase exists as soon as information on the advertised product and its price is available so that the consumer may make a decision to purchase, or if it is necessary that the commercial communication also offer an actual opportunity to purchase the product.³⁷

³⁴ Cf. Collins, Harmonisation by Example: European Laws against Unfair Commercial Practices, (2010) 73 (1) MLR p. 89, p. 785 (for the UK); Köhler, in Köhler/Bornkamm (eds.), Kommentar zum Gesetz gegen unzulässigen Wettbewerb, 2009, 28. edition, § 5a no. 30 (for Germany); Anderls/Appl, in Wiebe/Kodek, UWG, 2009, § 2 no. 530. It seems that there has been no discussion yet, if “invitation to purchase” also includes e.g. leases.

³⁵ § 2 (6) of the Austrian act against unfair competition. In contrary, § 5a (3) of the German act against unfair competition refers to “products and services.”

³⁶ Article 22 of the Italian consumer code (*codice del consumo*).

³⁷ Cf. the reference for a preliminary ruling of 8.32010, C-122/10 KO v. Ving Sverige.

The boundary between consumers and traders

According to the OFT, one of the difficulties with the current system of law relates to the division between consumers and businesses. Consumers dealing with businesses benefit from substantial additional protections through the UCPD and other provisions, but businesses dealing with other businesses do not. For instance, when trading online through an internet auction platform like e.g. eBay, it is preferable to be qualified as a consumer rather than a business. It may not be easy in those situations to decide what amount of sales prevents the qualification of the seller as a consumer. Another example is consumer to consumer sales (C2C). C2C sales are not covered by the European law on fair trading, which relates to B2C interactions. These issues have several effects: first, some “boundary” cases, such as misleading (false) job adverts, may be difficult to deal with as they cover the timeframe where consumers seek to become traders but have not yet done so;³⁸ second, small businesses, which may have fewer resources than larger traders, are left vulnerable to scams and other unfair practices; third, businesses may have incentives to pretend to be consumers, in particular when selling on the internet; lastly, it is not always clear what level of consumer protection is relevant for a particular transaction. The OFT pointed out that the need for a clear boundary between “business / traders” and “consumer” is a different issue than whether to extend B2C protection to businesses.

2.1.3. Misleading advertising and the black list

As for Annex I of the UCPD (the “black list”) it seems to be important to ensure that a “white list” is not created in any of the Member States: if a commercial practice resembles a commercial practice banned under Annex I of the UCPD but does not meet the degree of intent required in the black list, that does not mean that the commercial practice has to be regarded as fair under all circumstances.³⁹ For example, an advertisement aimed at children but not including “a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them” is not banned under No. 28 of Annex I. It may, however, still be qualified as aggressive (Articles 8, 9) or as misleading (Articles 6, 7) or as unfair under Article 5 of the UCPD. In addition, if the black list is to have an important impact on a uniform interpretation of the UCPD, it should be updated frequently to enlist new unfair commercial practices.

2.1.4. Special problems with misleading advertising on the internet

If one examines the unfair commercial practices named in chapter 1 (hidden advertisement, misleading pricing information, misleading use of quality labels) it seems that there are no loopholes which are due to the fact that the given advertisement was published online. All of the stated misleading advertisements are covered by the UCPD.

³⁸ According to CJEU 3.7.1997, C-269/65 Benincasa, a person setting up a new business shall not be regarded as consumer. The background of this decision, however, was not the interpretation of a consumer law directive but the Brussels Convention (in force at that time) on jurisdiction and the enforcement of judgements in civil and commercial matters.

³⁹ Cf. Anagnostaros, *The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?* (2010) 73 CMLR p. 147, p. 150; Köhler/Bornkamm, in Köhler/Bornkamm (eds.), *Kommentar zum Gesetz gegen unlauteren Wettbewerb*, 2009, 28. edition, Anhang zu § 3 Abs. 3 no. 0.8.

There might be some uncertainty with regard to the application of the provisions under which these advertisements are regulated.⁴⁰ However, these uncertainties would also exist if such an advertisement has been published e.g. in print.

With regard to problems related to the burden of proof, it might be useful to evaluate the implementation of Article 12 of the UCPD⁴¹ into national laws and if Member States have not used this possibility to discuss whether Article 12 of the UCPD should become mandatory.

To summarize, it can be said that, as of now, no concrete loopholes can be detected. However, the existence of loopholes depends on the interpretation of still pending questions by the CJEU. In addition it can be noted that despite the full harmonization clause the UCPD so far does not achieve its aim to create a fully harmonized law of unfair commercial practices. On the one hand, this is due to the limited scope of the Directive and the choices the UCPD leaves to Member States with regard to certain questions. On the other hand this is due to the different architecture of implementation of the Directive in national laws, the limited time since its implementation and the not yet decided open questions regarding its application.⁴²

2.2. Loopholes with regard to the enforcement of the UCPD

2.2.1. Enforcement of the UCPD

Member States have very different enforcement systems, ranging from civil law systems to public systems (including criminal sanctions) or a mixture of both. Article 11 of the UCPD has done nothing to harmonize the enforcement systems as it leaves much discretion to the Member States. This may be owed to the procedural autonomy of the Member States and the question of whether and to what extent the EU has competence to regulate procedural questions. However, it seems to be important to foster the harmonization of enforcement in order to ensure the success and effectiveness of the UCPD. With regard to the cooperation of different enforcement systems Regulation (EC) No. 2006/2004 on consumer protection cooperation provides a legal basis for the cooperation between such agencies. According to a report of the European Commission the regulation has led to more efficiency with regard to cross-border enforcement, but it has certain shortcomings.⁴³ General problems of enforcement of the UCPD, as well as options to address them, have been discussed in detail in a complementary briefing paper.⁴⁴

⁴⁰ For example, there is an ongoing discussion if test results provided by consumer organisations fall under Annex I no. 2. However, if such tests do not fall under no. 2, advertisement with such tests can still be regarded as misleading under Articles 6, 7 (or 5) of the UCPD under certain circumstances, cf. OGH (*Oberster Gerichtshof*, Austrian Supreme Court) 20.4.2010, 4 Ob 159/09z.

⁴¹ Article 12 of the UDCP states, "Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 11: (a) to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case; and (b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority."

⁴² For a detailed discussion, please refer to Briefing Paper on the State of Play of the implementation of the provisions on advertising in the Unfair Commercial Practices legislation.

⁴³ Report from the Commission to the European Parliament and to the Council on the application of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), 2.7.2009, COM (2009) 336 final.

⁴⁴ See Briefing Paper on the State of Play of the implementation of the provisions on advertising in the Unfair Commercial Practices legislation..

2.2.2. Enforcement problems with regard to misleading advertising on the internet

A special enforcement problem with regard to misleading advertising on the internet seems to be rogue traders, promoting “free” or “gratis” services which are not free of charge at all. A large number of such cases have especially been reported by the Federation of German consumer organisations (VZBV). While the VZBV has the right to bring an injunction and to skim off profits,⁴⁵ these two sanctions are not sufficient in practice: An injunction has neither any deterrence effect – as it is easy for rogue traders to close down one misleading internet site and to start another – nor does it provide any redress for victims of such traders. The skimming off profits procedure under § 10 of the German act against unfair competition (UWG) might be helpful in theory, but due to certain requirements, cannot be regarded as a success so far.⁴⁶ It seems that to combat such rogue traders, criminal offences might be more appropriate sanctions.⁴⁷

⁴⁵ See Briefing Paper on the State of Play of the implementation of the provisions on advertising in the Unfair Commercial Practices legislation.

⁴⁶ See Civic Consulting, Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, 2008.

⁴⁷ Such practices might be regarded as fraud under the German criminal code. However, so far courts have been reluctant to do so; cf. also § 16 UWG.

3. THE ROLE OF NATIONAL ADVERTISING SELF-REGULATORY BODIES IN COMBATING UNFAIR COMMERCIAL PRACTICES?

KEY FINDINGS

- Under Article 10 of the UCPD the relation of self-regulation and legal enforcement ensured by courts and administrative agencies is a system of co-existence. However, it remains the Member States' responsibility to ensure the legal enforcement of the UCPD. Self-regulatory systems therefore cannot substitute legal enforcement.
- The main focus of self-regulatory codes seems to be on questions of taste and decency.
- Self-regulatory codes could help to create a uniform law for B2B and B2C relations by implementing principles of the UCPD for B2B relations. Self-regulatory bodies could help national enforcement agencies to combat unfair commercial practices (including misleading advertising on the internet) under certain conditions

3.1. Introduction

Under Article 10 of the UCPD the relation of self-regulation and legal enforcement ensured by courts and administrative agencies is a system of co-existence. According to Article 10 (1) of the UCPD Member States are free to allow self-regulation of commercial practices. However, according to Article 10 (2) it remains the Member States' responsibility to ensure the legal enforcement of the UCPD. Self-regulatory systems therefore cannot substitute legal enforcement.

The UCPD refers to codes of conduct⁴⁸ on several occasions and bans misleading references to codes of conduct.⁴⁹

There are national advertising self-regulatory bodies in all Member States of the EU as well as a European umbrella organisation of advertising self-regulatory bodies.⁵⁰ However, the importance of national advertising self-regulatory bodies differs from one Member State to another. Historically, advertising self-regulatory bodies have played a more important role in Member States which, before the implementation of the UCPD, did not have a developed set of laws dealing with unfair competition (e.g. UK⁵¹ and Ireland).⁵²

⁴⁸ A code of conduct is defined under Article 2 lit. f of the UCPD as: "an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors."

⁴⁹ Cf. Annex I no. 1 and 3, Article 6 (2) lit. b of the UCPD.

⁵⁰ Cf. <http://www.easa-alliance.org>.

⁵¹ Cf. for the question whether a specific field of law with concern to unfair competition existed in the UK before the implementation of the UCPD, see Davis, Unfair Competition Law in the United Kingdom, in Hilty/Henning-Bodewig, Law Against Unfair Competition. Towards a New Paradigm in Europe? 2007, p. 183-198. For advertising self-regulation cf. Jergolla, Die britische Werbeselbstkontrolle anhand des Advertising Code – eine Gegenüberstellung mit der Rechtslage in Deutschland, WRP 2003, 431-449; Howells, Codes of Conduct, in Howells/Micklitz/Wilhelmsson, European Fair Trading Law, 2006, p. 195, p. 197.

⁵² Advertising self-regulation also play an important role in the Netherlands and Italy, cf. Henning-Bodewig, Die Bekämpfung unlauteren Wettbewerbs in den EU-Mitgliedstaaten: eine Bestandsaufnahme, GRUR Int 2010, p. 273, p. 276, p. 277, p. 280, p. 281.

Self-regulation has played a less significant role in Member States which have a developed act dealing with unfair commercial practices: The more developed the binding legal framework, the smaller the scope left for self-regulation.

3.2. Self regulation and misleading advertising on the internet

With regard to the UCPD, it can be noted that not all self-regulatory advertising codes do include a broad concept of unfair commercial practices. In some Member States, the code issued by the advertising self-regulatory body contains only or primarily rules concerning taste and decency (e.g. on advertising disrespectful to women or glorifying violence) or health aspects (e.g. advertising glorifying alcohol or smoking). This is, for example, the case for the Austrian self-regulatory body (*Werberat*),⁵³ which does not cover misleading advertisement, despite the fact that, according to self-regulatory codes, advertising shall be truthful. Also the German advertising self-regulatory body (*Werberat*) primarily deals with questions of taste and decency.⁵⁴ Some of the rules primarily issued to ensure decent advertising may also fall within the scope of the UCPD. For example, the majority of codes of the self-regulatory bodies contain provisions dealing with advertisement especially aimed at children. A similar rule can also be found in Nr. 28 of Annex I of the UCPD. The English⁵⁵ and the Irish⁵⁶ code of conduct in contrast have a broader scope, also regulating misleading advertisement. However, there are other limitations which have to be considered as well. The English self-regulatory code (non-broadcast), for example, does *inter alia* not cover advertisements on the businesses' own homepage.⁵⁷

Self-regulatory bodies seem to agree that self-regulation can play a big role in combating misleading advertisement on the internet. Some specific initiatives have already been taken by self-regulatory organisations. In 2008, the European Advertising Standards Alliance (EASA) has published a Digital Marketing Communications Best Practice.⁵⁸ The document provides guidance to national self-regulatory bodies and advertising industry representatives by defining what a digital marketing communication is and what kind of digital marketing communications fall within the remit of self-regulation. The self-regulatory body in Spain, *Autocontrol*, together with AECCEM (Spanish Association for E-commerce and Direct Marketing) and *Red.es* (public institution created to promote the development of the internet in Spain) has founded *Confianza On Line*, an association in charge to apply the code of conduct for online advertising and e-commerce.⁵⁹

The Advertising Standard Authority in the UK (ASA) at the moment regulates only advertisements in paid-for space on the internet (e.g. banners, pop-ups, tower advertisements, paid search). However, there are ongoing discussions about the possibility of extending ASA's remit to cover other online marketing communications, including marketing communications on companies' own websites. A study recently commissioned by the OFT on online targeted advertising and pricing suggests that this approach is likely to be the most effective in dealing with transparency and control issues in relation to behavioural advertising.⁶⁰ The Finnish Consumer Ombudsman is more skeptical about the role of self-regulation.

⁵³ Cf. www.werberat.at

⁵⁴ Cf. www.werberat.de

⁵⁵ The code is available at www.asa.org.uk.

⁵⁶ The code is available at www.asai.ie.

⁵⁷ <http://asa.org.uk/Regulation-Explained/What-we-cover/Complaints-outside-remit.aspx>. There also exist different self-regulatory bodies (and consequently different codes of conduct) for different sectors, with details varying in each Member State.

⁵⁸ http://www.epceurope.org/issues/EASA_DMC_best_practice.pdf.

⁵⁹ The seal "Confianza On Line" is recognized by the Spanish Government and guarantees that member companies are committed to the Confianza On Line code of conduct and also meet the content of the mediation agreements achieved by the Advertising Jury (for advertising) or the *Junta Arbitral de Consumo* (public body for e-commerce issues) in case a complaint is filed for a breach of the code.

⁶⁰ The study is available at <http://www.offt.gov.uk/news-and-updates/press/2010/53-10>.

According to the Ombudsman, the self-regulatory bodies seldom are strong enough to act when needed. The bodies are representatives of a certain business and it is therefore, according to the Ombudsman, against their interests to act against their own members and they also do not have any legal means to enforce their decisions.

3.3. The interplay of self-regulation and enforcement agencies

To improve the interplay of self-regulatory bodies and national enforcement agencies, a two-step enforcement system could be established:

Advertising self-regulatory bodies could deal with “easier” cases, helping national enforcement agencies to save time and costs. Such a two-step system would require the existence of codes containing the standard set by the UCPD for unfair commercial practices. If the codes contained the standard set by the UCPD as a minimum, competitors and consumers who become aware of a misleading advertisement could in a first step refer to the self-regulatory body. It would be crucial that consumers could make complaints free of charge⁶¹ and with the option of remaining anonymous. Then the normal enforcement process at the self-regulatory body could commence. At this step it seems to be important that the self-regulatory body works independently of any influence from its members and has efficient sanctions if the business refuses to cooperate. If the sanction system of the self-regulatory body does not lead to any cooperation by the business, the self-regulatory body should refer the case to the national enforcement system. As there already exists a European umbrella organization, self-regulatory bodies also seem well-equipped for cross-border cases that result from misleading advertisement on the internet.

In some Member States such a system seems to be already in place, though not always including all commercial practices covered by the UCPD, especially not misleading advertising, and more on a basis of mutual understanding than of a formal agreement. It would also be important that – to ensure accordance with Article 10 of the UCPD – complaints could always be brought directly before enforcement agencies. It should be noted that such a system cannot work with regard to so-called rogue traders. Rogue traders first of all are not likely to sign any code of conduct and, secondly, will not be willing to cooperate with self-regulatory bodies at all. Therefore more severe sanctions than the self-regulatory body has at hand are required (cf. chapter 1).

Self-regulatory codes could also help to create a “unified approach” for unfair commercial practices as principles of the UCPD could be applied also to B2B relations through codes. Advertising self-regulatory bodies could in addition – and to a certain degree already do – help to prevent misleading advertisement in the first place by promoting compliance with the codes and by issuing guidelines.

⁶¹ At the moment, complaints are free of charge for consumers in most but not all Member States.

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