

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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**Internal Market and
Consumer Protection**





DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: SCIENTIFIC AND ECONOMIC POLICY

INTERNAL MARKET AND CONSUMER PROTECTION

Misleading packaging practices

BRIEFING PAPER

Abstract

The briefing note answers the question of whether EU legislation on misleading packaging practices is required. For this purpose 13 national reports which examined the situation in the respective countries have been analysed. Available material on consumers' awareness, attitudes and behaviour has been explored. Consumer organisation enquiries have been conducted. Furthermore, it was analysed whether misleading packaging practice fall foul with existing EU legislation. Eventually, options for a legislative solution are discussed.

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

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LINGUISTIC VERSIONS

Original: [EN]

Executive summary: [DE, FR]

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Manuscript completed in December 2011.

Brussels, © European Union, 2012.

This document is available on the Internet at:

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LIST OF ABBREVIATIONS

AG	Amtsgericht
Art.	Article
Artt.	Articles
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BT-Drucks	Bundestagsdrucksache
CAI	The Consumer Association of Ireland
CEN	Comité Européen de Normalisation
CENELEC	Comité Européen de Normalisation Électrotechnique
EC	European Community
EEC	European Economic Community
e.g.	Exempli gratia
EichG	Gesetz über das Meß- und Eichwesen
EKPIZO	The Greece Consumer Association "The Quality of Life"
EN- Standards	European Standards
Et seq.	Et sequens
(et seqq.)	(et sequentia)
ETSI	European Telecommunication Standards Institute
EU	European Union
Fn.	Footnote
g	Gram
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil
HUF	Hungarian forint
KG	Kammergericht
LG	Landgericht
Min.Bl.fin.	Ministerialblatt des Bundesministers für Finanzen
OJ	Official Journal of the European Union

- OJ L** Official Journal of the European Union for legislation
- OFT** The Office of Fair Trading
- OLG** Oberlandesgericht
- OVG** Oberverwaltungsgericht
- ProdHaftG** Produkthaftungsgesetz
- SCRPA** State Consumer Rights Protection Authority in Lithuania
- UoKiK** Urząd Ochrony Konkurencji i Konsumentów
- UWG** Gesetz über den Unlauteren Wettbewerb
- WRP** Wettbewerb in Recht und Praxis

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EXECUTIVE SUMMARY

Based on national reports of 13 Member States, an overview is given of the misleading packaging practices in evidence, the level of consumer awareness of such practices is identified and possible infringements of pre-existing EU legislation are analysed. A solution to the problem is suggested. Some additional measures supporting the problem solving are considered.

Misleading packaging practices

Over the past few years it has been observed that producers are increasingly employing packaging practices in order to mislead consumers. Consumers are subsequently led into thinking that within the producer's packaging there is a **greater quantity** of the product than is actually the case, that the **product is of a better quality**, or that the **product possesses certain other characteristics**.¹ These strategies can be described as "misleading packaging practices".

For the purpose of this study misleading packaging is defined as any kind of product packaging that notwithstanding a cursory examination as a result of the size of the packaging, its form or design or other important elements directly related to the packaging, including as well comparisons of the product in its current state to previous packaging and to competitors' packaging, deceives or is likely to deceive the average consumer in relation to the quantity, the quality or other main characteristics of the product, and which causes or is likely to cause the average consumer to make a transactional decision that he would not have taken otherwise.

Two main categories of practices which relate directly or indirectly to packaging have been identified in the Member States examined. These are packaging practices related to the quantity and packaging practices related to the quality of the product. They occur as follows.

First, packaging sizes and the relation between packaging size and its content and similar strategies (e.g. adding gifts) are employed in order to lead the consumer into thinking that there is greater quantity of the product. Second, the design of the packaging implies wrongful or misleading information. Third, producers imitate another's packaging in order to imply a certain geographic provenance or quality of the product. Finally, the price may be wrongfully indicated or absent from the packaging.

There are **two main reasons for the application of such packaging practices**. In the majority of cases, producers introduce stealth price increases. In other cases packaging is employed because the product needs to prevail in the competitive market. Since the range of comparative products is great, consumers are not able to evaluate the differences between similar products in competitive markets. Hence, packaging practices are employed in order to influence consumers' final choices.

¹See e.g.: <http://www.berlin.de/special/gesundheits-und-beauty/essen-und-genieessen/gesund-ernaehren/1140633-215-mogelpackungenbreitensichschleichendaus.html>; <http://www.berlin.de/special/gesundheits-und-beauty/essen-und-genieessen/gesund-ernaehren/946197-215-mogelpackungenbeilebensmittelnnehmenzu.html>.

Consumer awareness and counteractions against such packaging practices

The national reports and the questionnaires answered by consumer organisations demonstrate that consumers are generally aware of misleading packaging practices but to a high extent anyway misled. It could be observed that there is a lack of case law, administrative decisions and political initiatives related to misleading packaging practices. Consumers do not take action against misleading packaging and consumer associations are active only in some of the Member States examined. The available information on misleading packaging practices is scattered in the media. A bundled set of data is rarely provided. The information given occur inordinated and irregularly. There is limited support by governments in informing and counteracting such practices. Only in Germany, the Czech Republic and Poland there is a public database which keeps track of misleading packaging practices and facilitates discussion with the producers. Furthermore, Germany is the only country where there is a governmental initiative counteracting misleading (packaging) practices.

Infringements of EU legislation

Misleading packaging practices fall foul of EU legislation. Particularly, provisions of the Unfair Commercial Practices Directive², the Directive concerning misleading and comparative advertising³ and the Unit Prices Directive⁴ were taken into focus. The analysis, however, revealed that the application of pre-existing provisions on new market developments (grocery shrink ray/ downsizing) is not self-evident. Under certain circumstances these practices could fall out of the scope of the Unfair Commercial Practices Directive and other European consumer protection regulations. Hence, **in some cases there would be a regulatory gap**. Clarification is desirable.

Furthermore, no application failures of the provisions of the Unfair Commercial Practices Directive and other regulations examined could be identified. However, it was reported that provisions on the indication of unit prices are not always enforced. It was also noted that in case unit prices are indicated but illegible or placed inconveniently no infringement of EU legislation could be established. This however leads to the ineffectiveness of the provisions of the Unit Prices Directive which may assist the the consumer in comparing products and may counteract the effect of misleading packaging.

Measures to be taken

Eventually, the study suggests some measures to be taken which could help to deal with misleading packaging practices. These are not exclusive and could be employed simultaneously.

² 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 and 2002/65/EC of the Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149/ 22 of 11.6.2005.

³ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376/21 of 27.12.2006.

⁴ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80/ 27 of 18.3.1998.

Favourably, the **Unfair Commercial Practices Directive⁵ should be amended**. A paragraph on “misleading packaging” could be inserted into Art. 6 of the Unfair Commercial Practices Directive because, first of all, this would lead to more clarity as regards the ability to apply Art. 6 on certain practices. Furthermore, Art. 6 could prove to be too narrow, not covering new market developments. Lately packaging practices occurred which exploit consumer expectations in respect of the quantity of a certain product which they were familiar with. These products were sold in the same packaging but with less quantity. It could be questioned whether the comparison between the previous version of the product with more quantity and the new introduced version of the product with less quantity already allows for the conclusion that a practice is misleading in the sense of Art. 6 of the Directive.⁶

Additionally, a **database** as already exists in Germany, the Czech Republic and Poland could be set up. A European Union database could be created or the EU could recommend that such a database should be created in each Member State. The latter proposal is insofar disadvantageous as language would constitute a barrier for communication between consumers and traders. Databases would be centralised providing information on consumer rights, examples of misleading packaging practices and to present new market and legal developments. They would be regularly updated. The producers could also have the possibility of responding to consumer complaints which would stimulate a dialogue between producers and consumers.

Furthermore, further **EN-Standards for packaging** could be established. These standards would define requirements for products to be described as fit for purpose. The advantage of these standards is, firstly, that they are flexible and could be extended at anytime. The standards would therefore be capable of being adapted to changing commercial practices in the market. Furthermore, such EN-Standards could be consulted to aid in determining when a packaging practice is misleading for the purposes of the Unfair Commercial Practices Directive.

Since it is claimed, that unit price indications are often illegible or placed inconveniently, it could be considered to **amend the Unit Prices Directive** adding provisions as to the font and font size and placement of the indication.

Furthermore, the **website of the European Commission on the Unfair Commercial Practices Directive** as well as the **Guidance for the Unfair Commercial Practices Directive could be updated** and completed in order to reduce interpretation problems.

As previously stated, there has been an exponential increase in the choice of similar products in all markets which are available to consumers. With greater choice, the decision-making process becomes increasingly difficult. Packaging can play a decisive role. Nevertheless, even the average consumer with the opportunity of examining the products in-store, though in a necessarily cursory manner, may not even notice the presence of a misleading packaging practice. A final possible solution would be to give the consumer a **general right to withdraw** from the contract. Once consumers realise, in most cases at home, and feel aggrieved as a result of the packaging practice, they could return the goods for a refund.

⁵ 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 market and amending Council Directive 84/450/EEC, Directives 97/7/EC and 2002/65/EC of the Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149/ 22 of 11.6.2005.

⁶ See chapter 3.1.1.1.1.5.

Conclusion

Misleading packaging practices constitute an important consumer protection problem in the markets of EU Member States.⁷ Particularly, it may be concluded that consumers generally are rather aware of these packaging practices. However, consumers are tendentially to a significant degree misled by the packaging practices in question. Even though there are valuable press releases, centralised and regularly updated databases providing information on misleading packaging and new market developments are rare. Moreover, consumer reaction on misleading packaging practices is poor. Particularly, consumers do not take legal actions. It is, hence, not astonishing that there is a lack of case law, administrative decisions and governmental actions. In the cases identified the parties taking legal actions were either public authorities or competitors.

Misleading packaging practices in most of the cases would fall foul of the Unfair Commercial Practices Directive and other European consumer protection provisions examined. Furthermore, the already existing legislation on price indication, misleading advertisement, labelling and packaging as an aspect of the protection of the environment are measures at least indirectly preventing misleading packaging practices.

However, certain new market developments (downsizing) under certain circumstances are not covered by the Unfair Commercial Practices Directive or the European consumer protection provisions examined. A regulatory gap in these cases, hence, exists. At least the application of Art. 6 of the Unfair Commercial Practices Directive on certain packaging practices is not in every case self-evident. A clarification could prove very useful as an aid for interpretation.

Price indication also is only helpful if it is conducted and legible. In the latter case an amendment of the Unit Prices Directive which would include provisions on the font or font size or placement of the unit prices would constitute a not intricate, but effective additional measure to deal with misleading packaging practices. As it was already pointed out above, there are also several non legislative measures that could help to deal with misleading packaging practices. Particularly, the setting up of a database could serve as an effective and uncomplicated alternative to the taking of legal actions.

The options presented can be imposed simultaneously. They are apt to interact with each other.

⁷ Conclusion from national reports and questionnaires answered by consumer organisations.

GENERAL INFORMATION

KEY FINDINGS

- Neither on EU level nor on Member States level there is a legal definition of “misleading packaging practices”.
- For the purpose of this study misleading packaging is any kind of product packaging including e.g. packaging size, form or design that notwithstanding a cursory examination deceives or is likely to deceive the average consumer, particularly as to the quantity or the quality, but also other main characteristics of the product and related to the product, taking into account as well comparisons of the product in its current state to previous packaging and to competitors’ packaging, and which causes or is likely to cause the average consumer to make a transactional decision that he would not have taken otherwise.
- When determining if a packaging practice is misleading, objective measures are to be applied, every individual case needs to be examined.

Definition of “misleading packaging”

“Misleading packaging” is not a legal term. A legal definition could neither be found in EU legislation nor in the legislation of one of the Member States covered. The legal literature provides only some descriptions of misleading packaging.⁸

Commonly misleading packaging is defined as product packaging that intentionally is designed to mislead the consumer into thinking that the product is of more quantity or of better quality than it is actually the case.⁹ However, this definition seems to be not apt for a legal definition of these practices. It premises that packaging was *intentionally* designed to mislead a consumer. This would constitute a very high barrier for identifying misleading packaging practices. In respect of the Unfair Commercial Practices Directive this barrier is only taken in the “black list” according to which a practice falling under the black list is in any circumstances unfair. However, the function of “intentionally” in the sense of this definition would only be to establish an unfair commercial practice without the advantage of the irrefutable presumption that the practice is misleading.¹⁰ Furthermore, it appears that there is no justification for such a high protection of the producer applying a misleading packaging practice.

Hence, eleven consumer organisations from eight countries were asked to give a definition of misleading packaging practices. Most of them pointed out that in case of misleading packaging, there is a discrepancy between the product packaging and the product itself as regards the quantity or quality or other properties of the product.

⁸ “Die „Mogelpackung“ verspricht mehr als sie hält. Wesensmerkmal der „Mogelpackung“ ist die Täuschung des Verbrauchers über die Füllmenge des erworbenen Produkts” (*Misleading Packaging promises more. Essential feature is that it deceives the consumer as to the quantity of the acquired product*), description by Kiethe and Groeschke in: Die Mogelpackung – Lebensmittel und wettbewerbsrechtliche Risiken der Produkteinführung, WRP 2003, p. 962 (962) with further references describing this term.

⁹ see: <http://www.businessdictionary.com/definition/deceptive-packaging.html>;
<http://www.answers.com/topic/deceptive-packaging>

Two consumer organisations restricted the scope of misleading packaging practices to those which are related to the quantity of the product.¹¹ However, the result of the question, how important quantity related issues are relative to other misleading packaging practices, was answered inconclusive. Six consumer organisations stated that these packaging practices are not important, five consumer organisations came to the conclusion that misleading packaging practices related to the quantity are relatively important. One consumer organisation explicitly stated that such packaging influences the consumer in his/ her choice.¹² Only one consumer organisation pointed out that the "average consumer" is a benchmark.¹³ One consumer organisation specified certain forms in which misleading packaging could occur (information on, shape and size of the package).¹⁴

The benchmark for misleading packaging must be the average consumer in the sense of EU legislation and jurisprudence.¹⁵ It was, however, questioned whether even an average consumer was able to recognise corresponding packaging practices.¹⁶ Consumers would base their purchasing actions on first impressions of the product exterior and would not engage in a considered examination of the product.¹⁷ For this reason the legal test that needs to be applied in order to determine whether a packaging practice was misleading should be the following: If the packaging still is apt to mislead the average consumer after a quick and superficial *prima facie* analysis, packaging needs to be considered as misleading.

Taking into account all these considerations, misleading packaging for the purpose of this study could be defined as follows:

Misleading packaging – any kind of product packaging that notwithstanding a cursory examination as a result of the size of the packaging, its form or design or other important elements directly related to the packaging, including as well comparisons of the product in its current state to previous packaging and to competitors' packaging, deceives or is likely to deceive the average consumer in relation to the quantity, the quality or other main characteristics of the product, and which causes or is likely to cause the average consumer to make a transactional decision that he would not have taken otherwise.

¹⁰ As to these consequences of the black list in the Unfair Commercial Practices Directive see *W.B. Schünemann* in: *Harte-Bavendamm/ Henning-Bodewig, Gesetz gegen den unlauteren Wettbewerb*, 2nd ed., Munich 2009, § 3 marginal number 457.

¹¹ *Test* (Czech Republic), *Federation of Consumers* (Poland).

¹² *Que Choisir* (France).

¹³ State Consumer Rights Protection Authority (Lithuania).

¹⁴ Office of Competition and Consumer Protection (Poland).

¹⁵ See Recital 18 of the Directive 2005/29/EC; see particularly: ECJ, 2.2.1994, C-315/ 92 – *Clinique*; ECJ, 16.7.1998, C-210/ 96 – *Gut Springenheide*, ECJ, 13.1.2000, C-220/ 98 – *Lifting Crème*. For more concrete information on the concept of the "average consumer" see: *Helm* in *Gloy/ Loschelder/ Erdmann, Wettbewerbsrecht*, 4th edition, Munich 2010, § 59 marginal number 76 et al.; for a more in-depth analysis of the term "average consumer" see also *Weatherill*, *Who is the average consumer*, in: *Weatherill/ Bernitz, The Regulation of Unfair Commercial Practices under Directive 2005/29 – New Rules and Techniques*, Oxford 2007, p. 115 et seqq.

¹⁶ See the Irish and Italian national reports.

¹⁷ See the Irish national report citing *Jacobs v Fruitfield Group Ltd* [2007] IEHC 368 at para.3.1; similar the Italian national report; see also: *Ambis* in *Erb/ Kohlhaas, Strafrechtliche Nebengesetze*, 185. Ergänzungslieferung (2011), § 7 EichG, marginal number 12.

Misleading packaging practices have to be identified by applying objective measures and by examining every individual case.¹⁸ Particularly, all functions of packaging need to be considered. These include marketing, advertising, efficient transportation of the product and keeping the product fresh. These elements are often formulated as legal requirements. They vary depending on the good to be packed. Furthermore, consumer expectations vary in relation to each type of product.¹⁹ When determining if a practice is misleading, these consumer expectations need to be regarded as well. Packaging practices and other misleading practices related to the design of or the information on the package, hence, are not always easy to distinguish.²⁰

Due to grey areas between different types of misleading packaging practices and the fact that most of the practices identified by national reporters were not solely related to the packaging itself, misleading packaging practices had to be analysed comprehensively.

The study concerns particularly misleading packaging practices related to the quantity of the product and such related to the quality of the product. On this account some misleading information practices need to be considered. The analysis of these practices, however, is restricted to cases, where misleading packaging and misleading information practices overlap.²¹ Particularly, practices related to labelling and advertising are excluded.

Choice of countries

Map 1: Investigated Member States

The study is based on reports from 13 Member States.²²



In order to assure representativeness of the study it was important to include as well Common Law systems (United Kingdom excluding Scotland, which is a mixed legal system, Ireland and Cyprus) and Civil Law countries. It was important to give an account of France and Germany as the archetypal systems of the continental legal tradition. The new EU Member States were also taken into consideration.

Source: http://ec.europa.eu/publications/booklets/eu_glance/79/de.pdf, p. 15; modified by author.

¹⁸ So called "Mogelpackungen" see: *Zipfel/ Rathke*, Lebensmittelrecht (2011), EichG § 7, marginal number 35; see also:

http://www.bmelv.de/SharedDocs/Downloads/Ernaehrung/KlarheitUndWahrheitInitiativeZusammenstellung.pdf?__blob=publicationFile, p. 4.

¹⁹ For example luxury products are expected to be packaged more generously, see: *Ambis* in Erbs/ Kohlhaas, Strafrechtliche Nebengesetze (04/2011), § 7 EichG marginal number 10; *Helm* in Gloy/ Loschelder/ Erdmann, Wettbewerbsrecht, 4th edition, Munich 2010, § 59 marginal number 333.

²⁰ Deception is usually caused as a consequence of the interaction of information on the package, advertisement and the packaging itself, see:

http://www.bmelv.de/SharedDocs/Downloads/Ernaehrung/KlarheitUndWahrheitInitiativeZusammenstellung.pdf?__blob=publicationFile, p. 3.

²¹ For the distinction of these categories see 1.2.1.

²² The Republic of Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Poland, Portugal, United Kingdom, see map 1.

1. MAIN TYPES OF MISLEADING PACKAGING PRACTICES

KEY FINDINGS

Misleading packaging practices either relate to the quantity or to the quality of the product.

Misleading packaging practices related to the quantity are:

- Bigger packages, same quantity, same price/ higher price
- Same packages, less quantity, same price
- Attaching “gifts” to the package
- Turning metric

Misleading packaging practices related to the quality are:

- Wrongful or misleading information on the package
- Copycat packaging
- New formula

Two main categories of misleading practices became apparent in all national reports. These were **misleading practices related to the quantity** and **misleading practices related to the quality of a product**.

1.1. Misleading packaging practices as to the quantity

The term “misleading packaging related to the quantity” of a product describes a practice directly related to the packaging itself in which consumers are misled into thinking that the packet contains greater quantity of the product than is actually the case. It can be subdivided into two main kinds of misleading practices: **Bigger packages, same quantity** and **same packages, less quantity**. Furthermore, practices like **attaching gifts** to the product and **turning metrics** are encompassed.

1.1.1. Bigger packages, same quantity, same price/ higher price

In the case of the category “Bigger packages, same quantity, same price/ higher price” products are placed in a packaging which functionally is not required.²³ The packaging standard, however, may vary. Respective guidelines developed by public authorities²⁴ as well as national legislation and case law need to be considered.

²³ See for Germany e.g.: <http://www.vzhh.de/ernaehrung/119742/Luftpackungen%20Top9.pdf>; for Italy see: http://www.consumatori.it/index.php?option=com_content&task=view&id=1326&Itemid=339; further examples are e.g. lifted bottoms and doubled wall thicknesses.

²⁴ See e.g.: Kiethe/ Groeschke, Die Mogelpackung – Lebensmittel und wettbewerbsrechtliche Risiken der Produkteinführung, WRP 2003, p. 962 (965), who refer to Min.Bl.fin. 1978, p. 65.

The following practices can be identified: A product packed in the described manner is newly introduced into the market or products which were already available are reintroduced into the market in new, bigger packaging.²⁵ However, the same quantity is sold at the same or a higher price. Both strategies suggest that there is more product than actually is the case.

Examples for such practices are:

- Non-functional or empty space in the packaging
- Lifted bottoms
- Doubled wall thickness
- Big caps
- Relatively too big covering box

In case of these packaging practices consumers are misled in order to influence their choices **due to the range of different comparable products** on the market. In Germany, Italy, Ireland, Lithuania and Poland it was noted that packages of certain products – usually in comparison with the packaging of competitors – either contained hardly any product at all or included air in order to make the amount sold appear greater. In Italy this practice is usually applied to cosmetic products. In Ireland and the United Kingdom such practices are known as non-functional “**slack fill**”.²⁶ In Germany²⁷, Poland²⁸ and Lithuania²⁹ the key word for some of these practices is “**selling air**”.

1.1.2. Same packages, less quantity

The category “same packages, less quantity” describes a practice by which a down-sized version of the product is introduced without changing the size of the packaging and not changing or even increasing the price.³⁰

²⁵ <http://www.vzh.de/ernaehrung/30287/inflation-in-kleineren-tueten.aspx>;
<http://www.vzh.de/ernaehrung/32618/2GenerationPreiserhoehung.pdf>.

²⁶ Slack fill means the difference between the potential capacity of packaging and its actual content, see: http://www.ehow.com/list_6811482_deceptive-packaging-tricks.html.

²⁷ See e.g.: <http://www.vzh.de/ernaehrung/119742/Luftpackungen%20Top9.pdf>.

²⁸ Pro-Test przeciw oszukańczym opakowaniom in: PRO-TEST: Nr 9 (102) wrzesień 2010, http://www.pro-test.pl/article_article/110112,0/Akcja+Pro_Test_Pro_Test+przeciw+oszukanczym+opakowaniom.html; Duże opakowanie, mała zawartość – jak płacimy za powietrze” (6.5.11), see: http://wyborcza.biz/biznes/1,101562,9551222,Duże_opakowanie_mała_zawartosc_jak_placimy_za_powietrze.html.

²⁹ For Lithuania it was reported that e.g. the product is placed into a bigger package, not changing the quantity of the product. When the product is placed into a bigger package it is more likely that the buyer will notice it on the shelves of the supermarket. This tactic is used when selling for example chemical products for household.

³⁰ In **France** just a few articles on misleading packaging are accessible, see: <http://www.quechoisir.org/commerce/actualite-emballages-libres-surveillez-le-prix-au-kilo>;
<http://www.clcv.org/Liberalisation-des-formats-d-e.cp5.0>; <http://www.clcv.org/Liberalisation-des-formats-d-e.7065.0.html>; <http://www.defimedia.info/articles/5618/1/Information-des-consommateurs--Packaging-decevant--ou-trompeur/Page1.html>.

Other sources include: http://consottisier.blogs.liberation.fr/marie_dominique_arrighi/2008/03/packaging-tromp.html and <http://pundo3000.com/werbunggegenrealitaet3000.htm>; see also: Emballages libres – surveillez le prix au kilo – 19 avril 2009; for examples for **Germany**, see: <http://www.lebensmittelklarheit.de/cps/rde/xchg/lebensmittelklarheit/hs.xsl/2085.htm>;

<http://www.vzh.de/ernaehrung/119742/Luftpackungen%20Top9.pdf>; see also misleading packaging of the «second generation»: <http://www.vzh.de/ernaehrung/32618/2GenerationPreiserhoehung.pdf>; such practices have also been identified in **Greece**. The described practices in **Ireland** are known as “Grocery Shrink Ray”, see: <http://www.independent.ie/lifestyle/good-buys-products-hit-by-shrink-ray-1460229.html>. Such practices have also been listed in the **Italian** and **Lithuanian** reports. Examples for packaging practices in Portugal are given by DECO (Associação Portuguesa para a Defesa do Consumidor / Portuguese Association to the Consumer Protection) are available in press releases in internet (www.deco.proteste.pt). One example is the omission of the net drained weight for frozen products, which misleads the consumer, as he pays for ice instead of the product (package of frozen shrimp). For the **United Kingdom** see: *Cadbury Dairy Milk*: 99p bar down from 140g to 120g; *Tropicana Fruit Juice*: *PepsiCo* 1.75 litres to 1.5 litres; *Maltesers*: A £1 box was 146g, then 120g; *TOBLERONE*: £1 for 200g, then 170g; Tetley Teabags: £1 box from 100 bags to 88 bags. Cited from Daily Mirror article. Note on website

The misleading effect of such practices is often deepened by changing the outward appearance of the packaging to distract from the fact that there is less quantity of the product sold.³¹

Examples for such practices are³²:

- minimal reduction of weight, so that the packaging can stay as it was
- reduction of the number of sheets of toilet paper or kitchen roll
- embossing the surface of the paper
- dividing the product into smaller unities without keeping the same unit
- changing the positioning of the product (e.g. cookies inside the plastic package which leads to a smaller amount of cookies); changing its shape (e.g. a bottle design appearing larger than other bottles of the same volume)
- changing portions sold, for example, changing the number of filets of chicken from four to three without changing the price

These practices can be distinguished from the previous practices because, here, **hidden price increases** are imposed which are supposed to remain unnoticed.³³

In most of the countries these practices are known as “**downsizing**” or “**grocery shrink ray**”.

1.1.3. Gifts

Producers attach “gifts” to the products suggesting that the additional good is for free. However, when comparing the same product with and without the “gift” it usually becomes apparent that the gift has to be paid for.³⁴ The same is true when two or more products of the same or similar kind are packed together.³⁵

A practice which could be listed at this point, but also constitutes a practice which could fall under point 1.2., is the indication of a product as being of “extra” quantity.³⁶ In these cases unit prices did not actually change.

1.1.4. Turning metric

For UK it was reported that the consequences of turning metric are apparently still being felt as products which were sold, for example, in half-pounds then converted to 227g are subsequently reduced to 200g.

about changing from 1l (£2.85) cartons to 750ml (£2.79) and 1.25l, (£3.69): http://innocentdrinks.typepad.com/innocent_drinks/2011/06/big-and-slightly-smaller-change-is-afoot.html.

³¹ For **Lithuania** it was reported that e.g. dish washer, coffee, animal food packaging has more curves, which purpose is to reduce the volume of the package and thereby cause an “optical illusion”. This was also pointed out in the report for **Ireland**. Here it is stated that due to such practices it is apparent that consumers are more swayed by the overall visual impression of the package (including total package size) and do not always consult the statement of net quantity on package or notice that the package has shrunk.

³² The first five examples were listed on the following Polish homepage of the « Federacja Konsumentów » (federation of consumers): <http://www.federacja-konsumentow.org.pl/story.php?story=409>.

³³ For **Ireland** it was reported that the consumer would seem to be placed in a vulnerable position owing to this asymmetric exchange of information, see: Package downsizing: is it ethical? Omprakash M K. Gupta, Sudhir Tandon, Sukumar Debnath, Anna S. Rominger, p.241; See cf, <http://www.valueireland.com/2009/06/businesses-giving-smaller-portions-but-charging-the-same/>; <http://www.rte.ie/tv/theconsumershow/s2p4.html>.

³⁴ See for **Hungary** e.g.: Decision KMF-1125/1/2010 (A toothbrush is attached to a twin pack of toothpaste. This toothbrush is declared as a gift. However, the price for two packs of toothpaste without a toothbrush amount to HUF 478 and the twin pack with toothbrush HUF 579); Decision KMF – 07421-7/2009 (a mop is attached to cleaning supplies indicating that the mop is a gift).

³⁵ For **Hungary** see: Decision BPF-00285-1/2011 (A refilling bag is attached to one piece of liquid soap and the joint packaging is indicating that the refilling bag is for half price).

³⁶ Other attracting promotions are describing the good as e.g. “jumbo”, “extra large”, “giant”, see: <http://www.federacja-konsumentow.org.pl/story.php?story=409>.

1.1.5. Packaging after the deregulation of nominal quantities for pre-packed products

Criticism was also raised concerning the abolishment of provisions on nominal quantities for pre-packed products due to the implementation of Directive 2007/45/EC³⁷. According to Recital 5 of the Directive free nominal quantities in certain sectors allow the producers to provide consumers with goods according to their taste. Furthermore, it was pointed out that the abolishment of nominal quantities promotes competition in the market which can lead to better quality and lower prices.³⁸ These are very strong and persuasive arguments. In France and Germany it was feared, that the liberalisation of the rules on nominal quantities for packaging might diminish the level of consumer protection and encourage misleading packaging practices.³⁹ Such a case was, however, not reported.⁴⁰

This practice would overlap with the practices described above.⁴¹

1.2. Misleading packaging practices as to the quality

1.2.1. Wrongful or misleading information transferred by packaging design

It proved difficult to find relevant case law, administrative decisions and even actions by consumer associations concerning market practices directly related to packaging which is misleading as to the quantity of the product. Most of the identified cases and administrative decisions dealt with packaging practices designed in such a manner that wrongful or misleading information concerning the quantity, quality or other specific characteristics of the product were transferred. These practices relate to e.g. misleading photos of the product⁴², as well as false and confusing indications.⁴³ They need, however, to be distinguished from misleading information practices, e.g. wrongful information on the package. As long as the packaging itself (by its design, form, size) transfers certain information it can be assigned to misleading packaging practices.

³⁷ Directive 2007/45/EC of the European Parliament and the Council of 5 September 2007 laying down rules on nominal quantities for prepacked products, repealing Council Directives 75/106/EEC and 80/232/EEC, and amending Council Directive 76/211/EEC, OJ L 247/17 of 21.0.2007.

³⁸ See Recital 5 of the Directive ; similar also here:

http://europa.eu/legislation_summaries/consumers/product_labelling_and_packaging/l32049_de.htm.

³⁹ For **Germany** see: <http://www.vzh.de/ernaehrung/30287/inflation-in-kleineren-tueten.aspx>; <http://www.manager-magazin.de/finanzen/artikel/0,2828,618642,00.html>, <http://www.test.de/themen/essen-trinken/meldung/Mogelpackungen-Weniger-drin-als-frueher-4129048-4129059/>; <http://www.myheimat.de/laetzen/ratgeber/mogelpackung-20-verbraucherschutz-veroeffentlicht-neue-liste-d816937.html>; <http://www.baeko-magazin.de/archiv/meldung/1397-Packungsgroessen-von-EU-freigegeben/>. For

France see: "Libéralisation des formats d'emballage" – 17.03.2011.

⁴⁰ Information on <http://www.vzh.de/ernaehrung/30287/inflation-in-kleineren-tueten.aspx> from September 2010. However, any new information suggesting that the abolishment of nominal quantities for pre-packed goods was exploited by producers in order to mislead the consumer could also not be found.

⁴¹ See chapter 1.1.2.

⁴² Even though the information concerning the ingredients written on the product are correct, the photos on the package suggest a greater quantity of one or more ingredients, see e.g.:

<http://www.lebensmittelklarheit.de/cps/rde/xchg/lebensmittelklarheit/hs.xsl/2347.htm>.

⁴³ In **Bulgaria** cases concerning misleading labelling of indications of the quantity of the product were notified (e.g. The indication was «200 gr. + 10 %». In fact the package included only 200 gr what constituted 10 % more than the former package of the same product). In **Lithuania** there have been a number of complaints regarding frozen fish, when the quantity of ice was bigger than stated on the package. See for example:

<http://nevartok.lt/2-maisto-produktai/perki-zuvi-%E2%80%93-moki-uz-leda/>;

<http://www.diena.lt/dienrastis/ekonomika/ledas-uz-zuvies-kaina-115376>. In **Portugal** the following examples of misleading information were listed: The pictures and the description which often were found on packages of digital cameras and mp3-players did not correspond with the products. Cosmetics were sold in green packages in order to suggest nature-based ingredients even though this was not the case.

However, when packaging only in connection with written information misleads the consumer and the information would be misleading even without being in any manner presented on the package, the deception cannot be defined as misleading packaging practice but constitutes a classic deception by wrongful information.⁴⁴

1.2.2. Copycat packaging

Copycat packaging is packing products in such a manner that another manufacturer's packaging is copied.⁴⁵ These packaging practices play an important role within the framework of the study. They may mislead consumers into thinking that they are buying a premium brand. The design and colour of the package and images on the package are confusing.⁴⁶ The "copycat" producer thereby avoids investing in brand development and rides free at its rival's expense.⁴⁷ The consumer may be misled as regards three aspects: the consumer might take the copycat product for the original, the consumer could be misled as to the quality or the consumer could be misled as to the origin of the product.⁴⁸

1.2.3. New product formula

Another common practice though not necessarily related to the packaging itself, is the reintroduction of products with a new formula. The consumer is misled into thinking that the product was improved. This might be the case. However, in some cases producers simply reintroduce a product containing slightly less of a certain ingredient.⁴⁹ A milligram less of one ingredient would not be noticeable for the consumer but effective when aiming to decrease production costs. Although product costs decrease, the price remains the same.

1.3. Other misleading practices

Price indication missing/ wrongful

In some national reports wrongful or missing price indication played a major role. In this regards, price indication and in particular the indication of unit prices was usually missing, wrongful or illegible.⁵⁰

⁴⁴ When asking consumer organisation for some examples of misleading packaging practices, most of them (approximately 6 out of 11) named misleading information practices among other examples.

⁴⁵ «Distinctive features of a brand's packaging are hijacked in order to trick shoppers into buying something they believe to be that brand, made by the brand manufacturer or sharing the reputation of that brand», see:

<http://www.britishbrandsgroup.org.uk/the-group/policies>; compare also:

http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_de.pdf, p. 42; see also: *Marsland*, Unfair Commercial Practices: Stamping out Misleading Packaging, in: Weatherill/ Bernitz, The Regulation of Unfair Commercial Practices under EC Directive 2005/29 – New Rules and New Techniques, Oxford 2007, p. 191 (192).

⁴⁶ Such practices have been reported for **Ireland**, **Italy** and the **United Kingdom**. See for **Ireland**: *Jacobs Fruitfield v United Biscuits supra*; *Irish Distillers Ltd v Cooley Distillery PLC* [2008] IEHC 236; for the **United Kingdom** the infamous case of *United Biscuits (U.K.) Ltd. v Asda Stores Ltd.* [1997] RPC 513 in which a supermarket had started selling a chocolate biscuit range by the name of 'Puffin', the packaging of which also resembled the market-leading brand 'Penguin', and was found liable under the tort of passing off; see also: <http://www.britishbrandsgroup.org.uk/pages/parasitic-copying>. For some examples, see: <http://www.britishbrandsgroup.org.uk/upload/File/Similar%20pkg%20examples%202010.pdf>.

⁴⁷ Lookalike Products. How close is too close, Aine Matthews,

<http://www.lkshields.ie/htmtdocs/publications/pub299.htm>.

⁴⁸ http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_de.pdf; for further information on the impact of copycat packaging on consumer see *Marsland*, Unfair Commercial Practices: Stamping out Misleading Packaging, in: Weatherill/ Bernitz, The Regulation of Unfair Commercial Practices under EC Directive 2005/29 – New Rules and New Techniques, Oxford 2007, p. 191 (192, 193) with references to the RSGB "Study of Lookalikes" in March 1998.

⁴⁹ See: <http://www.test.de/themen/essen-trinken/meldung/Mogelpackungen-Weniger-drin-als-frueher-4129048-4129052/>.

⁵⁰ This was reported for the **Czech Republic**, **Bulgaria** and **Poland**. In **Bulgaria** cases were identified where the net price was not indicated. In other cases only the « recommendable» and not the actual price was indicated which in most of the cases was much higher. In **Poland** reports of the commercial inspection show that there are many violations of the obligation to indicate unit prices. In 2006 46,3 % of the 1650 controlled parties did either not at all indicate prices or did not indicate unit prices or units; 15, 3 % of 1311 parties did not calculate the unit

Unit price indication is to be mentioned in the context of misleading packaging practices since it can serve as a very useful measure preventing the consumer to be misled by packaging practices as addressed in this study.

prices correctly. In 2007 an improvement was notable. For **Poland** see: Informacja o wynikach kontroli prawidłowości i rzetelności organizowania promocji przez przedsiębiorców (BK/ AŻ – 034 – 4/ 08/ AJ) which is available at: <http://uokik.gov.pl/szukaj.php?szukaj=Informacja+o+wynikach+kontroli&x=0&y=0>; and Informacja o wynikach kontroli prawidłowości wprowadzania do obrotu produktów żywnościowych oferowanych w promocjach w dużych sieciach handlowych (BK/ AŻ – 034 – 1/ 07/ AJ).

2. CONSUMERS' AWARENESS, ATTITUDES AND BEHAVIOUR TOWARDS MISLEADING PACKAGING PRACTICES

KEY FINDINGS

- In none of the countries there is a survey directly addressing consumers' awareness or attitude or behaviour towards misleading packaging practices. Such a survey is strongly recommended.
- According to consumer organisations (eleven from eight countries) consumers are neither unaware nor very aware of misleading packaging practices. On a scale of 1 to 4, with 1 being unaware and 4 being very aware, the middle field was balanced. On the grounds of these results it may, hence, be concluded that consumers are generally aware of misleading packaging practices. The intensity of awareness, however, is not clear.
- According to consumer organisations consumers are misled by the packaging practices in questions. A tendency to "very misled" became apparent.
- However, there is no consensus about the degree of importance of misleading packaging practices relative to other consumer problems. In this context two of eleven consumer organisations stated that misleading packaging practices are not important, whereas two of eleven consumer organisations came to the conclusions that misleading packaging practices are very important. The middle field was again balanced. The majority of consumer organisations, however, would not state that misleading packaging practices are not important in comparison to other consumer problems.
- The picture drawn by the national reporters as regards consumer awareness in most cases corresponds to the results revealed in the consumer organisation enquiries.
- The national reports revealed that consumer pro-activity is rare and varies from Member State to Member State. In at least four of thirteen countries no complaints concerning misleading packaging practices were registered. It became also apparent that consumers rather expect consumer organisations or public authorities to enforce their rights. Administrative decisions and case law is either not existing or rare. Legal actions (if existent) are not taken by consumers but by public authorities or competitors. Consumers either do not react on misleading packaging practices, switch brands and/ or in some of the Member States contact consumer organisation complaining about misleading packaging practices.

2.1. Methodology

The conclusions made in the following chapters are based on information revealed from the materials available. In order to establish the extent of consumer awareness and deception, their attitudes and behaviour towards such practices indirectly relevant studies, items in the press, internet websites, the actions of consumer associations, consumer campaigns, political initiatives, administrative decisions and case law were evaluated.

Furthermore, questionnaires were sent out to consumer organisations addressing particularly the questions on consumer awareness, the extent to which consumers are misled and on the importance of misleading packaging practices relative to other consumer protection problems.

However, a survey addressing consumers' awareness, attitudes and behaviour and which also takes into account cultural, educational, gender and age criteria could not be found in any of the countries investigated.⁵¹ Such a study is strongly recommended.⁵²

2.2. Consumer awareness and the extent to which consumers are misled

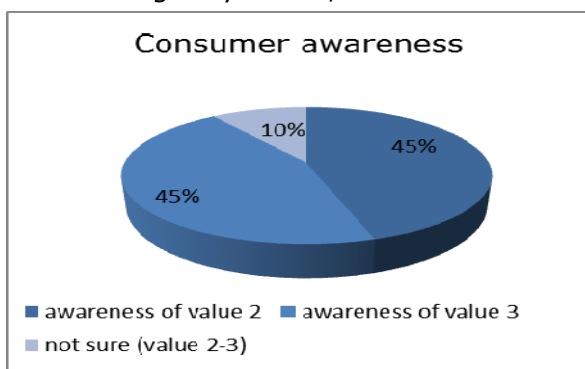
The following chapter analyses: 1) the answers revealed from consumer organisation enquiries and from the national reports concerning consumer awareness and 2) the extent to which consumer are misled.

2.2.1. Consumer organisation enquiries

The following figures mirror the results revealed from the enquiries of consumer organisations. The enquiries were conducted in **eight of the thirteen countries** investigated.⁵³ From these eight countries **representatives of eleven consumer organisations** were interviewed.⁵⁴

Figure 1: Consumer awareness according to consumer organisations

Consumer organisations were asked to evaluate on a scale to 4, with 1 being unaware and 4 being very aware, to what extent they think consumers are aware of misleading



Packaging practices.

None consumer organisation came to the conclusion that consumers are definitely unaware or very aware of misleading packaging practices.

Five consumer organisations⁵⁵ came to the conclusion that consumers' awareness may be valuated with "2";

Source: Author

five consumer organisations⁵⁶ assessed consumer awareness with "3".

⁵¹ However, it is noteworthy, that within the framework of the initiative "*Klarheit und Wahrheit bei der Kennzeichnung und Aufmachung von Lebensmitteln*" (clear and honest indication and presentation of foodstuffs) against misleading trading practices set up by the *Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz* (Federal Ministry of nourishment, agriculture and consumer protection) it is planned to conduct surveys on current consumer expectations, see: http://www.bmelv.de/SharedDocs/Downloads/Ernaehrung/KlarheitUndWahrheitInitiativeZusammenstellung.pdf?__blob=publicationFile, p. 7.

⁵² For **Germany** e.g. it has been pointed out that the set of data currently available is insufficient and that its extension could help public authorities when taking measures against misleading (packaging) practices, see: http://www.bmelv.de/SharedDocs/Downloads/Ernaehrung/KlarheitUndWahrheitInitiativeZusammenstellung.pdf?__blob=publicationFile, p. 7. For other countries this also became apparent in the national reports.

⁵³ These were : Bulgaria, the Czech Republic, France, Germany, Greece, Lithuania, Poland, United Kingdom. The correspondents for Cyprus, Ireland, Italy and Portugal did not receive any answers from the consumer organisations in their countries.

⁵⁴ It was asked to interview at least two consumer organisations from each country. However, either the consumer organisations contacted did not answer or there was only one consumer organisation in the respective country to be interviewed. Only the correspondents from Bulgaria, Germany and Poland received answers from two consumer organisations each.

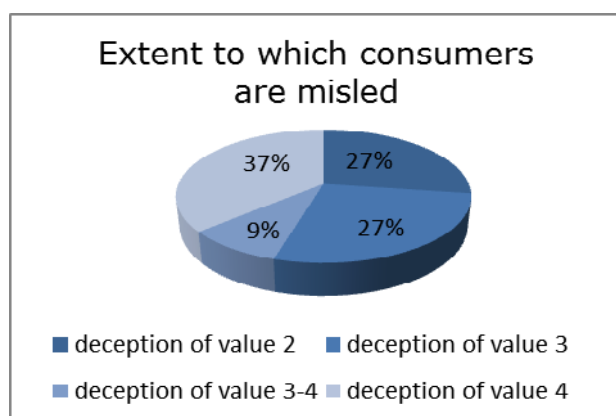
⁵⁵ Test (Czech Republic); Que Choisir (France); EKPIZO (Greece); State Consumer Rights Protection Authority (Lithuania) ; Federation of Consumers (Poland).

One consumer organisation⁵⁷ was not sure as regards the intensity of consumer awareness. It valued consumer awareness with 2-3.

A clear tendency to “aware” or “unaware” did not become apparent. However, none of the consumer organisations assumed that consumers are unaware of misleading packaging practices. Hence, it may be concluded that according to the consumer organisations interviewed consumers rather are aware of misleading packaging practices. There is, however, no consensus as regards the intensity of consumer awareness.

Figure 2: Extent to which consumers are misled according to consumer organisations

Consumer organisations were also asked to evaluate on a scale to 4, with 1 being not misled and 4 being very misled, to what extent consumers are misled by packaging practices.



Source: Author

None consumer organisation came to the conclusion that consumers are not misled by the packaging practices in question.

Three consumer organisations⁵⁸ valued the extent to which consumers are misled with “2” and three consumer organisations⁵⁹ with “3”.

One consumer organisation⁶⁰ came to the conclusion that consumers’ deception should be valued with “3-4”.

Finally, four consumer organisations⁶¹, however, valued the deception of consumers with “4”, very misled.

Here a clear tendency to “very misled” (73 %) became apparent.

⁵⁶ Independent Union of the Consumers in Bulgaria; Bulgarian National Association « Active Consumer »; Lebensmittelklarheit.de (Germany); Office of Competition and Consumer Protection (Poland); OFT (United Kingdom).

⁵⁷ Verbraucherzentrale Hamburg.

⁵⁸ State Consumer Rights Protection Authority (Lithuania); Office of Competition and Consumer Protection (Poland); OFT (United Kingdom).

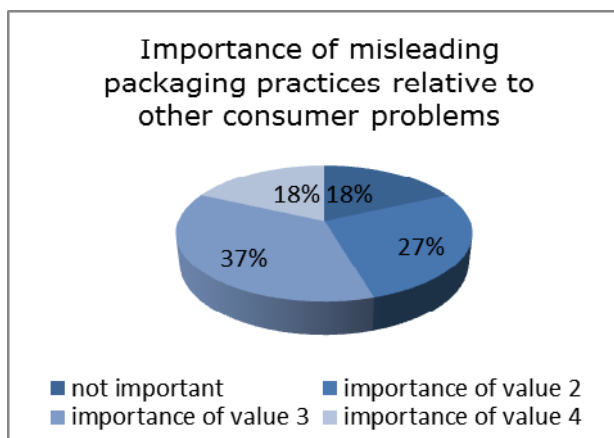
⁵⁹ Independent Union of the Consumers in Bulgaria; Test (Czech Republic); Lebensmittelklarheit.de (Germany).

⁶⁰ Bulgarian National Association « Active Consumer ».

⁶¹ Que Choisir (France); Verbraucherzentrale Hamburg; EKPIZO (Greece); Federation of Consumers (Poland).

Figure 3: Importance of misleading packaging practices relative to other consumer problems according to consumer organisations

Consumer organisations were asked to evaluate on a scale to 4, with 1 being not important and 4 being very important, how important misleading packaging is relative to other consumer problems.



Two of eleven consumer organisations⁶² think that misleading packaging practices are not important relative to other consumer problems. It is pointed out that consumer complaints concerning misleading packaging practices are rare and consumers rather have problems with wrongful labelling and misleading information.⁶³ Furthermore, Test⁶⁴ came to the conclusion that misleading packaging practices do only have one negative consequence for consumers which is their disappointment. Misleading

Source: Author

packaging practices are not related to any other consumer problems.

Two of eleven consumer organisations⁶⁵, however, valued the importance of misleading packaging in relation to other consumer problems with "4", very important. Firstly, it was pointed out that packaging is decisive as regards the purchase choices of consumers. Secondly, misleading packaging practices lead to price increases that could not be enforced in a usual manner and which have a great impact on consumers because they lead to notably high costs.⁶⁶

Three of eleven consumer organisation⁶⁷ said that misleading packaging practices have an importance value of "2".

Four consumer organisations⁶⁸ came to the conclusion that the importance of misleading packaging practice relative to other consumer problems needs to be valued with "3".

The answers are spread on the whole scale, being balanced between not important and very important. The middle field is likewise quite counterbalanced. A tendency of the views to not important or very important is not apparent. Particularly, the arguments of the consumer organisations in favour of and against the importance of misleading packaging practices are contrary.

⁶² Test (Czech Republic); State Consumer Rights Protection Authority (Lithuania).

⁶³ State Consumer Rights Protection Authority (Lithuania).

⁶⁴ Consumer organisation in the Czech Republic.

⁶⁵ Que Choisir (France); Verbraucherzentrale Hamburg.

⁶⁶ Verbraucherzentrale Hamburg. (A similar argument –however in another context– was raised in the Bulgarian national report. It was pointed out that for certain groups of consumers (e.g. extended families, retired persons etc.) small differences in quantity have decisive effects.)

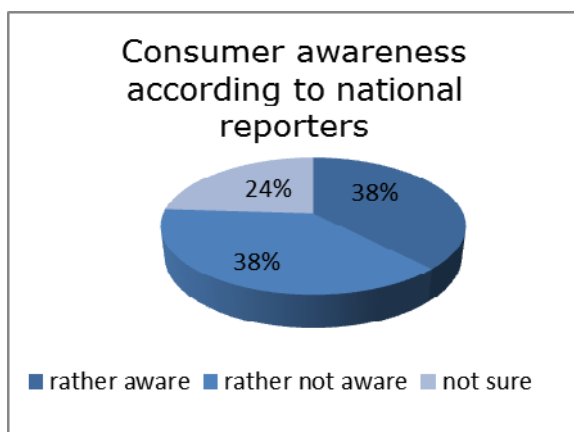
⁶⁷ Lebensmittelklarheit.de (Germany); EKPIZO (Greece); OFT (United Kingdom).

⁶⁸ Independent Union of the Consumers in Bulgaria; Bulgarian National Association « Active Consumer »; Office of Competition and Consumer Protection (Poland); Federation of Consumers (Poland).

2.2.2. Country reports analysis

Figure 4: Consumer awareness according to the national reports⁶⁹

The following figure mirrors the results national reporters revealed to the question whether consumers in their countries are aware of misleading packaging practices from their analysis of press releases, internet websites, actions of consumer associations, consumer campaigns, political initiatives, related surveys, case law and administrative decisions.



Source: Author

National reporters from five countries came to the conclusion that consumers rather are unaware of misleading packaging practices.⁷⁰

National reporters from five other countries⁷¹ stated that they think that consumers rather are aware of misleading packaging practices.

Three national reporters from the three remaining countries⁷² could not give a clear answer to the question whether consumers are aware of misleading packaging practices.

2.2.2.1. General considerations

When assessing consumer awareness regard is to be held to several criteria. First of all, the benchmark for the assessment of awareness is the average consumer conducting a cursory examination.⁷³

Secondly, it needs to be considered that consumer awareness varies with respect to the gender, age, the place of residence and the cultural and educational background.⁷⁴ Hence, consumer awareness may also vary in different Member States.

Thirdly, the average consumer can belong to a specific group of consumers (e.g. mothers, extended families, retired persons etc.), who are more sensitive when buying everyday products frequently and to whom differences in quantity or quality are particularly decisive.⁷⁵

Furthermore, it needs to be analysed whether packaging constitutes a decisive element when purchasing. From this it may be concluded whether consumers are aware of such practices.

⁶⁹ Figures are rounded.

⁷⁰ Cyprus, Czech Republic, Greece, Hungary, Italy.

⁷¹ Bulgaria, Germany, Ireland, Lithuania, Portugal. Based on the consumer organisation enquiries it was pointed out for Bulgaria that the number of persons being aware of misleading packaging practices increases but when asking about consumers awareness regard to should be held to the place of living and the age of the consumers. For further information on the views of other reporters see beneath.

⁷² Poland, France and the United Kingdom. The reporter for France and the United Kingdom stated that consumers either are unaware of misleading packaging practices, or such practices are not recognised as a problem. For Poland it was pointed out that consumer activity seems very poor. From this it could, however, not be concluded that consumers unnot aware of misleading packaging practices. For further see beneath.

⁷³ See the deliberations on the definition of misleading packaging practices in the chapter titled « general information ».

⁷⁴ Compare distinctions made in comparable surveys undertaken by the UoKiK (Poland) on the "awareness of consumer rights and analysis of barriers preventing consumers from safe and satisfactory participation in the market", see: <http://www.uokik.gov.pl/publications.php#faq1132>.

⁷⁵ Remarks by the Bulgarian reporter and the Bulgarian consumer organisations.

Surveys directly addressing packaging practices and their importance on consumers' choices have not been conducted. However, there are related surveys from which conclusions possibly could be drawn.

For example in Poland surveys (of 2009 and 2007) exist on the "awareness of consumer rights and analysis of barriers preventing consumers from safe and satisfactory participation in the market".⁷⁶ The survey (of 2009) focuses on six different groups of persons of different gender, age, education and place of residence. According to the survey the most important motive for buying a certain product is its price.⁷⁷

A similar result was revealed in a Lithuanian survey on "consumer attitudes towards information presented on the labels of food products and on food safety" conducted by the Lithuanian Veterinary Academy, Kaunas University of Technology and State Food and Veterinary Authority.⁷⁸ Relatively to the price packaging as well as advertisement⁷⁹ does not play a decisive role in most cases.⁸⁰

In comparison to the motive "price" 39 % of a sample of 1000 persons interviewed about their motives of choice when buying food said that packaging is decisive and 29 % of a sample of 1000 persons interviewed admitted that packaging is decisive when buying cosmetics.⁸¹ Also, 39 % of the persons interviewed think that advertisements are a good source of information.⁸² Furthermore, the majority claims that they can distinguish true from false information in advertisements.⁸³ From the fact that 39 % of the interviewed persons think that packaging could be decisive, it could be concluded that consumers are not sufficiently aware of misleading packaging practices. Otherwise packaging would play a more important role for their purchase choices. This assumption, however, needs to be proved.

For that purpose "price" as the main motive for consumers' choices needs to be analysed. There are two possibilities of interpreting this. (1) Either the term "price" could include the unit price or (2) it could simply mean the actual price of the good presented. Eventually, the study simply did not define "price".

Consumers, who state that the price is their main reason for purchasing a product, also could take the unit price into consideration. Hence, if considering the price also includes the comparison of unit prices, it could be concluded that consumers are aware of misleading packaging. Such packaging strategies would then be ineffective in most cases. This would also mean that behaviour towards misleading packaging – namely avoiding products which are misleadingly packaged- could be identified. However, this conclusion cannot be drawn from the survey.

⁷⁶ <http://www.uokik.gov.pl/publications.php#faq1132>; (hereinafter: « the survey »).

⁷⁷ 86 % of 1000 persons interviewed about their motives of choice when buying food; 79 % of 1000 persons interviewed about their motives of choice when buying cosmetics; see the survey on p. 21; see also in "Idą święta – kupuj świadomie" (30.3.2007) to be found on: http://www.uokik.gov.pl/aktualnosci.php?news_id=286 and "Święta w promocji" (18.3.2008) to be found on: http://www.uokik.gov.pl/aktualnosci.php?news_id=396. This was furthermore pointed out in the Irish report.

⁷⁸ Here 77,2 % of 400 persons interviewed stated that, first of all, they look at the price of a product, see : http://www.lmai.lt/failai/44_1_Stankeviciene.pdf. It was also reported for **Ireland** that consumers are becoming more price conscious.

⁷⁹ 21-22% of 1000 persons interviewed, see the survey p. 21, 22.

⁸⁰ The consumers' federation (*Federacja Konsumentów*), however, points out that the packaging of a product is one of the basic factors deciding about our market choices. The shape and functionality of the package may both help as well as harm the image of the product. According to them the package itself is a statement addressed to the customer, see: <http://www.federacja-konsumentow.org.pl/story.php?story=409>.

⁸¹ See the survey on p. 21.

⁸² 39 % of 1000 persons interviewed, see the survey p. 77.

Hence, there are two possibilities left. Either consumers do not take unit prices into consideration or the study does not reveal any valuable information on consumer awareness because the meaning of "price" was not determined before the survey was conducted.

Also, the fact that 39 % of persons regard advertising as a good source of information and that the majority claims it can estimate which information is false and which is correct (which might be regarded as a deliberation over the producers' practices), may not be projected on the problem of misleading packaging. Whereas advertisement serves the function of promoting the product in a subjective manner and thereby by its nature needs to be questioned, misleading packaging often remains unnoticed, having a somewhat unconscious effect on the consumer. In case of misleading packaging the state of questioning the practice is usually even not reached.

Again it becomes obvious that well-founded results on consumer awareness should be rather obtained by a comprehensive survey directly addressing misleading packaging practices.

Finally, regard is to be held to the expectations of consumers as regards a specific product, its packaging and packaging function. As already pointed out in chapter one this can vary. For example consumers expect luxurious products to be packaged generously. When giving something as a present packaging fulfills also a specific function. Consumers in this case want it to be larger than necessary.

2.2.2.2. Consumer awareness according to the national reports

2.2.2.2.1. Member States where consumers are not aware of misleading packaging practices

For **five out of thirteen Member States**⁸⁴ barely any information on misleading packaging practices could be found. In none of these Member States governmental consumer policies, administrative decisions nor case law concerning misleading packaging practices could be identified.

From these five Member States only in the **Czech Republic** consumer association activities are on-going. A database collecting information and cases of misleading packaging practices has been set up.

According to the **Greek Secretary** for Consumer Protection, the majority of consumers complain about substantial properties of a product, namely the lack of compliance with the standards set by the producer or about a default, but not about the package itself. Until now, no complaints about misleading packaging have been reported.

In the **Czech Republic** consumers who follow the magazine dTest published by the non-profit organisation Test⁸⁵ are acquainted with the problem, as there was a public call addressed to consumers and published in the above mentioned periodical in July 2010 with the title "Do you buy air?" (Kupujete vzduch?).

⁸³ See the survey p. 78.

⁸⁴ Cyprus, the Czech Republic, Greece, Hungary, Italy.

⁸⁵ The non profit organization "Test"- association of consumers was founded in 1992. It conducts testing of all kind of products - food, electronic, cosmetics, transportation, finance etc. and its results publish in the magazine dTest and contributes so to the protection of the consumer; see : <http://www.dtest.cz/>.

So there are a certain number of consumers who are aware of the problem of oversized packages. Particularly, consumer reactions on this campaign are increasing, many complaints are submitted.

However, beside this campaign no other activities against misleading packaging could be identified. Hence, it was concluded that – generally- the average Czech consumer is rather not aware of this problem.

To sum up, the argument for these countries to conclude that consumers are rather not aware of misleading packaging practices⁸⁶ is the lack of complaints about misleading packaging practices and press releases, governmental policies, administrative decisions and case law. However, any reference indicating the opposite could not be found.

2.2.2.2. Member States where consumers are aware of misleading packaging practices

For **Lithuania** it was stated that there are no or barely any complaints about misleading packaging practices. Consumers are informed about misleading packaging *via* press or internet.⁸⁷ Their awareness and concerns towards misleading packaging is reflected in internet comments and their participation in forum discussions. Furthermore, there are several private initiatives on internet suggesting not to buy products which are pre-packed in a misleading manner.⁸⁸ From this it was concluded that consumers are aware of misleading packaging practices.

For **Ireland** it was pointed out that there are no or barely complaints about misleading packaging practices. It could only be surmised based on internet research, a perusal of newspaper articles, social media outlets, anecdotal evidence and advertising campaigns that Irish consumers are aware of this issue, particularly the issue of grocery shrink ray. In this respect, it was noteworthy that a major selling point of the English language marketing campaign of the French cosmetics company Nuxe is the company's statement that it is against misleading packaging practices. This would seem to point to an awareness of this issue on the part of consumers.

Based on the analysis of consumers' complaints the organisations in **Bulgaria** claim that misleading packaging is to a huge extent successful in misleading the consumers. However, they are able to judge that more and more consumers are becoming aware of the misleading packaging practices. It was furthermore pointed out, that consumers can be divided in two groups with regard to their residence and age. Consumers living in bigger cities such as the capital (Sofia), Plovdiv and Varna, actively report and announce misleading practices. Furthermore, more careful groups of consumers, such as mothers of small children, are more sensitive to misleading packaging practices.

⁸⁶ The reporter for France and the United Kingdom, however, listed this only as one possible explanation for the lack of available material on misleading packaging.

⁸⁷ See for example: <http://www.pinigukarta.lt/patarimai-3/verslas-ir-ekonomika-patarimai-3/prekyba-verslas-ir-ekonomika-patarimai-3/preke-sumazejo-kaina-pakilo>;
http://www.alfa.lt/straipsnis/182559/Pakuote..panasi..bet.produkto..maziau=2008-05-12_09-16/;
<http://verslas.delfi.lt/business/article.php?id=14743605>

⁸⁸ <http://dali.us/2011/aktualijos/siulau-akcija-nukreipta-pries-lietuviskus-maisto-fasuotojus/>;
<http://www.giedresblogas.lt/?p=673>. These initiatives are not coordinated, expressed by single individuals. Hence, their effectiveness may be questioned.

From the number of complaints as well as the number and intensity of activities it may be concluded that consumers in **Germany** are generally aware of misleading packaging practices.⁸⁹ The Verbraucherzentrale in Hamburg publishing a list of these packaging practices since five years stated that the number of complaints did not decrease.⁹⁰ Furthermore, in September 2009 the *Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz*⁹¹ set up an initiative against misleading trading practices called "*Klarheit und Wahrheit bei der Kennzeichnung und Aufmachung von Lebensmitteln*" (clear and honest indication and presentation of foodstuffs).⁹² This campaign attracted numerous reactions, showing that consumers are aware of misleading packaging practices and that they are willing to fight against these practices actively.

2.2.2.2.3. Member States with inconclusive results as to consumers' awareness of misleading packaging practices

Even though some campaigns against misleading packaging practices occurred⁹³ and there is a lot of information (e.g. in media releases) available, it could not be concluded that consumers in **Poland** are aware of misleading packaging practices. It was observed that participations in the campaigns as well as in forum discussions on the internet are very poor. Furthermore, there were no administrative decision and no case law available where consumer took action against misleading packaging practices. The analysis of a survey related to misleading packaging practices did not reveal any transferable information on the awareness of misleading packaging practices.⁹⁴ It was pointed out that a survey directly addressing misleading packaging practices is recommendable. Moreover, it is also noteworthy that misleading packaging practices do not play any role in the consumer policy for 2010-2013⁹⁵. Most of the press releases of the past two years deal either with misleading information (especially concerning certain promotional campaigns) or misleading advertisements.⁹⁶ The same can be concluded for the past activities of the Office on Competition and Consumers Protection.⁹⁷ Also, the inspections conducted were mainly confined to investigating the regularity and honesty of the organisation of promotional campaigns.⁹⁸

Based on the lack of general media articles addressing misleading packaging, it was concluded that consumers in **France** and **the United Kingdom** are either not aware of the problem, or misleading packaging is not recognised as a problem. In France, only a few consumer associations addressed the potential problem of such packaging practices, but this is only done in general articles which are meant to warn consumers. The few articles identified are a response to the recent deregulation of uniform packaging sizes.

⁸⁹ See:

http://www.bmely.de/SharedDocs/Downloads/Ernaehrung/KlarheitUndWahrheitInitiativeZusammenstellung.pdf?__blob=publicationFile, p. 5.

⁹⁰ <http://www.vzh.de/ernaehrung/30287/inflation-in-kleineren-tueten.aspx>.

⁹¹ Federal Ministry of nourishment, agriculture and consumer protection.

⁹² See: http://www.bmely.de/DE/Ernaehrung/Kennzeichnung/Lebensmittelklarheit/lebensmittelklarheit_node.html.

⁹³ Pro-Test przeciw oszukańczym opakowaniom in: PRO-TEST: Nr 9 (102) wrzesień 2010, http://www.pro-test.pl/article_article/110112.0/Akcja+Pro_Test_Pro_Test+przeciw+oszukanczym+opakowaniom.html.

⁹⁴ See general remarks above.

⁹⁵ See: <http://www.uokik.gov.pl/publications.php#faq1466>.

⁹⁶ See e.g. "Idą święta – kupuj świadomie" (30.3.2007) and "Święta w promocji" (18.3.2008) (Fn. 77).

⁹⁷ See the Report on Activities 2010, p. 34-41, which may be found on:

<http://www.uokik.gov.pl/publications.php#faq1466>.

⁹⁸ See: Informacja o wynikach kontroli prawidłowości i rzetelności organizowania promocji przez przedsiębiorców (BK/ AŻ – 034 – 4/ 08/ AJ) which can be found on:

<http://uokik.gov.pl/szukaj.php?szukaj=Informacja+o+wynikach+kontroli&x=0&y=0>; and Informacja o wynikach kontroli prawidłowości wprowadzania do obrotu produktów żywnościowych oferowanych w promocjach w dużych sieciach handlowych (BK/ AŻ – 034 – 1/ 07/ AJ).

However, the sure remedy mentioned by the articles against such practices is for consumers to look to the price per unit of measurement. No comparable activities were reported for the United Kingdom.⁹⁹

2.2.3. Conclusion

According to consumer organisations consumers are neither unaware nor very aware of misleading packaging practices. On a scale of 1 to 4, with 1 being unaware and 4 being very aware, the middle field was balanced. Anyhow, it may be concluded that consumers are aware of misleading packaging practices. The intensity of awareness, however, is not clear.

Furthermore, it may be concluded that consumers are misled by the packaging practices in questions. A tendency to “very misled” became apparent.

A clear picture, however, of whether misleading packaging practices are important relative to other consumer problems could not be drawn. The views are very ambiguous. The majority of consumer organisations, however, would not state that misleading packaging practices are not important in comparison to other consumer problems.

In correspondence to the picture revealed from the consumer organisation enquiries no clear tendency to “aware” or “unaware” allowing for a general conclusion could be identified. Evaluating consumer awareness with a value of “2”, the representatives of the consumer organisations in the Czech Republic and Greece rather tended to “unaware”. This is in accordance with the views of the corresponding national reporters. The national reporter from Lithuania and the Lithuanian consumer organisation agreed that consumers in their country are aware of misleading packaging practices. However, in contrast to the national reporter, the consumer organisation tended rather to “unaware” as regards the intensity of consumers’ awareness. Furthermore, the Bulgarian consumer organisations and the Bulgarian correspondent agreed that consumers in their country rather are aware of misleading packaging practices. The same is true for one consumer organisation from Germany and the German national reporter. In the case of other national reports no consensus could be identified because either no results from consumer organisations¹⁰⁰ of the corresponding country were available or the national reporters abstained from evaluating¹⁰¹ whether consumers in their countries are aware or unaware.

Generally, it may be, however, concluded that the impression the national reporters had from their analysis mostly was in accordance with the views of the consumer organisations presented. Also the picture drawn from the national reports in general corresponds to the picture revealed from consumer organisation enquiries. It cannot unambiguously be concluded how intense consumers’ awareness is. This again would require a study directly addressing consumers’ and the problem of misleading packaging practices.

⁹⁹ However, a press review and internet research revealed some articles bringing numerous counter-arguments against reductions in quantity without proportional price decreases in the public domain of the UK. According to the national reporter, there are, however, a greater number of articles concerning food inflation in general and reductions in packaging to comply with environmental regulation.

¹⁰⁰ The national reporters from Cyprus, Hungary, Ireland, Italy and Portugal did not receive any answers from consumer organisations contacted in their countries. This means that there were only results of eight countries of which five (at least partially) corresponded to the respective national report.

¹⁰¹ This is true for the Polish national reporter and the national reporter for the United Kingdom.

2.3. Consumers attitude and behaviour towards misleading packaging practices

2.3.1. General observations

The general observations made on consumers' attitude and behaviour towards misleading packaging practices in many points overlap with the general remarks on consumer awareness.

2.3.1.1. Consumers' behaviour before and during the purchase

First of all, consumer behaviour before and during the purchase needs to be analysed. This is relevant in order to understand why and how consumers are misled by packaging practices.

According e.g. to the **Polish survey** on the "awareness of consumer rights and analysis of barriers preventing consumers from safe and satisfactory participation in the market"¹⁰² consumers rather **buy in a thought-through manner** (deciding what to buy at home and not in the shop).¹⁰³ For **Italy**, however, it was stated that consumers **rather buy impulsive**. The above mentioned study again also pointed out that 43 % of all persons interviewed admitted that they usually **choose the particular products in the shop**.¹⁰⁴ Hence, even though the shopping is planned, packaging practices may still have effect on the very concrete choice of a product of a certain product sector.

Furthermore, this survey, but also the national reports of **Ireland** and **Lithuania** revealed that consumers **purchase choices in the first place depend on the price** of the product. However, at least **for Poland** it could not be clarified whether the comparison of prices also includes the comparison of unit prices. This is important because mandatory unit pricing may have a positive effect in this regard as it enables consumers to compare the prices of products which come in different sizes, and thereby influences purchasing decisions and prevents the success of misleading packaging.

For Ireland it was pointed out that consumers are becoming more price conscious and seek value for money in these recessionary times. Encouraged by consumer associations and the media, the Irish consumer tends to compare unit prices, votes with his/ her wallets and shops around for better value.¹⁰⁵

Furthermore, it has been concluded that the **average consumer only conducts a cursory examination** of the product.¹⁰⁶ Similar results were revealed for **Ireland** and **Hungary**. This view can also be underlined by the results revealed in a survey on "consumer attitudes towards information presented on the labels of food products and on food safety" conducted by the **Lithuanian Veterinary Academy**, Kaunas University of Technology and State Food and Veterinary Authority,¹⁰⁷ showing which factors are examined when choosing a product. According to the **Lithuanian survey**, the first things consumers consider are discounts (60 %). 77.2 % of the respondents revealed that in most cases or always the consumers primarily look at the price of the product; 69.3 % look at its expiry date.

¹⁰² See Fn. 76.

¹⁰³ See p. 29 of the survey.

¹⁰⁴ 43 % of 1000 persons interviewed ; see the survey p. 29.

¹⁰⁵ <http://www.independent.ie/lifestyle/good-buys-products-hit-by-shrink-ray-1460229.html>

¹⁰⁶ See the Italian report.

¹⁰⁷ Here 77,2 % of 400 persons interviewed, see : http://www.lmai.lt/failai/44_1_Stankeviciene.pdf.

Furthermore, the examination will also include the checking of freshness (96 %), taste and flavour (86.6 %) of the product which are important to consumers. The majority of the respondents in most cases or at least sometimes (69.3 %) will also take notice of health factors of the ingredients of a product. Common information on food labelling is read by 49.2 %¹⁰⁸ of customers, and only 17.3 % of the consumers always read the information.¹⁰⁹

2.3.1.2. Consumer behaviour after the purchase when being misled

Consumers in Member States investigated approach misleading packaging practices in different manners. This approach also depends on the group, the age and the place of residence of the consumers. According e.g. to the Bulgarian report consumers living in bigger cities such as the capital (Sofia), Plovdiv and Varna, actively report and announce misleading practices. Usually these consumers are aged between 20 and 45. Such consumers are proactive and post photos of respective packaging practices on various internet platforms in order to warn other consumers.

It was, however, observed that consumers generally **either do not react** on misleading packaging practices¹¹⁰, **or they complain** about misleading packaging practices to consumer organisations or public authorities.¹¹¹

Furthermore, consumer organisations encourage consumers to **switch brands** and, hence, vote with their wallet.¹¹²

However, **in most of the countries investigated** (seven of thirteen)¹¹³ it may be observed that there are **no consumer complaints** on misleading packaging practices.

For Ireland and Poland it was reported that **consumer complaints are rare**. Participation in campaigns conducted and in forum discussions particularly in Poland are very poor.

In contrast, in **Bulgaria, Germany** and the **Czech Republic consumer complaints** seem to **occur very often**.¹¹⁴ The number of complaints seems rather to increase than to decrease.¹¹⁵

¹⁰⁸ More than 400 consumers of different age and education from various cities in Lithuania were interviewed.

¹⁰⁹ The majority of the respondents (74.2 %) claimed that producers information on product label is partially clear and only 20.14 % of the respondents think that the information on the label is completely clear.

¹¹⁰ According to the Greek Secretary, consumers in Greece pay more attention on the product itself, to its properties and are not influenced by its package. Hence, their behaviour is unaffected by packaging. For the target group of "homines consumentes" the product itself and not its covering box is important. A similar argumentation was presented by the Portuguese national reporter, stating that consumers compare important features of products, but do not, however, compare sizes of packaging.

¹¹¹ In this respect the Polish survey on the "awareness of consumer rights and analysis of barriers preventing consumers from safe and satisfactory participation in the market" (see. Fn. 76) is mentionable which revealed that consumers rather expect consumer organisation or public authorities to take action, see page 10, 34 of the survey. 76 % of 1000 persons interviewed stated that consumer interests should be represented by authorities or organisations and not by the consumers themselves.

¹¹² See e.g. for Poland : <http://www.federacja-konsumentow.org.pl/story.php?story=409>; and for Ireland: <http://www.independent.ie/lifestyle/good-buys-products-hit-by-shrink-ray-1460229.html>; see also the Lithuanian national report.

¹¹³ Cyprus, Greece, Hungary, Italy, France, Lithuania and the United Kingdom. However, according to the OFT there are complaints on misleading packaging practices in the United Kingdom. The number is very low. The consumer organisation EKPIZO in Greece stated that there are complaints on misleading packaging practices. The Greek Secretary, however, did not receive any corresponding complaints.

¹¹⁴ See e.g.: <http://www.lebensmittelklarheit.de/cps/rde/xchg/lebensmittelklarheit/hs.xsl/1048.htm?keyword=verpackung>; <http://www.vzh.de/ernaehrung/30287/inflation-in-kleineren-tueten.aspx>; more general : <http://www.vzh.de/ernaehrung/3465/aktuelles.aspx>. For the Czech Republic it was stated that the database of

It is, however, peculiar that **in none of the Member States consumers take legal actions** against misleading packaging practices. There are no administrative decisions and no case law where a consumer actually acted. Cases and administrative decisions identified in Germany, Greece, Ireland, Italy and Lithuania (for the latter only cases) exclusively involved either the corresponding producer and a public administrative body or the producer and a competitor.

2.3.2. Possible reasons for consumers reactions

The different reactions and the lack of case law and administrative decisions may surely be ascribed to a different culture of litigation as well as to varying, available instruments for the enforcement of one's rights and different litigation systems. This includes also ineffective national legal protection mechanisms. According to the Lithuanian report claims in order to protect public interest are not widely used and unpopular. The (usually relatively small) damage faced by the individual consumer is balanced against the time, the costs and the benefit of a legal proceeding and particularly the value of the product, usually ending with a resignation.¹¹⁶

As already indicated, consumers expect institutions or authorities to take action against the practices violating their best interest rather than taking the initiative themselves.¹¹⁷ The reasons listed are **lack of awareness of their rights**¹¹⁸, **fear of the sellers' reaction**¹¹⁹, **the relative benefit to gain from possibly costly and lengthy court proceedings**¹²⁰. This means that the consumer's only alternative is either to accept the practice, to complain to the producer directly or to switch brands.

Furthermore, it was assumed that consumers have come to expect non-functional empty spaces in packaging and this may explain the lack of complaints in this regard.¹²¹ According to the Irish national report it might also be conjectured that the consumer may perceive over-packaging as a health and safety issue (protection against tampering) and may therefore not make an official complaint.

The Lithuanian report lists an additional reason for the passivity of consumer organisations and individual consumers. It is stated that this could be due to the lack of human resources in consumer protection organisations.

Moreover, when considering consumers' behaviour in certain Member States it also becomes obvious that consumers reactions and consumers pro-activity are higher in case where more centralised and updated information are provided and a forum to discuss misleading packaging practices is made available.

However, it also could be considered whether misleading packaging practices simply have not been recognised as a problem yet or possibly, there are measures sufficiently tackling the problem.

oversized packages is functional since the end of October 2011 and that it already publishes 46 pictures of oversized packages to the date of 4.11.2011; see: <http://www.dtest.cz/nadmerne-obaly>.

¹¹⁵ See : <http://www.vzh.de/ernaehrung/30287/inflation-in-kleineren-tueten.aspx>.

¹¹⁶ See the survey, p. 44, 45.

¹¹⁷ This is what 76 % of 1000 persons interviewed are convinced of, see the survey p. 11, 35.

¹¹⁸ 75 % of 1000 persons interviewed say that they do not know their rights ; 65 % claim this would be due to the complexity of the respective regulations, see the survey p. 33, 34.

¹¹⁹ See the survey p. 46.

¹²⁰ See the survey p. 11, 44, 45.

¹²¹ http://www.ehow.com/list_6811482_deceptive-packaging-tricks.html

If the problem has been recognised and measures prove to be insufficient, the question may be raised whether misleading packaging practices really constitute an important consumer problem relative to other consumer problems.

In this respect, it is noteworthy that misleading packaging practices e.g. in Poland do not play any role in the consumer policy for 2010-2013¹²². Furthermore, most of the press releases of the past two years deal either with misleading information (especially concerning certain promotional campaigns) or misleading advertisements.¹²³

The same can be concluded for the past activities of the Office of Competition and Consumer Protection in Poland.¹²⁴ Also, the inspections conducted were mainly confined to investigating the regularity and honesty of the organisation of promotional campaigns.¹²⁵ A lack of updated and centralised information about misleading packaging as well as political initiatives etc. has also been reported for several other Member States. Assuming that misleading packaging practices take place, either they are not recognised or the obligation to indicate unit prices constitutes an effective solution and is thereby also the reason why the problem of misleading packaging practices does not attract great attention (in this case) in Poland. However, it does not seem that either of these conclusions is correct. Most consumer organisations enquired could name some packaging practices occurring. Furthermore, it was concluded that consumers rather are aware of such practices. Moreover, unit price indications are mandatory in all of the Member States.

In contrast, with regard to information available to consumers, it seems that e.g. in Germany, Ireland and the Czech Republic the problem is recognised and measures are already planned to be taken.¹²⁶

¹²² See : <http://www.uokik.gov.pl/publications.php#faq1466>.

¹²³ See e.g. "Idą święta – kupuj świadomie » (30.3.2007) and "Święta w promocji" (18.3.2008) (Fn. 77).

¹²⁴ See the Report on Activities 2010, p. 34-41, which may be found on:

<http://www.uokik.gov.pl/publications.php#faq1466>.

¹²⁵ See: Informacja o wynikach kontroli prawidłowości i rzetelności organizowania promocji przez przedsiębiorców (BK/ AŻ – 034 – 4/ 08/ AJ) which can be found on:

<http://uokik.gov.pl/szukaj.php?szukaj=Informacja+o+wynikach+kontroli&x=0&y=0>; and Informacja o wynikach kontroli prawidłowości wprowadzania do obrotu produktów żywnościowych oferowanych w promocjach w dużych sieciach handlowych (BK/ AŻ – 034 – 1/ 07/ AJ).

¹²⁶ The **German governmental initiative** "Klarheit und Wahrheit bei der Kennzeichnung und Aufmachung von Lebensmitteln" plans to conduct surveys on current consumer expectations. It has been pointed out that the set of data currently available is insufficient and that its extension could help public authorities when taking measures against misleading (packaging) practices, see:

http://www.bmenv.de/SharedDocs/Downloads/Ernaehrung/KlarheitUndWahrheitInitiativeZusammenstellung.pdf?__blob=publicationFile, p. 7; In **Ireland** the connected problem of excess packaging and the corresponding environmental impact is a source of disquiet

(See e.g. <http://www.irishtimes.com/newspaper/finance/2011/0422/1224295253217.html>; www.recyclemore.ie/files/press_releases/Packaging_Tax_June_2011_.pdf). There are plans afoot at governmental level (Irish Government programme for national recovery 2011-2016) to introduce a packaging levy and extend producer responsibility as regards waste reduction. Potentially, a spin-off effect of these measures could be a reduction in slack fill in packaging, reducing the scope for misleading packaging. In this context, it has also been pointed out that other jurisdictions such as Australia and California have legislated to prescribe the amount of empty space permitted in packaging (Overview of Environmental Packaging Practices in North America; Author: Catherine Goodall, presented at the 13th Annual European Packaging Law Conference, Brussels, March 14 2006; available at <http://www.repak.ie/files/Catherine%20Goodall.pdf>; California Business and Professions Code, Chapter 6, Fair Packaging and Labeling Act (§12606.2) which may provide a template for the EU legislator. These rules vary according to the product type and also take account of the functions served by product packaging (hygiene, safety etc) (Incopen Factsheet on Excessive Packaging: <http://www.packagingfedn.co.uk/images/fact%20sheets/Excessive%20packaging.pdf>). Furthermore, the National Consumer Agency in Ireland stated that they "will be closely monitoring [misleading packaging practices] in its upcoming grocery survey" (See the quotation of the spokesperson of the NCA on: <http://www.independent.ie/lifestyle/good-buys-products-hit-by-shrink-ray-1460229.html>). Furthermore, as well the Consumer Association of Ireland (CAI) is going to enter into dialogue with producers making use of such practices (<http://www.independent.ie/lifestyle/good-buys-products-hit-by-shrink-ray-1460229.html>); By the end of October the consumer organisation in the **Czech Republic** established a database on misleading packaging practices (<http://www.dtest.cz/nadmerne-obaly>). Consumers can send in pictures of packaging suspected to be misleading. Contact dates of the producer/seller are published as well.

These conclusions may be also undermined by the evaluation of consumer organisation with respect to the extent to which consumers are misled (tendency to “very misled”).

In this case it could, however, be questioned whether misleading packaging practices are of great importance relative to other consumer problems. This was already questioned by consumer organisations who cannot agree whether misleading packaging practices are of importance relative to other consumer problems or not. In Poland there are several administrative decisions of the President of the Office of Competition and Consumer Protection.

These decisions, however, are not directly related to misleading packaging practices. Most of them deal with wrong or incomplete information in connection with promotional campaigns or misleading advertising.¹²⁷ Similar has been reported by the national correspondents for other Member States who barely found legal material on misleading packaging but, in contrast, on other consumer problems like misleading labelling. The fact, however, that according to consumer organisations consumers are rather “very misled” justifies measures to be taken against misleading packaging practices.

2.4. Conclusion

According to consumer organisations it may be concluded that consumers are aware of misleading packaging practices even though there is no consensus as regards the intensity of awareness. A similar picture was also drawn by the national reports. The national reports in most cases confirmed the results revealed from the consumer organisation enquiries of the corresponding country.

Furthermore, it has been concluded that consumers are misled by misleading packaging practices. Even a tendency to consumers being “very misled” became apparent from the answers given by consumer organisations.

Anyhow, consumer organisations do not agree with respect to the importance of misleading packaging practices relative to other consumer problems. There is the same amount of voices stating that misleading packaging is not important as the amount of voices concluding that misleading packaging practices are very important. Since the middle-field is balanced even no tendency could be ascertained.

Consumers’ behaviour in the Member States varies. In most of the Member States investigated consumer do not take a pro-active role. In some of these Member States no consumer complaints were registered.¹²⁸ In two Member States consumer complaints were rare. According to the national reporters and the consumer organisations only in Bulgaria, Germany and the Czech Republic the frequency of consumer complaints is high relative to other countries (10 %, 70-100%; 1-2 complaints per week). It is, however, peculiar that there is no legal action taken by consumers in any of the Member States. Cases or administrative decisions on misleading packaging practices either were litigated by public authorities or competitors.

¹²⁷ Decision no RPZ 12/ 2011 from the 13.7.2011 (Aflofarm Fabryka Leków) about a misleading advertisement; in the television claiming that the person recommending the product has an academic title even though she had not; Decision no RPZ/2011 from 7.7.2011 about a television competition (One-2-One S.A.); Decision no RWR 12/2011 from 1.7.2011 about incomplete information within the framework of a promotion campaign (E.Wedel sp. z o.o.); decision no DDK – 2/ 2011 from 20.4.2011 about a promotion campaign which in fact was not really a promotion campaign but only assigned as one (Agros Nova sp. z o.o.).

¹²⁸ From the material underlying this study definitely in Cyprus, France, Hungary and Lithuania. Compare also Fn.113.

From a survey undertaken by the Polish Office of Competition and Consumer Protection it could be concluded that consumers also expect public authorities and organisations to represent their interests rather than taking actions themselves. Finally, it was observed that consumers either do not take any action, complain about misleading packaging practices or simply switch brands and value with their wallets.

Consumers' behaviour could be explained on the one hand with different litigations systems and cultures and ineffective national protection systems and on the other hand with the lack of information and forums to discuss such practices. It was also pointed out that consumers could have come to expect non-functional spaces in the packaging or that free space could be perceived as a health or safety issue.

Finally, it was explained that the poor reaction of consumer could originate from the lack of human resources. For that reason consumer organisation would not be able to inform consumers about misleading packaging practices and to handle consumer complaints. The simplest explanation would be that misleading packaging practices actually do not play an important role relative to other consumer problems.

3. DO MISLEADING PACKAGING PRACTICES FALL FOUL OF EU LEGISLATION? HOW IS EU LEGISLATION APPLIED?

KEY FINDINGS

- Misleading packaging practices fall foul of EU legislation.
- The application of certain pre-existing provisions on new market developments (grocery shrink ray/ downsizing) is not self-evident. Under certain circumstances these practices could fall out of the scope of the Unfair Commercial Practices Directive and other European consumer protection regulations. Hence, in these cases there would be a regulatory gap.
- As already indicated above, consumers rather do not take any legal action. Hence, provisions implementing the Unfair Commercial Practices Directive are rarely applied to misleading packaging practices even though most of these practices fall within the scope of the Directive. It became also apparent that other regulations which could cover misleading packaging practices are used rarely to address these practices.
- No application failures of the provisions of the Unfair Commercial Practices Directive or other regulations examined with respect to misleading packaging practices could be identified. However, the adherence to the provisions of the Unit Prices Directive proves problematic in some of the Member States. Price indications are missing, wrongful or written in an illegible manner or placed inconveniently.

3.1. Do misleading packaging practices fall foul of EU legislation? How is EU legislation applied?

Misleading packaging practices affect EU legislation with regard to different issues. Relevant EU legislation may concern health¹²⁹, environmental¹³⁰, and product safety¹³¹ aspects. Furthermore, there are a great number of provisions regulating the labelling and advertising of products.¹³²

¹²⁹ E.g. the Regulation 1924/2006/EC of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, OJ L 404/09 of 30.12.2006.

¹³⁰ See e.g. Annex II No. 1 Para. 1 of Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste, OJ L 365/ 10 of 31.12.1994, stating that « packaging shall be so manufactured that the packaging volume and weight be limited to the minimum adequate amount to maintain the necessary level of safety, hygiene and acceptance for the packed product and for the consumer »; for the status of the compliance of the Essential Requirements in the Member States of which one is the packaging size and for the status of implementation of Directive 94/62/EC see: The Survey on compliance with the Essential Requirements which is available at: http://ec.europa.eu/environment/waste/packaging/pdf/report_essential_requirements.pdf.

¹³¹ Packaging may play a role as regards product safety and product liability. If misleading packaging practices under certain circumstances could fall foul of the following provisions, however, needs to be established in the individual case: see e.g. Art. 5 (1) (4) (a) of the Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001, OJ L 11/4 of 15.1.2002; Packaging could also fall under the term « presentation » in the sense of Art. 6 (1) (a) of the Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. According to *Wagner* in Münchener Kommentar zum BGB, Munich 2009, § 3 ProdHaftG marginal number 12 and *Oechseler* in Staudinger, BGB Neubearbeitung 2004, § 3 ProdHaftG marginal number 42 (with further references), presentation are all activities by which the product is present to public or the concrete end-user. See as well : http://gsi.nist.gov/global/docs/EUGuide_ProductLiability.pdf, p. 3, where packaging is listed as one possibility of presentation.

¹³² See Fn. 202. Questions of labelling and advertising are, however, not covered by the scope of the study.

Misleading packaging practices indirectly may be prevented when EU legislation on these aspects is applied. However, the core issue addressed in this study is the protection of consumer interests which due to misleading market strategies in form of misleading packaging may be infringed. Hence, the following analyse is restricted to EU legislation which is closely related to this problem. Particularly, provisions of the Unfair Commercial Practices Directive¹³³, the Directive concerning misleading and comparative advertising¹³⁴ and the Unit Prices Directive¹³⁵ are in the focus of the following analysis. In addition, it is briefly answered whether misleading packaging practices could infringe provisions of the Directive on certain aspects of the sale of consumer goods and associated guarantees.¹³⁶ Case law and examples if existing are presented in a direct relation to the provisions taken into focus. The answer to the question if there is a regulatory gap in EU legislation is addressed in the conclusion.

3.1.1. Misleading packaging practices as to the quantity

3.1.1.1. Bigger packages, same quantity/ Same packages less quantity

3.1.1.1.1. Unfair Commercial Practices Directive

Quantity related practices could fall foul of the Unfair Commercial Practices Directive.

According to Art. 5 of the Unfair Commercial Practices Directive, unfair commercial practices shall be prohibited. Commercial practices listed in Annex I of the Directive are considered unfair in any circumstances.¹³⁷ However, misleading packaging as to the quantity of the product does not fall within the scope of this list.

Moreover, commercial practices shall be considered unfair if they are misleading as set out in Art. 6 and 7 of the Directive, Art. 5 (4) (a) of the Directive. According to Art. 6 of the Unfair Commercial Practices

Directive, a commercial practice shall be regarded as misleading if it deceives or is likely to deceive the average consumer by the overall presentation in relation to the quantity of the product, even if the information is factually correct, and if it causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. According to Art. 7 a commercial practice shall be regarded as misleading if, in its factual context, taking into account of all its features (here the size and the quantity of filling), it omits material information that the average consumer needs to take an informed transactional decision that he would not have taken otherwise.

¹³³ 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 and 2002/65/EC of the Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149/ 22 of 11.6.2005.

¹³⁴ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376/21 of 27.12.2006.

¹³⁵ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80/ 27 of 18.3.1998.

¹³⁶ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171/12 of 7.7.1999.

¹³⁷ For the meaning and function of the black list see: *Köhler* in *Köhler/ Bornkamm*, UWG, 29th edition, Munich 2011, Anhang zu § 3 Abs. 3 marginal number 0.10. As to the structure of the Unfair Commercial Practices Directive and the hereof resulting structure of the examination, see: *Köhler* in *Köhler/ Bornkamm*, UWG, 29th edition, Munich 2011, § 4 marginal number 1.6; *Alexander* explains the "inverted pyramid" structure of the Unfair Commercial Practices Directive in "Die «Schwarze Liste» der UGP-Richtlinie und ihre Umsetzung in Deutschland und Österreich", GRUR Int. 2010, 1025 (1027).

3.1.1.1.1.1. Application of the provisions of the Unfair Commercial Practices Directive

According to Art. 3 (4) of the Unfair Commercial Practices Directive in the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.

Furthermore, the provisions are only applicable between traders¹³⁸ and consumers¹³⁹. Above that, the misleading packaging practice needs to be a "business-to-consumer commercial practice"¹⁴⁰. The study is restricted to relations between consumers and traders. Moreover, misleading packaging practices are acts including advertising and marketing by a trader directly connected with the promotion, sale or supply of a product to the consumer and therefore constitute business-to-consumer commercial practices. The provisions are, hence, applicable.

3.1.1.1.1.2. Concept of the average consumer

The benchmark for a packaging practice being regarded as misleading is according to Art. 6 of the Unfair Commercial Practices Directive the average consumer. According to Recital 18 of the Directive and in accordance with the jurisprudence of the ECJ¹⁴¹ the average consumer is a person, "who is reasonably well-informed and reasonably observant and circumspect". It is, furthermore, stated that social, cultural and linguistic factors should be taken into account. Recital 18 also stresses that commercial practices and their impact when being addressed to a specific group of consumers should be evaluated from the perspective of an average consumer being member of the respective group.¹⁴²

3.1.1.1.1.3. Causal link

Furthermore, there needs to be a causal link between the misleading action and the consumer's transactional decision. Hence, it needs to be proved that the consumer would not have taken the decision in other circumstances. This constitutes a high evidential bar to litigation and, therefore, might be the reason for the lack of cases in the Member States examined.

3.1.1.1.1.4. Bigger packages, same quantity/ higher price as misleading commercial practice

In case packaging is made bigger but the quantity remains the same or packaging is too big with respect to its functional necessity the average consumer will be misled into thinking that the package contains more quantity as it actually is the case. If this packaging does not fulfill any useful function and justified consumer expectations are not met, it will usually be regarded as misleading in the sense of Art. 6 of the Unfair Commercial Practices Directive provided that the average consumer's transactional decision is based upon these circumstances.¹⁴³ This, however, needs to be examined in each individual case.¹⁴⁴

¹³⁸ As defined in Art. 2 (b).

¹³⁹ As defined in Art. 2 (a).

¹⁴⁰ Art. 2 (d) of Directive 2005/29/EC; Recital 4, 6, 8 of Directive 2005/29/EC; for further information on the scope of the directive see: Ohly in Piper/ Ohly/ Sosnitza, Gesetz gegen den unlauteren Wettbewerb, 5th edition, Munich 2010, Einführung C. marginal number 43.

¹⁴¹ Compare Fn. 15.

¹⁴² For further information on the concept of the average consumer in the context of the Directive see Fn. 15.

¹⁴³ Compare e.g. *Sosnitza* in Piper/ Ohly/ Sosnitza, UWG, 5th edition, Munich 2010, § 5 marginal number 157. 7.139 *Bornkamm* in Köhler/ Bornkamm, UWG, 29th edition, Munich 2011, § 5 marginal number 2.169.

¹⁴⁴ Compare Recital 7 of the Unfair Commercial Practices Directive.

3.1.1.1.1.5. Same packages, less quantity as a misleading commercial practice or misleading omission

It lately was observed that producers increasingly, negatively deviate from the quantity of their products in comparison to the previous quantity of their products which the consumer was familiar with. In addition, they retain the familiar packaging and packaging size of the product and thereby take advantage of consumers' expectations.¹⁴⁵ In some German cases it was argued, that these new market developments do not substantiate a deception. The *Oberverwaltungsgericht Berlin*¹⁴⁶ pointed out that the comparison of the new package (with less quantity) with the old package is irrelevant for the decision whether a certain practice is misleading in the sense of § 7 (2) EichG¹⁴⁷ which is a criminal law provision.¹⁴⁸ Only the package as it is in the present moment should be evaluated. The same was concluded for the comparison to packaging of other producers' products.¹⁴⁹ Hence, it could be questioned, whether such a comparison is also not admissible within the framework of the Unfair Commercial Practices Directive.

In the *Jacobs-coffee* case, which as well was based on § 7 (2) EichG, §§ 1, 3 UWG (now § 5 UWG¹⁵⁰), a comparison to the packaging of other producers was relevant for the evaluation whether a practice could be deemed as misleading.¹⁵¹ It was stated that the packaging of the defendant was similar to the common 500 gr. coffee packaging size. The purpose of § 7 (2) EichG in contrast to the unfair commercial practices provisions is not to prevent hidden price increases by the reduction of quantity without changing the package.¹⁵² According to § 1 of the EichG these provisions rather shall protect the consumer when purchasing measureable goods or services and in the sense of fair commercial trading establish the requirements for correct measuring in the course of business. Whether a deception can be established, hence, needs to be evaluated with the help of objective criteria.¹⁵³

In this respect it could be argued, that the court decisions were not contradictory since the *Jacobs-coffee* was only compared to *common trading* sizes for coffee. Hence, this comparison would be in line with the purpose of § 1 EichG. However, the comparison of the new package (with less quantity) with the old package or another producer's package, in fact is irrelevant for the decision whether a certain practice is misleading.

For the determination whether a packaging as described in this chapter is misleading in the sense of the Unfair Commercial Practices Directive this comparison could be irrelevant, too.

¹⁴⁵ The German Verbraucherzentrale in Hamburg calls these strategies even "second generation" strategies, see: <http://www.vzhh.de/ernaehrung/32618/2GenerationPreiserhoehung.pdf>.

¹⁴⁶ OVG Berlin, 24.9.2003 – OVG 1 B 16.03, LLRR 2003, p. 106.

¹⁴⁷ § 7 (2) EichG states that pre-packaging has to be designed and filled in such a manner that it does not suggest more quantity of the product than there actually is. (Translation by the author).

¹⁴⁸ See also : Meyer in Meyer/ Streinz, LFBG, BasisVO, 1st edition, Munich 2007, § 11 marginal number 45-49; different view: AG Berlin-Tiergarten in LMRR 1984, 47 (47) with references to the administrative guidelines for the interpretation of the EichG, MinBIFin 1977 p.26; furthermore, Zipfel/ Rathke, Lebensmittelrecht, 144. Ergänzungslieferung (2011), § 7 EichG, marginal number 28 stating that downsizing may constitute an infringement of § 7 (2) EichG because the consumer in these cases compares the previous package of the producer with his current package and presumes that he will purchase more quantity than this is actually the case, with reference to KG in LMRR 1994, 43 (43). The Court, however, points out that the wording of the provisions does not exclude the comparison test but the purpose of § 7 EichG does.

¹⁴⁹ KG in LMRR 1987, 74 (74).

¹⁵⁰ § 5 UWG implements Art. 6 of the Unfair Commercial Practices Directive.

¹⁵¹ OLG Hamburg, 14.4.2004 – 5 U 123/03, p. 263 (264).

¹⁵² OVG Berlin, 24.9.2003 – OVG 1 B 16.03, LLRR 2003, p. 106.

¹⁵³ Ambs in Erb/ Kohlhaas, Strafrechtliche Nebengesetze, 185. Ergänzungslieferung (2011), § 7 EichG, marginal number 10; Zipfel/ Rathke in Zipfel/ Rathke, Lebensmittelrecht, 144. Ergänzungslieferung (2011), § 7 EichG marginal number 26, 27; OVG Berlin, 24.9.2003 – OVG 1 B 16.03, LLRR 2003, p. 106.

Whether a practice is misleading, needs to be evaluated on the basis of consumer expectations.¹⁵⁴ As already stated above, the average consumer must be taken as a benchmark.¹⁵⁵ Minorities are protected as well, as long as they are not too small.¹⁵⁶ According to Recital 18 of the Directive the average consumer test is not a statistical test. Hence, the benchmark is not the subjective perspective of one consumer but an objectified point of view which needs to be determined normatively.¹⁵⁷ According to Recital 7 of the Unfair Commercial Practices Directive full account is to be taken of the context of the individual case. In this respect the product and the function of the packaging have to be considered.¹⁵⁸ Furthermore, a comparison of the product to trading customs like sizes of packaging being a common practice for a particular product (see e.g. the 500 gr. packaging size for coffee) is –in accordance to what has been said previously- without doubts admissible.¹⁵⁹ However, considering the objectified perspective of an average consumer and the fact that minorities are only protected as long as their number is not too small, the affirmation of such a (subjective) comparison as the reason for a practices being regarded as misleading is not obvious. After all what has been stated above the actual knowledge of a particular consumer may not be of relevance. Only one source expressly stated that hidden price increases by means of packaging practices as described here could constitute a deception because consumer expectations persist and continue to have an effect on the transactional decision of the consumer.¹⁶⁰ In cases of the quantity of products which previously was regulated by provisions on the nominal quantity, the number of persons being misled, because the quantity of a product changed whereas packaging size did not change, is very high. A misleading commercial practice, hence, could clearly be established. In the above mentioned cases, however, this conclusion would not be that self-evident.

Misleading packaging as described in this chapter, hence, could fall foul of the provisions of the Unfair Commercial Practices Directive. However, the individual case needs to be examined with the help of the measures established in the previous paragraph. The subsuming of misleading packaging practices as listed in this chapter under the Unfair Commercial Practices Directive is not self-evident.

It remains questionable whether downsizing falls under the term “misleading action”. In this case the quantity filled into the package is reduced while packaging is not adjusted. This could lead to the assumption that the consumer is not misled by an action as to the quantity of the product but rather that material information (quantity has been reduced) are not disclosed. Whether the practice issued is an omission or an action depends on the question whether it has to be drawn on the action “filling with less quantity” or the later happening, namely the omission of the information that the package has been filled with less quantity. The question, hence, is where the focus is on. Considering that the package was not misleading before the quantity was changed and that the packaging itself as regards its shape or size was not changed in contrast to the aforementioned example of misleading packaging practices, it may be concluded that the focus is not on the action “less filling” but must be on the omission of the information that the package contains less quantity.

¹⁵⁴ *Dreyer* in Harte-Bavendamm/ Henning-Bodewig, Gesetz gegen den unlauteren Wettbewerb, 2nd edition, Munich 2009, B. § 5 (1) marginal number 5.

¹⁵⁵ Recital 18 of the Unfair Commercial Practices Directive; see for further: Fn. 15.

¹⁵⁶ *Helm* in Gloy/ Loschelder/ Erdmann, Wettbewerbsrecht, 4th edition, Munich 2010, § 59 marginal number 333.

¹⁵⁷ *Dreyer* in Harte-Bavendamm/ Henning-Bodewig, Gesetz gegen den unlauteren Wettbewerb, 2nd edition, Munich 2009, B. § 5 (1) marginal number 5, 10.

¹⁵⁸ *Ambis* in Erb/ Kohlhaas, Strafrechtliche Nebengesetze, 185. Ergänzungslieferung (2011), § 7 EichG, marginal number 10; *Helm* in Gloy/ Loschelder/ Erdmann, Wettbewerbsrecht, 4th edition, Munich 2010, § 59 marginal number 333.

¹⁵⁹ *Helm* in Gloy/ Loschelder/ Erdmann, Wettbewerbsrecht, 4th edition, Munich 2010, § 59 marginal number 333.

¹⁶⁰ *Helm* in Gloy/ Loschelder/ Erdmann, Wettbewerbsrecht, 4th edition, Munich 2010, § 59 marginal number 333.

However, with respect to the question whether EU legislation is infringed the distinction between misleading action and misleading omission and, hence, the question whether Art. 6 or Art. 7 needs to be applied is of subordinated relevance. If the abovementioned pre-conditions are met and the packaging is accordingly evaluated as to its function, the relation between filling and packaging size and consumer expectations, the packaging practice as described in this chapter will usually be regarded as misleading. However, packaging in the individual case needs to be examined.

3.1.1.1.1.6. Further case law examples

In the case of spices packed with a lot of air in a soft package¹⁶¹ the *Oberlandesgericht Frankfurt a.M.* pointed out that the package itself must have a misleading effect.¹⁶² An average consumer, however, would not have had the impression that the package is full. Rather the consumer could even feel that a part of the package is only filled with air.

In contrast, the *Oberlandesgericht Hamburg* decided in the case of packages for coffee pads which also were filled partly with air¹⁶³ that the average consumer – who is not meticulous – could be misled not only by the size of the package but also and in particular by its design.

These cases, however, are not comparable. Whereas the consumer in the first case could even look into the package and feel how much filling was factually in the package which allowed for a comparison with other products on the market, the consumer in the second case was not able to estimate how much coffee was in the package. Not only the size of the product package, which was comparable to a 500 gr. one, but also its design could potentially mislead the consumer. It was not possible to look into the product. Even the indication of portions was not very helpful because it did not lead to the conclusion that one portion equates to one cup. This was underlined by the image on the package presenting two big cups. In this case, it was assumed that even an average consumer could have concluded that in comparison to other products, this package contained more quantity. The practice was thereby regarded as being misleading.

In the case of an Eau de toilette¹⁶⁴ and also in the case of the cherry-alcohol-pralines¹⁶⁵ it was also held that in order to determine whether something is misleading, the product itself needed to be evaluated. When buying luxurious products, average consumers expect the packaging to be proportionally greater. In that case the relationship between price and benefit is not decisive. Hence, the packaging fulfils another function with respect to prestige objects and therefore does not suggest more quantity. It therefore was not regarded as being misleading.

A relevant case to mention is furthermore case 1009/2008 of the Multimember Court of Athens (Chronicles of Private Law (XpID) 2008.743). The applicant company took legal action against the defendant, who was a competitor in the sector of oil distribution which was based on the claim that the defendant's products (packaged olive oil) were sold in disproportionate big packaging and, hence, could mislead consumers.

¹⁶¹ OLG Frankfurt a.M., 21.10.2008 – 14 U 240/ 07.

¹⁶² OLG Frankfurt a.M., 21.10.2008 – 14 U 240/ 07, LLRR 2008, p. 75 (76); OVG Berlin, 24.9.2003 – OVG 1 B 16.03, LLRR 2003, p. 106 (107). In the last case it was also pointed out that a comparison of the new package (with less quantity) with the old package is also irrelevant. Only the package as it is in the present moment is deceive when evaluating if an average consumer could have been misled.

¹⁶³ OLG Hamburg, 14.4.2004 – 5 U 123/03.

¹⁶⁴ KG, 15.12.1987 – 5 U 5249/87.

¹⁶⁵ KG, 21.1.1983 – 5 U 6040/82.

Therefore, the practice could be regarded as an act of unfair competition. The court ruled that packaging, which despite its size, clearly stated its quantity on the front side (3 L) of the package, was not misleading. The average consumer was deemed to be thoroughly inspecting such products, so was likely to see the actual size and not to be deceived. As already pointed out above, the legal action was not taken by a consumer and therefore could not be based on the Greek Consumer Act, but accordingly on the act 146/1914 against unfair competition. It is, however, noteworthy that according to the Greek literature the "black list" of unfair practices of Directive 2005/29/EC, which is incorporated in the Greek Consumer Act (Art. 9a – 9θ) by act 3587/2007, is also used as criterion for the specification of an unfair action.

Some complaints concerned frozen shrimp packages where information on the net drained weight was missing. The packaging being bigger due to the ice suggested more quantity of the actual product. In these cases the missing information on the net drained weight was deemed to be a misleading packaging practice which was in breach of the regulations. However, Art. 6 (1) (d) of the Unfair Commercial Practices Directive was applied which states that an action may be misleading with respect to "the price or the manner in which the price is calculated, or the existence of a specific price advantage". Furthermore, it was pointed out that according to Art. 4 (2) of the Unit Prices Directive the unit price of the net drained weight should have been indicated where national or Community provisions require the indication of the net weight and the net drained weight for certain pre-packed products.

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3.1.1.1.2. Product-specific secondary EU legislation relating to unfair competition

As already pointed out above, in the case of conflict between the provisions of the Unfair Commercial Practices Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects, (Art. 3 (4)). Hence, it needs to be examined whether there are Community rules regulating specific aspects of packaging as an unfair commercial practice. In this respect, product-specific secondary EU legislation could be of relevance. This legislation mainly concerns foodstuffs, tobacco products, pharmaceuticals and cosmetics.¹⁶⁷

In relation to foodstuffs, the Regulation laying down the general principles and requirements of food law¹⁶⁸ states that the labelling, advertising and presentation of food shall not mislead consumers, Art. 16. Article 16 of the Regulation is restricted to the deception by the shape, appearance or packaging of food, the packaging materials used, the manner in which it is arranged and the setting in which it is displayed.¹⁶⁹ However, the regulation does not provide any examples which would specify "deception". It is argued that the European legislator thereby did not want to affect the more specific provision of Art. 2 of the Directive relating to the labelling, presentation and advertising of foodstuffs¹⁷⁰ ("Without prejudice to more specific provisions of food law").¹⁷¹

¹⁶⁷ v. Jagow in : Harte-Bavendamm/ Henning-Bodewig, Gesetz gegen den unlauteren Wettbewerb, 2nd ed., Munich 2009, Einleitung H marginal number 1.

¹⁶⁸ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of safety, OJ L 31/1 of 1.2.2002.

¹⁶⁹ See Meyer/ Streinz, LFBG-BasisVO, 1st edition, Munich 2007, Art. 16 VO 178/2002/EG.

¹⁷⁰ Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs. However, this Directive will be replaced by the new Regulation on the provision of food information to consumers which has been adopted by the Council on 29.9.2011 but not yet published in the Official Journal.

¹⁷¹ Zipfel/ Rathke in Zipfel/ Rathke, Lebensmittelrecht, 144. Ergänzungslieferung (2011), Art. 16 EWG VO 178 2002 marginal number 16.

Taking into account only the wording of this article, packaging as described under 1.1 would fall foul of this regulation if a misleading effect on the consumer could be identified.

No case law concerning an infringement of this article could be identified. However, with respect to what has been said above it is not likely that Art. 16 of Regulation No. 178/2002 could be found in case law due to the nature of this article being a general clause. Case law would rather concern more specific provisions which precise the prohibition to mislead by means of packaging.

As already indicated above there is a more specific provision related to packaging of foodstuffs. According to Art. 2 (1) (a) subpara. (i) of the Directive on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs labelling and methods used must not be such as could mislead the purchaser to a material effect as to its quantity. Art. 3 (a) of this Directive regulates that this prohibition shall also apply to the presentation of foodstuffs, in particular shape, appearance or packaging, the packaging materials used and the setting in which they are displayed. The practice, however, only needs to be apt to mislead.¹⁷² The benchmark here is as well the average consumer in the sense of the European legislation and jurisprudence.¹⁷³ Whether a practice was misleading, needs, hence, to be established according to consumer expectations but again not from a subjective but rather an objectified point of view.¹⁷⁴ These pre-conditions overlap with the pre-conditions established under the Unfair Commercial Practices Directive. Packaging practices in the sense of 3.1.1.1.4 would, hence, without any doubts fall foul of Directive 2000/13/EC. However, the deliberations made as to the possible infringement of the Unfair Commercial Practices Directive by packaging practices in the sense of 3.1.1.1.5. need also to be made within the scope of Directive 2000/13/EC.

No case law was found which dealt with the infringement of the provisions of Directive 2000/13/EC by misleading packaging practices. Examples given by legal scholars of "presentation" include artificially flavoured fruit products packaged in fruit shaped containers.¹⁷⁵ According to the Irish report, it is submitted that this legislation would also appear to embrace deceptively shaped packaging, e.g. slack fill but not grocery shrink ray. This undermines the concern expressed above. Furthermore, the German literature refers to the same cases as already analysed within the framework of the possible infringement of the Unfair Commercial Practices Directive. Conclusions drawn from these cases may be projected to the application of Art. 2 (3) (a) in connection with Art. 2 (1) (i) of the Directive.

As regards tobacco products, pharmaceuticals and cosmetics no EU legislation seems to be relevant for the study.¹⁷⁶

However, no specific examples can be found as to the application of this EU legislation.

¹⁷² Meyer in Meyer/ Streinz, LFBG, BasisVO, 1st edition, Munich 2007, § 11 LFBG marginal number 16.

¹⁷³ Rathke in Zipfel/ Rathke, Lebensmittelrecht, 144. Ergänzungslieferung (2011), § 11 LFBG marginal number 36.

¹⁷⁴ Meyer in Meyer/ Streinz, LFBG, BasisVO, 1st edition, Munich 2007, § 11 LFBG marginal number 18-25.

¹⁷⁵ <http://www.bordbia.ie/industry/services/brandforum/events/BrandProtectionApril2010/Labelling%20and%20Packaging%20-%20Larry%20Fenelon,%20Leman%20Solicitors.pdf>

¹⁷⁶ As well Directive 2001/37/EC as Directive 2003/15/EC are related to advertisement of the product and information on the package.

3.1.1.1.3. Consumer Sales Directive

Additionally, it could be considered that the product purchased is not in conformity with the contract. The principle of conformity is stressed at numerous points¹⁷⁷ in the Consumer Sales Directive and may be regarded as *the* underlying principle.¹⁷⁸ Article 3 (1) states that the seller shall be liable to the consumer for *any* lack of conformity. Consequently, any kind of a lack of conformity would entitle the consumer to the remedies as laid down in Art. 3.¹⁷⁹ In case of misleading packaging practices, hence, it needs to be examined if supplying the consumer with the quantity of a product expressed on the package but less than the consumer expected is still conform with the contract. For this purpose all aspects relating to the conclusion of the contract need to be considered.¹⁸⁰ This assessment encompasses *inter alia* features of the product, advertisement, labelling and the expectations of the consumer with respect to the product. Normally, information regarding the quantity of the product on the package will not be incorrect in cases of misleading packaging. The problem rather is that consumers' expectations despite the indication of quantity are not met. However, an objective addressee of the information on the package and also expressed by the package would not conclude that he/ she would receive more quantity than stated on the package. The average consumers' idea of the subject of the contract is the product in the quantity corresponding to the information on the package. The sellers' obligation regarding the quantity of the product is determined in the contract by the nomination of the weight.¹⁸¹ Since in most of the cases the indicated quantity will correspond with the factual quantity of the product, a lack of conformity, hence, cannot be established. Misleading packaging practices related to the quantity of the product, hence, do not fall foul of Directive 1999/44/EC.

3.1.1.1.4. Misleading and Comparative Advertising Directive

Misleading packaging practices could, however, infringe competitors' interests as provided by Directive 2006/114/EC¹⁸². The relevant provisions of Directive 2006/114/EC do not directly protect consumers' interest.¹⁸³ However, the Misleading and Comparative Advertising Directive is one of the main pillars of European unfair commercial practices and competition law¹⁸⁴. Since the study focuses consumer protection interests the following analysis should be limited to giving a brief overview.

The packaging practices in question could constitute a misleading advertising in the sense of Art. 2 (a) and (b). Advertising in the light of Art. 2 (a) means the making of a representation in any form in connection with a trade in order to promote the supply of goods. Packaging, hence, would have to be a representation in the sense of Art. 2 (a). Representations are statements made by the producer.

¹⁷⁷ See e.g. Recital 7-12 and 17.

¹⁷⁸ Compare: *Serrano*, Geltungsbereich und Begriffsbestimmung, in: Grundmann/ Bianca, EU-Kaufrechts-Richtlinie, 1st edition, Cologne 2002, p. 122.

¹⁷⁹ Compare: *Serrano*, Geltungsbereich und Begriffsbestimmung, in: Grundmann/ Bianca, EU-Kaufrechts-Richtlinie, 1st edition, Cologne 2002, p. 122.

¹⁸⁰ Compare: *Serrano*, Geltungsbereich und Begriffsbestimmung, in: Grundmann/ Bianca, EU-Kaufrechts-Richtlinie, 1st edition, Cologne 2002, p. 123.

¹⁸¹ Compare: *Matusche-Beckmann*, Staudinger BGB Neubearbeitung 2004, § 434 marginal number 122.

¹⁸² Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376/21 of 27.12.2006.

¹⁸³ Only provisions on the prohibition of unlawful comparative advertising shall protect as well consumer as business interests whereas provisions on the prohibition of misleading advertising are restricted to B2B relations. See: *Keirsbilck*, The New European Law of Unfair Commercial Practices, Oxford 2011, p. 69; *Busch*, Lauterkeitsrecht in Europa : Acquis communautaire, in: Schmidt-Kessel/ Schubmehl, Lauterkeitsrecht in Europa, 1st edition, Munich 2011, p. 1 (11).

¹⁸⁴ Assumed this term could encompass all EU legislation related to unfair commercial practices and competition.

These statements are intended to supply the addressee with any kind of promoting information.¹⁸⁵ Not only expressions but also actual activities¹⁸⁶ as well as e.g. pictures may be regarded as a representation.¹⁸⁷ Hence, also the outwards appearance of the product is a representation in the sense of Art. 2 (a).¹⁸⁸ This includes also packaging. The size of the package may be a representation in respect of the quantity of the product.¹⁸⁹ This representation is made in connection with the trade in order to promote the supply of the product in question. Therefore, packaging as well in the sense of 3.1.1.1.4 as 3.1.1.1.5 may be an advertisement in the sense of Art. 2 (a).

The respective packaging practice also would have to be misleading. According to Art. 2 (b) advertising is misleading if it in any way, including its presentation, deceives or is likely to deceive the person to whom it is addressed or whom it reaches and which, by reason of its misleading nature, is likely to affect their economic behaviour or which, of those reasons injures or is likely to injure a competitor. When assessing whether advertising is misleading, objective criteria need to be applied.¹⁹⁰ However, the Directive does not state whether the test if advertising is misleading should be evaluated by mean of statistical results or by means of normative interpretation.¹⁹¹ Art. 3 determines grounds for the assessment of the deception. According to Art. 3 in determining whether advertising is misleading regard is to be held to all its features and the information it contains concerning the quantity of a product.

If these pre-conditions are fulfilled the practice is regarded as unfair. Misleading packaging practices, hence, would fall foul of EU legislation. Case law concerning the infringement of the Misleading and Comparative Advertising Directive by means of misleading packaging practices could not be identified. How EU legislation in this case is applied, cannot be answered. This particularly proves difficult because provisions on misleading advertising in B2B relations underlie the minimum harmonisation approach.¹⁹² Member States, hence, are free to adopt stricter regulations.¹⁹³

3.1.1.2. Gifts

According to Annex I para. 20 of the Unfair Commercial Practices Directive the description of a product as "gratis", "free", "without charge" and so on is regarded as a commercial practice which is in all circumstances considered unfair, if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.¹⁹⁴ The practice is, hence, unfair if two pre-conditions are fulfilled: the producers needs to describe the product in the above mentioned manner and costs others than the above mentioned arise.

¹⁸⁵ See: *Bornkamm* in Köhler/Bornkamm, UWG, 29th edition, Munich 2011, § 5 marginal number 2.36, 2.37.

¹⁸⁶ *Dreyer* in Harte-Bavendamm/ Henning-Bodewig, Gesetz gegen den unlauteren Wettbewerb, 2nd edition, Munich 2009, § 5 marginal number 44.

¹⁸⁷ compare: *Wolff* in Hoeren/Sieber, Multimedia-Recht 04/2011, § 5 UWG marginal number 43 and *Bornkamm* in Köhler/Bornkamm, UWG, § 5 marginal number 2.33; *Dreyer* in Harte-Bavendamm/ Henning-Bodewig, Gesetz gegen den unlauteren Wettbewerb, 2nd edition, Munich 2009, § 5 marginal number 37.

¹⁸⁸ see: *Bornkamm* in Köhler/Bornkamm, UWG, § 5 marginal number 2.53.

¹⁸⁹ *Dreyer* in Harte-Bavendamm/ Henning-Bodewig, Gesetz gegen den unlauteren Wettbewerb, 2nd edition, Munich 2009, § 5 marginal number 44.

¹⁹⁰ Recital 7 of the Misleading and Comparative Advertising Directive.

¹⁹¹ *Glöckner*, Europäisches Lauterkeitsrecht, in: Schulze/ Zuleeg/ Kadelbach, Europarecht, 2nd edition, Baden-Baden 2010, p. 664 (695).

¹⁹² Art. 14 of the Unfair Commercial Practices Directive; see further : *Keirsbilck*, The New European Law of Unfair Commercial Practices, Oxford 2011, p. 69; *Busch*, Lauterkeitsrecht in Europa : Acquis communautaire, in : Schmidt-Kessel/ Schubmehl, Lauterkeitsrecht in Europa, 1st edition, Munich 2011, p. 1 (11).

¹⁹³ *Keirsbilck*, The New European Law of Unfair Commercial Practices, Oxford 2011, p. 69.

¹⁹⁴ For further information see: *Köhler/ Bornkamm* in Köhler/ Bornkamm, UWG, 29th edition, Munich 2011, Anhang zu § 3 Abs. 3 marginal number 21.1-21.4.

Examples are so-called 'gift promises' meaning that additional goods are attached to a product and are indicated as gift for the consumer (e.g. a mop which is attached to cleaning supplies indicating that the mop is a gift – Hungarian Decision KMF – 07421-7/2009).

Furthermore, an example is the packing of two or more different products into one package and offering it for sale jointly conveying the impression that the consumer acquires one or more of the attached products for free or at least gets a discount (e.g. to one piece of liquid soap a refilling bag is attached and the joint packaging indicates that the refilling bag is for half price – Hungarian Decision BPF-00285-1/2011; a toothbrush is attached to a twin pack of toothpaste whereas the toothbrush is declared as a gift. However the price for a pack of toothpaste was HUF 478. The twin pack with toothbrush was supposed to cost HUF 579 – Decision KMF-1125/1/2010).

Furthermore, it may be contemplated whether such practices do not fall foul of Art. 6 (1) (d) of the Unfair Commercial Practices Directive if the consumer is misled as to the price and even the manner it is calculated and all pre-conditions of Art. 6 of the Directive are fulfilled¹⁹⁵.

3.1.2. Misleading packaging practices as to the quality

3.1.2.1. Wrongful or misleading information transferred by packaging design

3.1.2.1.1. Unfair Commercial Practices Directive

Misleading packaging practices related to the quality of a product could fall foul of the Unfair Commercial Practices Directive if the respective practice is not covered by any of the media-specific or product-specific EU legislation related to unfair competition.

Since misleading or wrongful information covered by the study¹⁹⁶ do not fall under any of the misleading commercial practices which in accordance with Annex I of the directive are in all circumstances considered unfair, it has to be examined if such practices can fall under the term "misleading actions" in the sense of Art. 6 (1) (b). The measurements and pre-conditions as already analysed above¹⁹⁷ need to be applied. If the pre-conditions are met, the practice will be regarded as misleading and hence unfair. According to Art. 5 (1) unfair commercial practices are prohibited. Misleading packaging practices hence would fall foul of EU legislation.

In **Lithuania** the State Consumer Rights Protection Authority¹⁹⁸ (hereafter – SCRPA) in the year 2011 received a consumer complaint concerning a package of sour cream and fat mixture. On the package the word "sour cream" was written in large letters, while the phrase "and fat mixture" was written in smaller letters. It was stated that in this case the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania was not violated. SCRPA pointed out that considering the fact that according to the law requirements producers are obliged to provide not only the price of the product itself, but also the unit price, the law is not violated as long as consumers have possibilities to compare prices of different products.

¹⁹⁵ The pre-conditions equate with the pre-conditions analysed in chapters 3.1.1.1.1- 3.1.1.1.5. For further see there.

¹⁹⁶ See chapter 1.2.1.

¹⁹⁷ See under Point 3.1.1.1.1- 3.1.1.1.5.

¹⁹⁸ <http://www.vvtat.lt/index.php?1513433377>.

However, SCRPA assured that every concrete complaint regarding unfair packaging would be analysed individually examining its conformity with the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania.

In **Portugal** complaints occurred stating that pictures and descriptions on the package were misleading. For example pictures of digital cameras and mp3-players did not correspond with the products. Furthermore, cosmetics were sold in green packaging in order to suggest nature-based ingredients even though this was not the case. These practices are apt to mislead the consumer into thinking that he would purchase a good of better or at least another quality. As has been pointed out at many points of the study visual appearance of the product plays a great role with respect to consumer's choices. The packaging design transfers information on the quality of the product by the pictures and the colour and thereby evokes certain associations and expectations. Pictures on the package commonly present what is in the package. If the product is available in different colours and the package only shows the product in one colour, it is usually indicated which colour the product in the respective package has. By experience with trading usages, the average consumer, hence, in fact would be misled into thinking that the picture on the package presents what is in the package. The practice could, hence, be regarded as misleading and thereby unfair. The colour green commonly is used as a symbol for the nature with respect to the ingredients of a product and an environment-friendly production. For particular groups of consumers both aspects are of fundamental relevance when choosing a product. In this case, the expectations of this group with respect to the symbolic meaning of the colour green would not be met. An infringement of Art. 6 of the Unfair Commercial Practices Directive, hence, could be established.

3.1.2.1.2. Product-specific secondary EU legislation related to unfair competition

Misleading or wrongful information transferred by the design of the package can particularly fall foul of the Directive relating to the labelling, presentation and advertising of foodstuffs. The pre-conditions and measures as analysed above need to be applied.¹⁹⁹

Since the pre-conditions and measures of the Unfair Commercial Practices are similar to the requirements and measure to be applied in Art. 16 of the Regulation laying down the general principles and requirements of food law, an infringement by the design of the packaging transferring misleading information could be established.²⁰⁰

Furthermore, the Directive relating to the labelling, presentation and advertising of foodstuffs states in its Art. 2 (1) (a) subpara. (i) that the labelling and methods used must not be such as could mislead the purchaser to a material degree, particularly as to the characteristics of the foodstuff. Art. 1 (3) defines "labelling" as any words, particulars, trademarks, brand name, pictorial matter or symbol relating to a foodstuff and placed on any packaging. This precisely encompasses the **Portuguese example** of pictures on the packaging which do not correspond the actual product and the symbol green used in order to mislead the consumer into thinking the product has natural ingredients or is environmental friendly.

Finally, in Art. 3 certain compulsory indications on foodstuff are listed. This list contains particularly the obligation to indicate the net quantity, Art. 3 (1), (4).

¹⁹⁹ See chapter 3.1.1.1.2.

²⁰⁰ See the examples and the argumentation in chapter 3.1.1.1.1.

In **Lithuania** there have been a number of complaints regarding frozen fish, when the quantity of ice was bigger than stated on the package.²⁰¹

Misleading or wrongful information on packages could fall foul of numerous further regulations specifying indication and labelling requirements as to certain products.²⁰² Furthermore, the Health-Claims Regulation²⁰³ could be of relevance as regards the correctness of information on packages.

However, these regulations deal exclusively with the written information on the package and with advertising without special regard to the effects of the package. Hence, the question of whether misleading or wrongful information could fall foul with these provisions is not covered by the scope of the study.

The same is true for directives on tobacco products,²⁰⁴ cosmetics²⁰⁵ and pharmaceuticals²⁰⁶

3.1.2.1.3. Misleading and Comparative Advertising Directive

Misleading or wrongful information as covered by the study could, however, infringe competitors' rights as provided by Directive 2006/114/EC. Since the study focuses on consumer protection aspects, only a brief overview should be given. Particularly, a more detailed analysis of the elements of misleading advertising in the sense of Directive 2006/114/EC has already been given above.²⁰⁷

In accordance with the interpretation of advertising as stated above²⁰⁸, pictures, symbols and colours are representations in connection with a trade in order to promote the supply of goods.

²⁰¹ <http://nevertok.lt/2-maisto-produktai/perki-zuvi-%E2%80%93-moki-uz-leda/>;
<http://www.diena.lt/dienrastis/ekonomika/ledas-uz-zuvies-kaina-115376>.

²⁰² E.g. Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuff, OJ L 276/40 of 6.10.1990; Council Regulation 1898/87/EEC of 2 July 1987 on the protection of the designation used in marketing of milk and milk products, OJ L 182/36 of 3.7.1987; Council Regulation 834/2007/EC of 28 June 2007 on organic production and labelling of organic products and repealing Regulation 2092/91/EC, OJ L 189/1 of 20.7.2007; Council Regulation 510/2006/EC of 20 March 2006 on the protection of geographical indications and designations of origin of agricultural products and foodstuffs, OJ L 93/12 of 31.3.2006; Council Regulation 509/2006/EC of 20 March 2006 on agricultural products and foodstuffs as traditional specialties guaranteed, OJ L 93/1 of 31.3.2006; Council Regulation 1130/98/EC of 26 May 1998 concerning the compulsory indication of the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112/EEC, OJ L 159/4 of 3.6.98; Regulation 1830/2003/EC of the European Parliament and the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC, OJ L 268/24 of 18.10.2003; Council Regulation 2200/96 of 28 October 1996 on the common organization of the market in fruit and vegetables, OJ L 297/1 of 21.11.1996; Commission Regulation 1580/2007 of 21 December 2007 laying down implementing rules of Council Regulation (EC) No 2200/96, (EC) No 2201/96 and (EC) No 1182/2007 in the fruit and vegetable sector. There are numerous further regulations/ directives on the labelling, presentation or advertising of certain products like natural mineral water (Dir. 80/777/EEC), wine (Reg. No. 753/2002), eggs (Reg. No. 2295/2003), honey (Dir. 2001/110/EC) and sugar (Dir. 2001/111/EC) etc. which cannot be listed comprehensively having regards to the scope of the study.

²⁰³ Regulation 1924/2996/EC of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, OJ L 404/09 of 30.12.2006.

²⁰⁴ Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 152/16 of 20.6.2003; Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States the manufacture, presentation and sale of tobacco product, OJ L 194/26 of 18.7.2001.

²⁰⁵ Directive 2003/15/EC of the European Parliament and of the Council of 23 February 2003 amending Council Directive 76/786/EEC on the approximation of the laws of the Member States relating to cosmetic products, OJ L 66/26 of 11.3.2003; Council Directive 76/786/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, OJ L 262/169 of 27.9.1976.

²⁰⁶ Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use, OJ L 113/13 of 30.4.92.

²⁰⁷ See chapter 3.1.1.1.4.

²⁰⁸ See chapter 3.1.1.1.4.

These representations constitute “advertising” in the sense of Art. 2 (a) of the Misleading and Comparative Advertising Directive. Advertising is misleading if it in any way, including its presentation, deceives or is likely to deceive the person to whom it is addressed or whom it reaches and which, by reason of its misleading nature, is likely to affect their economic behaviour or which, of those reasons injures or is likely to injure a competitor (Art. 2 (b) of the Directive). When assessing whether advertising is misleading, objective criteria need to be applied.²⁰⁹ Art. 3 determines grounds for the assessment of the deception. According to Art. 3 in determining whether advertising is misleading regard is to be held to all its features and the information it contains concerning its composition. The pictures and the colour of the packaging transfer information on particular characteristics of the product evoking the expectations that the actual product correspond to the pictured product or that cosmetics packaged in the symbolic colour green are nature-based. As already stated above the visual appearance has a great impact on the transactional decisions of a person. The addressee of these practices, hence, would be misled by information indicated by the design of the packaging. An infringement of the Misleading and Comparative Advertising Directive could be established.

There is case law concerning misleading information and advertising. For example there are several administrative decisions of the President of the Office of Competition and Consumer Protection²¹⁰. These decisions, however, are not directly related to misleading packaging practices. Most of them deal with wrong or incomplete information in connection with promotional campaigns or misleading advertising.²¹¹ However, the practices used in these cases were always regarded as infringements of common consumer interests. Each infringement was deemed to be an unfair market practice (here in the sense of Directive 2005/29/EC) or/ and an example of unfair competition. The test for determining whether a practice is misleading, is that the “average consumer”, who in Art. 2 (8) of the Polish legislation transposing the directive²¹² is defined according to EU legislation and case law.²¹³ No “average consumer”, understood as a consumer who is well informed, attentive and circumspect,²¹⁴ was regarded as misled by the practice in question. However, when determining whether the average consumer was misled regard was only held to packaging and its design. These practices, hence, are not covered by this study.

In contrast, no case law could be identified which concerns misleading practices that cause the deception because packaging design transfers wrongful or misleading information.

²⁰⁹ Recital 7 of the Misleading and Comparative Advertising Directive.

²¹⁰ Polish consumer association.

²¹¹ Decision no RPZ 12/ 2011 from the 13.7.2011 (Aflofarm Fabryka Leków) about a misleading advertisement; in the television claiming that the person recommending the product has an academic title even though she had not; Decision no RPZ/2011 from 7.7.2011 about a television competition (One-2-One S.A.); Decision no RWR 12/2011 from 1.7.2011 about incomplete information within the framework of a promotion campaign (E.Wedel sp. z o.o.); decision no DDK – 2/ 2011 from 20.4.2011 about a promotion campaign which in fact was not really a promotion campaign but only assigned as one (Agros Nova sp. z o.o.).

²¹² Ustawa z dnia 23 sierpnia 2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym implementing the Unfair Commercial Practice Directive (2005/29/EC).

²¹³ See e.g.: Decision no RPZ 12/ 2011, p. 11 and Decision RWR 12/ 2011, p. 8.

²¹⁴ See Art. 2 (8) of the act of 23 September 2007 implementing the Unfair Commercial Practice Directive (2005/29/EC) (Ustawa z dnia 23 sierpnia 2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym, Dz. U. z dnia 20 września 2007 r.).

3.1.2.2. Copycat Packaging

Unfair Commercial Practices Directive

Copycat packaging could fall foul of the Unfair Commercial Practices Directive.²¹⁵

Promoting a product similar to product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by the same manufacturer when it is not constitutes a commercial practice which is in all circumstances considered unfair according to Annex I para. 13 of the Unfair Commercial Practices Directive. This includes also packaging in a similar manner.²¹⁶ In order to apply this provision, it has therefore to be proved that the product was made deliberately similar so as to mislead the consumer.²¹⁷

If the product is not made deliberately in a manner as described above but the packaging, however, imitates the packaging of another manufacturer's product, the practice could infringe Art. 5, 6 (1) (b) or (2) (a) of the Unfair Commercial Practices Directive when it is likely to mislead the consumer as to the origin or quality of the product.²¹⁸ In case of Art. 6 (1) (b) the practice misleads the consumer as to the commercial origin of the product.²¹⁹ Art. 6 (2) (a), however, deals with the marketing of the product which gives reason for a confusion with another product, trade mark or name or other features or marks of the product which distinguishes it from other products.²²⁰ In both cases the same pre-conditions as set out in chapters 3.1.1.1.1.1.-3.1.1.1.1.5. must be satisfied.

A practice violating one of these provisions would be considered unfair. Unfair commercial practices are prohibited according to Art. 5 (1). Hence, they would fall foul of EU legislation.

In case of lookalike products Italian judges declare that in order to presume that a consumer was misled, it has to be proved that the respective packaging could be confused with the competitor's one regarding its size, colour and image. It is argued that consumers purchase impulsively. It may then be concluded that a consumer is misled, when packaging can be easily confused with a competitor's product which costs the same but contains more product, or is of better quality.

3.1.3. Missing or wrongful price indication

In relation to the consumer, failing to indicate prices and unit prices correctly infringes provisions of the Unit Prices Directive²²¹ and the respective national legislation which transposes it. According to these provisions the retailer must show the unit prices for product sold by weight, volume or measure which assists the consumer in comparing products and may counteract the effect of misleading packaging.

²¹⁵ *Marsland*, Unfair Commercial Practices: Stamping out Misleading Packaging, in: Weatherill/ Bernitz, The Regulation of Unfair Commercial Practices under EC Directive 2005/29 – New Rules and New Techniques, Oxford 2007, p. 191 (193, 194).

²¹⁶ *Marsland*, Unfair Commercial Practices: Stamping out Misleading Packaging, in: Weatherill/ Bernitz, The Regulation of Unfair Commercial Practices under EC Directive 2005/29 – New Rules and New Techniques, Oxford 2007, p. 191 (194).

²¹⁷ *Köhler/ Bornkamm* in *Köhler/ Bornkamm*, UWG, 29th edition, Munich 2011, Anhang zu § 3 Abs. 3 marginal number 13.5-13.7.

²¹⁸ Compare also Recital 14 of the Unfair Commercial Practices Directive.

²¹⁹ *Busch*, Unlauterer Wettbewerb, in : Gebauer/ Wiedmann, Zivilrecht unter europäischem Einfluss, 2nd edition, Stuttgart 2010, chapter 25 marginal number 131.

²²⁰ *Busch*, Lauterkeitsrecht in Europa : Acquis communautaire, in : Schmidt-Kessel/ Schubmehl, Lauterkeitsrecht in Europa, 1st edition, Munich 2011, p. 1 (24).

The reports of the commercial inspection²²² in Poland show that there are many violations of the obligation to indicate unit prices.²²³ One of the core points of the consumer policy for 2010-2013²²⁴ is the counteraction against these violations respectively the conduction of the existing provisions on unit price indication. This view was undermined by some of the national reporters but also by some consumer organisations.

It was, however, also stated that unit prices indications are sometimes illegible. The font size is very small and the placement is inconvenient. The Unit Prices Directive does not regulate specific questions on the manner in which unit prices should be presented (particularly font, font size). Such practices, hence, would fall foul of the Unit Prices Directive.

It could be contemplated whether Art. 6 (1) (d) of the Unfair Commercial Practices Directive could be applied which states that an action may be misleading with respect to "the price or the manner in which the price is calculated, or the existence of a specific price advantage". However, usually the price in these cases will be indicated. Furthermore, an infringement of Art. 6 (1) (d) of the Unfair Commercial Practices Directive cannot be considered because the manner in which the price is calculated is shown in cases where unit prices are only illegible (for some groups of consumers) because e.g. the letters are too small.

3.2. Conclusions

In accordance with the foregoing analysis misleading packaging practices fall foul of the EU legislation. Which EU legislation is affected depends on the type of the packaging practices applied. In focus of the study was the analysis of an infringement of the Unfair Commercial Practices Directive²²⁵ and the Directive concerning misleading and comparative advertising²²⁶. Since it was reported that the enforcement of provisions of the Unit Prices Directive in some of the Member States investigated is problematic regard was also held to the Unit Prices Directive²²⁷ which can assist to prevent the effectiveness of misleading packaging practices.

It may be concluded that both misleading packaging practices related to the quantity of the product as well as those related to the quality of the product would infringe EU legislation. However, downsizing packaging does not fall self-evidently under any EU legislation focused. A clarification with respect to this problem would be desirable.

²²¹ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products of to consumers, OJ L 80/27 of 18.3.1998.

²²² See: Informacja o wynikach kontroli prawidłowości i rzetelności organizowania promocji przez przedsiębiorców (BK/ AŻ – 034 – 4/ 08/ AJ) which can be found on:

<http://uokik.gov.pl/szukaj.php?szukaj=Informacja+o+wynikach+kontroli&x=0&y=0>; and Informacja o wynikach kontroli prawidłowości wprowadzania do obrotu produktów żywnościowych oferowanych w promocjach w dużych sieciach handlowych (BK/ AŻ – 034 – 1/ 07/ AJ).

²²³ In 2006 46,3 % of the 1650 controlled parties did either not at all indicate prices or did not indicate unit prices or units; 15, 3 % of 1311 parties did not calculate the unit prices correctly. In 2007 an improvement was notable.

²²⁴ See : <http://www.uokik.gov.pl/publications.php#faq1466>.

²²⁵ 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 and 2002/65/EC of the Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149/ 22 of 11.6.2005.

²²⁶ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376/21 of 27.12.2006.

²²⁷ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80/ 27 of 18.3.1998.

Hence, a clear answer to the questions whether there is no regulatory gap could not be given. Downsizing under certain circumstances may fall foul of the Unfair Commercial Practices Directive. Considering the pre-conditions that need to be fulfilled in order to affirm a deception (objectified perspective of an average consumer and the fact that minorities are only protected as long as their number is not too small), it is not unlikely that downsizing, which is substantiated by a comparison of previous packaging of the producer or other producers' packaging to current packaging of the producer, could fall out of the scope the Unfair Commercial Practices Directive and other European consumer protection provisions examined. A clarification of this case would be useful.

4. WHICH MEASURES COULD HELP TO DEAL WITH MISLEADING PACKAGING?

KEY FINDINGS

Six main measures have been identified which could effectively help to deal with misleading packaging.

From the analyses of case law it may be concluded that certain new market developments do not self-evidently fall within the scope of the Unfair Commercial Practices Directive.

Favourably, the Unfair Commercial Practices Directive should be amended in order to ease the above mentioned problem. Art. 6 could be completed by a new paragraph on packaging practices.

Furthermore, a database geared to the databases already existing in Germany should be set up as an uncomplicated and effective alternative to taking legal actions.

Additionally,

- EN-Standards on packaging could be established. These standards could help to interpret the paragraph added in the Unfair Commercial Practices Directive.
- the Unit Prices Directive could be amended. Provisions regulating the font and font size could be included.

Furthermore,

- the European Commission's website dedicated to the Unfair Commercial Practices Directive (<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show>) should be updated focusing misleading on packaging practices.
- chapter 2.4.4. of the Guidance for the UCP Directive in its function as a "living document" could be completed.
- a right to withdraw could be introduced.

4.1. Amendment of the Unfair Commercial Practices Directive

As already pointed out in chapter two, the lack of case law in some Member States in comparison to other Member States may surely be ascribed as well to a different culture of litigation as to varying, available instruments for the enforcement of one's rights and different litigation systems.

However, the application of Art. 6 of the Unfair Commercial Practices Directive on new market developments may, as has been shown in chapter three, as well prove problematic. It is at least not self-evident.

In order to ease these problems the Unfair Commercial Practices Directive could be completed. There are two possibilities open:

(1) Misleading packaging practices could be included into the “black list” of the Unfair Commercial Practices Directive which may be found in Annex I. Practices listed in Annex I are commercial practices which are in all circumstances considered unfair. This would prevent the problems of interpretation and especially of evidence. However, as already pointed out in the introduction, packaging serves very different functions and needs to meet different requirements depending on the packaged product. Furthermore, consumers’ expectations in relation to the packaging of a product vary depending on the product. “Misleading packaging”, hence, is a very broad term requiring further interpretation. It appears inconceivable that the list could encompass everything which could potentially be understood by the term “misleading packaging practices”. As regards the function of the list²²⁸ this also may not be particularly useful on balance. The term is not apt for incorporation into the black list.

It was, however, suggested by the German consumer association in Hamburg to introduce a benchmark which indicates the admissible size of packaging in relation to the size of the product itself.²²⁹ If it could be agreed on a percentage rate for the free space permitted for packaging, a respective rule on misleading packaging could also be introduced into the black list. This would be in line with the function of the black list and would prevent the problems as indicated above.

(2) Art. 6 of the Directive could provide a regulation addressing misleading packaging practices.²³⁰ Art. 6 could be supplemented as follows:

Art 6 (1) (a):

A packaging practice shall be regarded as misleading if it deceives or is likely to deceive the average consumer as a result of the size of the packaging, its form or design or other important elements directly related to the packaging, including a comparison of differences between the current packaging and (i) previous packaging, or (ii) the packaging of competitor's products, and causes, or is likely to cause him to make a transactional decision which he would not otherwise have taken.

In order to solve the above mentioned problems this supplement is desirable. It would clarify pre-existing regulations.

²²⁸ See: *Glöckner* in Harte-Bavendamm/Henning-Bodewig, Gesetz gegen den unlauteren Wettbewerb, 2nd edition, Munich 2009, Einleitung B. marginal number 342; for more details see: *Alexander*, Die «Schwarze Liste» der UGP-Richtlinie und ihre Umsetzung in Deutschland und Österreich, GRUR Int. 2010, 1025 (1027, 1028).

²²⁹ As already indicated in Germany the permitted free space of a package should not exceed 30 % (see. Fn. 24, 234 and particularly 299). This benchmark is considered too high according to the German consumer association in Hamburg. They suggest a limit of 10 %.

²³⁰ It could also be considered to include “misleading packaging practices” into the “black list” of the Unfair Commercial Practices Directive which may be found in Annex I. Practices listed in Annex I are commercial practices which are in all circumstances considered unfair. This would prevent the problems of interpretation and especially of evidence. However, as already pointed out in the introduction, packaging serves very different functions and needs to meet different requirements depending on the packaged product. Furthermore, consumers’ expectations in relation to the packaging of a product vary depending on the product. “Misleading packaging”, hence, is a very broad term requiring further interpretation. It appears inconceivable that the list could encompass everything which could potentially be understood by the term “misleading packaging”. As regards the function of the list this also may not be particularly useful on balance (see *Glöckner* in Harte-Bavendamm/Henning-Bodewig, Gesetz gegen den unlauteren Wettbewerb, 2nd edition, Munich 2009, Einleitung B. marginal number 342; for more details see: *Alexander*, Die «Schwarze Liste» der UGP-Richtlinie und ihre Umsetzung in Deutschland und Österreich, GRUR Int. 2010, 1025 (1027, 1028)). The term is not apt for incorporation into the black list.

4.2. Setting up a database

Additionally, it could be considered to either set-up one database for the Member States or to recommend the setting-up of a database to the Member States along the lines as it already exists in Germany.²³¹

A database can serve different functions. It can on the one hand provide consumers with information on their rights, on misleading packaging practices which may be found on the market and on new legal and market developments. It integrates the consumers into the informing process calling for pro-activeness by e.g. reporting misleading packaging practices, sending photos respectively anecdotal evidence. Furthermore, such a database allows the producers to enter a dialogue with the consumers. Producers would have the possibility to explain their packaging practice if the practice is justified in any respect. Since consumer reactions and reportings would mirror consumers' awareness of certain packaging practices, producers would be able to react on maybe (unknown) consumer perception by changing their packaging practices accordingly. Furthermore, it is pointed out that such "PR work" has an dissuasive influence on producers contemplating engaging in misleading practices, who are afraid of losing their good image.²³² A database in this respect is profitable since it constitutes an easy accessible, effective alternative to taking legal actions which is not bonded to time and costs and hence not depended on the price of the product.

It is, however, questionable if the parallel existence of different databases in each Member State would be effective. Producers distributing their products in more than one country realise that consumer expectations vary due to culture and usage. Products, hence, usually are adjusted to such expectations and usages. It is quite likely that consumer expectations would also vary with respect to packaging.²³³ A database for each country would, therefore, be advantageous because producers would get feedback in accordance with the respective expectations. They could react more selectively and in problem orientated way. However, it has to be admitted that such databases are problematic with respect to the language. Even though it could be recommended that databases should at least be translated into English, the favourable aspect of direct communication with the consumer would completely be excluded. The database, hence, would not be as effective as it could be.

It would be favourable therefore to establish a pan-European database as already indicated above.

²³¹ See:

<http://www.lebensmittelklarheit.de/cps/rde/xchg/lebensmittelklarheit/hs.xsl/1048.htm?keyword=verpackung>.

²³² <http://www.vzhh.de/ernaehrung/30287/inflation-in-kleineren-tueten.aspx>.

²³³ A comprehensive study addressing misleading packaging practices as already indicated above would be very helpful.

4.3. EN-Standards for packaging

Another possibility to meet the problem of misleading packaging practices could also be to further develop EN-Standards for packaging.²³⁴ EN-Standards are rules, guidelines or definitions that are developed by Standardisation Committees^{235, 236} EN-standards are not legally binding. However, they agree *inter alia* upon requirements so that for certain products upon can be described as fit for a particular purpose.²³⁷ These standards are developed in three steps: (1) Initially, there is a public enquiry, (2) followed by weighted vote by CEN national members and (3) finally the standards are ratified and announced at the national level.²³⁸ It is an added advantage that the requirements are not set for all time and can be quickly extended to follow market developments. These rules or guidelines, hence, are very flexible.

However, it remains the question which role EN-Standards could play if they are not legally binding. EN-Standards could be consulted when interpreting the term "misleading packaging practices" in the sense of the new included Art. 6 (1) (a) Unfair Commercial Practices Directive.

4.4. Amendment of the Unit Prices Directive

Websites, case law, press release analysis and the questionnaires answered by consumer organisations revealed that the Unit Prices Directive²³⁹ can serve as a helpful measure. However, the provisions are either not or not correctly put into practice or price indication is illegible or placed very inconvenient (e.g. lowest shelf), particularly for certain groups of consumers. This makes the provisions of the Price Indication Directive, which in principle are very useful, ineffective. Whereas the conduction of provisions of the Price Indication Directive is an issue that needs to be solved by the Member States, a more detailed regulation of how prices should be indicated (e.g. provisions on the font or font size) could solve the problem of illegibility and wrong placement. This would make the pre-existing provisions more effective.

²³⁴ There are already a few standards for packaging – see: EN 13427:2004 - Packaging - Requirements for the use of European Standards in the field of packaging and packaging waste; EN 13428:2004 - Packaging - Requirements specific to manufacturing and composition - Prevention by source reduction; EN 13429:2004 - Packaging – Reuse; EN 13430:2004 - Packaging - Requirements for packaging recoverable by material recycling; EN 13431:2004 - Packaging - Requirements for packaging recoverable in the form of energy recovery, including specification of minimum inferior calorific value; EN 13432:2000 - Packaging - Requirements for packaging recoverable through composting and biodegradation - Test scheme and evaluation criteria for the final acceptance of packaging. Furthermore, in Germany there are guidelines for the packaging of pre-packed goods which could be consulted, see: *Kiethe/ Groeschke, Die Mogelpackung – Lebensmittel und wettbewerbsrechtliche Risiken der Produkteinführung*, WRP 2003, p. 962 (965) and Min.BI.fin. 1978, p. 65.

²³⁵ Three standardisation organisations in Europe are recognised: The CEN (Comité Européen de Normalisation), CENELEC (Comité Européen de Normalisation Électrotechnique) and ETSI (European Telecommunication Standards Institute).

²³⁶ <http://www.cen.eu/cen/products/en/pages/default.aspx>.

²³⁷ <http://www.en-standard.eu/>.

²³⁸ <http://www.cen.eu/boss/supporting/Guidance%20documents/GD059%20-%20CEN%20deliverables/Pages/GD%20-%20CEN%20deliverables.aspx#1>.

²³⁹ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.

4.5. Update of the European Commission's website dedicated to the Unfair Commercial Practices Directive and amendment of the Guidance for the Unfair Commercial Practices Directive

The Commission imitated a database for national implementation measures, national and European case law and legal literature related to the implementation and application of the Unfair Commercial Practices Directive.²⁴⁰ This database, however, seems not to be up to date. Particularly, cases related to misleading packaging practices which e.g. were identified in this study are not included. This database is and can be a very helpful measure; supporting the decision if certain packaging practices could be recognised as misleading. Hence, if the lack of cases would be caused by problems to apply the respective Unfair Commercial Practices provision on certain practices (see 4.1.), this measure could help to reduce this problem.

Furthermore, the Guidance for the Unfair Commercial Practices Directive²⁴¹ is understood as a "living document".²⁴² As it is pointed out, it is not exhaustive. However, new developments are meant to be included if necessary. Misleading packaging practices could be mentioned under chapter 2.4.4. and thereby as well give guidance when deciding whether a practice falls under Art. 6 of the Directive.

4.6. Introduction of a (general) right to withdraw?

It was shown that the average consumer only conducts a cursory examination of the packaging. If this cursory glance does not detect anything amiss, even an average consumer will be misled by that first impression.²⁴³ Once consumers are at home and have the possibility of looking at their purchased goods more carefully, they will notice that the package suggested more quantity than there factually was. It may be considered if this situation could justify a right to withdraw.

Withdrawal rights on the European level are regulated for special situations.²⁴⁴ Within a specified period of time the consumer has the opportunity to renounce the effects of his/her undertaking without penalty and without giving any reason.

²⁴⁰ No. 20 of the European Parliament resolution of 13 January 2009 on the transposition, implementation and enforcement of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and Directive 2006/114/EC concerning misleading and comparative advertising, P6_TA(2009)2008; see: <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show>.

²⁴¹ SEC (2009) 1666 – Commission staff working document – Guidance on the implementation/ application of Directive 2005/29/EC on Unfair Commercial Practices of 3 December 2009.

²⁴² SEC (2009) 1666 – Commission staff working document – Guidance on the implementation/ application of Directive 2005/29/EC on Unfair Commercial Practices of 3 December 2009, p.6.

²⁴³ Compare: *Weatherill*, Who is the average consumer, in: Weatherill/ Bernitz, The Regulation of Unfair Commercial Practices under Directive 2005/29 – New Rules and Techniques, Oxford 2007, p. 115 (138).

²⁴⁴ Art. 5 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372/71 of 31.12.85; Art. 6 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumer in respect of distance contracts, OJ L 144/19 of 4.6.97; Art. 6 of the Directive 2002/65/EC of the Parliament and of the Council of 23 December 2002 concerning the distance marketing of financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271/16 of 9.10.2002; Art. 6 of Directive 2008/122/EC of the Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contract, OJ L 33/10 of 3.2.2009; Art. 14 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133/66 of 22.5.2008.

The justifications for the existing rights of withdrawal vary. In Directive 97/7/EC concerning distance contracts the right to withdrawal is justified with the assumption that consumers before concluding the contract cannot see the product and ascertain the nature of the service provided.²⁴⁵ Hence, in case of distance selling the consumer should have the possibility to examine the good. Recital 5 of Directive 85/577/EC concerning contracts negotiated away from business premises again states that by a right to cancellation the consumer should be enabled to assess the obligations arising under the contract. This right to withdraw, therefore, is justified with the surprising effect the situation has for the consumer. In case of the Consumer Credit Directive the consumer is supposed to have some time to think-through the complex contract and its conditions and compare it with other offers.²⁴⁶

The new Consumer Rights Directive²⁴⁷ in case of distance selling and off-premises contracts in its Art. 9 also provides a right to withdrawal. In its Recital 37 it summarises the reasons for granting a right to withdraw from the contract. These reasons precisely correspond to the justification presented in Recital 5 of the former Directive 85/577/EEC and Recital 14 of Directive 97/7/EC.

As the analysis shows, the initial situations and justifications for the same instrument vary.²⁴⁸ With respect to misleading packaging practices it is, however, notable that from Recital 47 of the new Consumer Credit Directive it may be concluded that the right to withdraw is provided to give the consumer the opportunity to “establish the nature, characteristics and functioning of the goods, the consumer should only handle and inspect them in the same manner **as he would be allowed to do in a shop**”. When taking into account the effects of misleading packaging practices as pointed out in this study, it is, however, questionable if this starting point (possibility to examine the goods in the shop) is still an adequate starting point for the justification of a right to withdraw. A comparability of consumers in the above described situations to consumers who find themselves in a situation of misleading (packaging) may be observed. Market developments force producers to establish market strategies to persist the immense competition. Hence, the assumption that consumers purchasing in the store are able to examine the good carefully and are not surprised by the strategies used is not true anymore. Even an average consumer is not always in the position to notice that he/ she was misled. It could be argued that the limitation of the right to withdraw to the above mentioned situations, hence, is not justified.

If a right to withdraw would be granted, the consumer would not be restricted to cursory examination. The effectiveness of misleading packaging practices depends on the unsuccessfulness of the consumer's first impressions. Producers hedge their bets that the consumer will be misled due to the purchasing situation. If the consumer had a general right to withdraw, producers would not be able to employ these strategies.

²⁴⁵ See Recital 14 of Directive 97/7/EC.

²⁴⁶ Compare : *Schürnbrand* in Münchener Kommentar zum BGB, 5th edition, Munich 2008, § 495 marginal number 2.

²⁴⁷ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304/ 64 of 21.11.2011.

²⁴⁸ Critical in this respect: *Eidenmüller*, *Widerrufsrechte*, in: Eidenmüller/ Faust/ Grigoleit/ Jansen/ Wagner/ Zimmermann, *Revision des Verbraucher-aquis*, Tübingen 2011, p. 109 (110).

Hence, it may be contemplated to align this situations to the situations in which a right of withdrawal is justified and recognised.²⁴⁹ Particularly, as has been pointed out, provisions of the Consumer Sales Directive are not applicable and legal actions on the grounds of the Unfair Commercial Practices are not taken by consumers. The introduction of a right to withdraw in the case of misleading packaging practices, hence, could be justified.²⁵⁰

However, if this right to withdraw would be only restricted to the situation of misleading (packaging) practices, the problem of interpreting what is misleading would only be transferred to another level, but not solved. In the every-day purchase situation this right to withdraw would be rather ineffective since the views of the parties, consumer and seller, would probably deviate in most of the cases. It would regularly be challenged whether the consumer has a right to withdraw. This problem could only be solved by respective case law setting standards. By now –as shown- there is no clear line.

A general right to withdraw again would be questionable as regards its operability and justification. The following analysis is restricted to the justification and operability of a general right to withdraw using the example of potentially misleading packaging.

It has been pointed out that the courts do not always affirm that an average consumer was misled by a packaging even though this was bigger than functionally necessary. In contrast, it has been said that an average consumer in certain cases would have been aware that the packaging size and quantity do not correspond.²⁵¹ Assuming this evaluation was conducted without any legal failure, a right to withdraw in these cases would unambiguously not be justified. It certainly constitutes a problem to establish an unfair commercial practice in form of misleading packaging practices. As case law showed there are ambiguous views. Clarification therefore is definitely advisable. However, it is questionable if it is justified to diminish these uncertainties by granting a general right to withdraw. If a right to withdraw is already not justified in this situation, *a fortiori* it may be concluded that it will not be justified in other comparable situation.

Leaving the crucial point of justification aside²⁵², operability of a general right to withdraw is problematic as well. This becomes apparent when taking into consideration the exceptions of the right to withdraw as listed in Art. 16 (d) and (e) of the new Consumer Rights Directive and in Art. 6 (3) of Directive 97/7/EC.

According to these provisions goods expiring rapidly are excluded from the right to withdraw. Furthermore, a right to withdraw is not provided for the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery.²⁵³ This is plausible and does not require any further explanation. However, these exceptions particularly cover the most common misleading packaging cases (food and cosmetics). Hence, granting a general right to withdraw and introducing respective necessary exceptions does not constitute an effective solution to the problem of misleading packaging practices. Misleading packaging practices must, hence, be approached earlier, preventing the introduction of products packaged in such a manner.

²⁴⁹ Critical: Eidenmüller, Widerrufsrechte, in: Eidenmüller/ Faust/ Grigoleit/ Jansen/ Wagner/ Zimmermann, Revision des Verbraucher-aquis, Tübingen 2011, p. 109 (113) with further references.

²⁵⁰ A right to rescind the contract («Rücktrittsrecht ») in case of wrong and misleading advertising has already existed e.g. in § 13 a of the UWG. When reforming the law it has, however, been abolished, arguing that due to the new § 434 BGB it has practically become redundant, compare: BT-Drucks 15/1487 v 22. 8. 2003, p. 14.

²⁵¹ See: OLG Frankfurt a.M., 21.10.2008 – 14 U 240/ 07 (packed spices).

²⁵² This question, however, cannot be answered within the scope of the study. For further information see Fn. 248.

²⁵³ Only and newly provided by the new Consumer Rights Directive.

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ANNEX I: National unfair commercial practices and competition laws

Table 1: Overview over the national unfair commercial practices and competition law²⁵⁴

Bulgaria	Cyprus	Czech Republic	France	Germany	Greece
Law on the protection of competition of 29.4.1998	Law No. 92 (I)/ 2000 on the control of misleading and comparative advertising as amended by Law No. 98 (I)/ 2007	Law No. 513/1991, §§ 41-54 (commercial code)	Arts. 1382, 1383 Civil Code	Law on Unfair Commercial Practices (which is completed by further provisions in other acts e.g.: Markengesetz, Preisangabenverordnung, Heilmittelwerbegesetz)	Law No. 146 of 26.12.1913/ 17.1.1914 counteracting unfair competition
Law on consumer protection of 24.11.2005	Law No. 103 (I)/ 2007 on the Unfair Commercial Practices Practices from Businesses to Consumers	Law No. 40/1995 (advertising law)	Arts. L. 121 et al. Consumer Code		Law No. 2251/1994 of 15.11.1994 on consumer protection
		Law No. 634/1992 (consumer protection law)			

²⁵⁴ Source: *Bodewig* in Harte-Bavendamm/ Henning-Bodewig, Gesetz gegen den unlauteren Wettbewerb, 2nd edition, Munich 2009, Einleitung E; a **list of the national implementation acts for the Unfair Commercial Practices Directive** may be found under "countries" on the following website: <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.showCountry&countryID=ZC#>.

Hungary	Ireland	Italy	Lithuania	Poland	Portugal	UK
Law LVII of 1996 concerning the prohibition of unfair and limiting commercial practices	Common Law	Arts. 2598 - 2601 Civil Code	Law VIII-1099 of 1999 on competition	Law on the counteraction against unfair competition of 16.4.1993	Art. 317, 318, 331 of the Law on commercial legal protection of 5.3.2003	Common Law
Law LVIII of 1997 on commercial advertising efforts	Consumer Protection Act 2007	Reg. No. 206/2005 on consumer protection	Law VIII-1871 of 2000 on advertising	Law on the protection of competition and consumer of 16.2.2007	Law No. 330/90 of 23.10.1990	Trade Description Act 1968
Law CLV of 1997 on consumer protection	European Communities (Misleading) Advertising Regulation 1988	Code on the self-discipline of commercial communication	Civil Code of 2000	Law preventing unfair market practices of 23.8.2007	Decree No. 57/2008 of 26.3.2008	Consumer Protection Act 1987
Law XLVII of 2008 on Unfair Commercial Practices	other instruments: ASAI Code of Standards for Advertising, Promotional and Direct Marketing in Ireland, 6 th edition, 1. January 2007		Code of 1994 on consumer protection			Control of Misleading Advertising Regulation 1988
			Law concerning			Consumer

			the prohibition of Unfair Commercial Practices			Protection from Unfair Trading Regulations 2008
						Trade Description – Business Protection from Misleading Marketing Regulations 2008
						other instruments: British Code of Advertising, Sales Promotion and Direct Marketing, 11 th edition; BCAP Radio Advertising Standards Code; BCAP Television Advertising Standards; OFCOM Broadcasting Code 2005

ANNEX II: National Reports

Annex II contains all national reports upon which the study is based. These national reports in a number of cases go beyond the scope of the study.

1. The Republic of Bulgaria

1.1 Which are the main types of misleading packaging practices

The main types of misleading packaging practices in Bulgaria are:

- indicating of wrongful information about the net price of the products,
- indicating on the products' package only a "recommendable" price and not the real one; the latter is in the most cases much higher,
- labelling of misleading indication of the quantity of the product in the package, e.g. 200 gr. + 10 % more (in fact the package includes only 200 gr. but the package includes 10 % more in comparison to the last package of the same product of 180 gr.).

1.2 What are consumers' awareness, attitudes and behaviour towards these packaging practices? To what extent are consumers misled by these practices

An enquiry between national consumer organisations²⁵⁵ has been carried on in Bulgaria. Their representatives shared that misleading packaging is a known unfair commercial practice and very common on the Bulgarian market.

Based on the everyday contact with consumers, it has been reported that around 10% out of all consumers' complaints refer to misleading packaging. In the major part of the complaints the misleading packaging tendencies are related to other intervening unfair practices violating consumers' interests. The most frequent example of misleading packaging refers to prices stated for a measurement and not for the unit that is sold in supermarkets.

Based on the analysis of consumers' complaints the organizations claim that misleading packaging is to a huge extent successful in misleading the consumers. However, they are able to judge that more and more consumers are becoming aware of the misleading packaging practices. However, consumers can be divided in two groups with regard to their residence and age. Consumers living in bigger cities such as the capital (Sofia), Plovdiv and Varna, actively report and announce misleading practices. Usually these consumers are aged between 20 and 45. Such consumers are proactive and post photos of respective packaging practices on various internet platforms in order to warn other consumers. This is in contrast to consumers from other countries. Furthermore, more careful groups of consumers perceive misleading packaging practices better, such as mothers of small children.

²⁵⁵ The interviewed consumer organizations are Bulgarian National Association "Nezavisim Sayuz na Potrebitelite v Bulgaria" and "Aktivni Potrebiteli"

If packaging deceives or is likely to deceive the average consumers' in relation to substantial elements of a product, such as the price, and the consumer takes a transaction that he would not have taken otherwise, the practice has to be regarded as misleading.²⁵⁶ Where the quantity of a product is wrongly indicated, such practices are most commonly considered less misleading since they represent an "additional" argument for the consumer to purchase the product but not the main one. However, this should be regarded as relative since there are groups of consumers for whom a small difference in quantity has decisive effect, e.g. extended families, retired persons etc.

In their attempt to defend consumers and their rights the organizations are focused on informing consumers in detail about the misleading practices registered on the Bulgarian market and about the standards in product packaging, using their own web sites and also through related articles in the media.

Also they make attempts to propose changes in legislation connected with more concrete provisions about product packaging. When asked to suggest at least two improvements that could be made at a regulatory level to protect consumers against misleading packaging, the representatives shared that there should be tougher penalties for the offenders of consumers' interests, that there should be more particular provisions about product packaging (including statement of the percentage of the ingredients, the font of the written text regarding measurements and relative prices, etc.), that the order of submitting a complaint on behalf of the consumers should be simplified and free of charge (in case that a product should be investigated in a laboratory, there are fees that are usually paid by the consumer initiating the complaint, e.g. the investigation of the ingredients of a product).

1.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied? Please provide examples.

Most of the cases of 'misleading packaging', e.g. wrongful indication of the price or indication of a "recommendable price", indication of a smaller quantity of the product, fall foul with provisions of the Directive 2005/29/EC concerning unfair business-to-consumer commercial practices which has been implemented in Bulgaria in Chapter IV. of the Consumer Protection Act (CPA).

However, since it is quite difficult to evaluate always if the misleading practice, e.g. the indication of a quantity exceeding the content of the package, has influenced the consumer in such a significant way that he would not have taken a decision for the purchase of the product.

A good example is a yogurt package on which it is indicated by the producer that the product has a content of 200 gr. + 10 %. However, the quantity of the package is only 200 gr. but the package is 10 % bigger than the last one sold on the market. If the last kind of package of the product could not be purchased any more, it would be impossible to prove that such misleading indication of "+ 10 %" has been a pre-condition for the average consumer to buy the product and thus, it would not be sanctioned as misleading commercial practice.

²⁵⁶ Compare Art. 6 of 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 market and amending Council Directive 84/450/EEC, Directives 97/7/EC and 2002/65/EC of the Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149/ 22 of 11.6.2005.

2. Cyprus

KEY FINDINGS

- The consumers in Cyprus feel especially deceived from the faulty information or even the total lack of information given on the packages in relation to the content and the quality of the contained product.
- The Cyprian legislation, until now, aims directly against misleading and therefore unfair commercial practices in general. Moreover, it regulates in a rather detailed way the nominal quantities of pre-packed products, the legitimate description of sold goods, as well as the labelling, presenting and advertising of foodstuffs. By doing this, Cyprus has systematic and consequent implemented the EU-Directives upon the above mentioned matters.
- To date, neither cases, nor articles or any other form of complaints are to be found, concerning types of misleading packaging or product downsizing. The main reason for that is the unawareness of authorities and consumers upon this matter. Since the current legislation upon unfair commercial practices is rather vast and can also contain the various forms of misleading packaging, it is therefore strongly recommended to inform both authorities and consumers in Cyprus about their tasks and rights regarding such misleading practices.

2.1 Which are the main types of misleading packaging practices

In Cyprus the main types of misleading packaging are primarily about the information provided on the package, rather than the form of the package itself. Problems of great concern are the following:

- misleading labeling,
- lack of information on the product written in Greek,
- faulty or incorrect translation into Greek.

Some examples of problems that have already occurred are the following²⁵⁷:

- a. A company sold on 27th of April 2005 in Lacia, near Nicosia canned corn. On the cans none of the facts were written in Greek. The company was therefore fined to pay an amount of £125.
- b. A company sold on the 1st of February 2005 to a supermarket in Lacia coffee with milk in a cardboard box. The labeling in Greek was found to be faulty and misleading. Instead of condensed milk, as it was written in the original, English language, in Greek it was written that the product contains evaporated milk. The company was therefore fined to pay an amount of £ 210.
- c. A company sold on the 4th of May 2006 to another company a chocolate product, on which the labeling was found to be misleading to the consumers. The company was therefore fined to pay an amount of £ 150.

²⁵⁷ Source: the Announcement of the local health Authority of the Ministry of Health concerning the decade 1996 – 2006 found under URL:
http://www.consumersunion.org.cy/conunion/page.php?pageID=2&instance_ID=11&newsid=110

- d. A company sold on the 7th of January 2005 certain amounts of vanillin pure bottle, but after inspection it was found that the content did not arise to the expectations of the buyer, as it was of lower quality and therefore the labeling of the product was found to be misleading. The company was fined to pay an amount of £ 450.

2.2 What are consumers' awareness, attitudes and behaviour towards these packaging practices? To what extent are consumers misled by these practices?

Consumers in Cyprus are generally aware of misleading trading practices and especially of their rights concerning miscellaneous goods and services. However, only a small percentage of consumers submit complaints²⁵⁸. According to the annual report of ECC Cyprus 6 complaints were submitted in the year 2006²⁵⁹ concerning misleading trading practices. Four of these complaints were submitted by Cypriots and two by consumers of other European citizenship. According to the annual reports of ECC Cyprus for the year 2008²⁶⁰ 3 complaints were submitted about miscellaneous goods and services, when in 2009 the complaints about miscellaneous goods and services or unfair commercial practices were 6. Until now, no complaints have been submitted upon the matter of a misleading package-form that could lead to a wrong perception about the quantity of the contained product.

The consumers in Cyprus are mainly misled by the information provided on the package. In particular, when given false information about the contained ingredients, the real content or sometimes even about the quality of the product.

2.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied? Please provide examples.

Such misleading packaging practices certainly do collide with the EU legislation. In Cyprus the EU legislation is being implemented either through new laws or through regulatory administrative acts, which launch new (general) regulations.

For example:

- Directives 2000/13/EC, 1999/10/EC, 94/54/EC, 90/496/EC, 89/396/EEC as well as Reg.1139/98, Reg.49/2000 and Reg.50/2000 were implemented through The Labelling, Presenting and Advertising of Foodstuffs (General) Regulations of 2002 (Regulatory Administrative Act 262/2002²⁶¹).
- Directive 2001/101/EC was transposed into Cyprian Law through The Amending of Annex of the Labelling, Presenting and Advertising of Foodstuffs (General) Regulations, Ordinance of 2003 (Regulatory Administrative Act 289/2003²⁶²).

²⁵⁸ Consumers can submit complaints about misleading practices either to the Cyprian Consumers Association or to the Office of fair trading and consumers' protection, when their complaint is directed against a tradesman or a company, whose headquarters are in Cyprus. For products coming from other countries, complaints can be submitted to the European Consumer Centre (ECC) in Cyprus.

²⁵⁹ URL: <http://www.ecccyprus.org/pdf/ECC%20Cyprus%20annual%20report%202006.pdf>

²⁶⁰ In one case a UK customer bought a Greek CD/DVD package from a trader in Cyprus. When she arrived home she discovered that the two cds were missing although the package was sealed. The consumer sent a number of emails to the trader but received no reply. The complaint was then submitted to ECC UK and shared with ECC Cyprus. After the intervention of ECC Cyprus, the trader forwarded the two missing cds to the consumer with his apologies'. URL: http://www.ecccyprus.org/Greek/pdf/ecc_annual_report_2008_web.pdf, p. 18.

²⁶¹ Official journal Number and Date: 3608/31.5.2002. Date of adoption 16.5.2002. Date of entry into force 31.5.2002.

²⁶² Official journal Number and Date: 3704/11.4.2003. Date of adoption 1.2003. Date of entry into force 11.10.2003.

- Directives 2002/67/EC as well as 2000/13/EC were implemented through The Labelling, Presenting and Advertising of Foodstuffs (General) (Amendment) Regulations of 2004 (Regulatory Administrative Act 97/2004²⁶³).
- Directive 2003/120/EC has been implemented in Cyprus through The Amending of Annex of the Labelling, Presenting and Advertising of Foodstuffs (General) Regulations, Ordinance of 2004 (605/2004²⁶⁴) but also through The Labelling, Presenting and Advertising of Foodstuffs (General) (Amendment) (No. 2) regulations of 2004 (Regulatory Administrative Act 884/2004²⁶⁵).

Defendants mentioned in the examples a-d, mentioned above under 2.1, were sued because of non-compliance with the legislation on labelling, presenting and advertising of foodstuffs were the. Another example of non-compliance to the legislation on labelling, presenting and advertising of foodstuffs can be found in the case C&M Varnavas Enterprises Limited against the Republic of Cyprus on the 14.1.2009²⁶⁶. The Supreme Court ruled against the plaintiff.

- Directive 2005/29/EC concerning unfair business-to-consumer commercial practices was transposed into Cyprian Law through the Law 103(I)/2007.
- Directive 2007/45/EC on nominal quantities about pre-packed products was implemented in Cyprus through General Regulation 236/2009.

Moreover, the Law about the description of mercantile 5 (I) entered since 1987 into force²⁶⁷.

In summary it can be said, therefore, that the current legislation in Cyprus mainly aims against unfair commercial practices and regulates rather explicitly the labelling, presenting and advertising of foodstuffs as well as the nominal quantities of pre-packed products. Until now, no cases, or complaints have been brought up, regarding problems such as misleading packaging or product downsizing, primarily because neither the consumers, nor the consumers associations or other authorities, to which consumers may turn to, are aware that also this kind of problem can be added to their responsibilities. For this reason, a clarification upon this matter is rather crucial and therefore much-needed.

2.4 Which measures could help to deal with misleading packaging? In this context, are there any new developments in the market that require the updating of the respective legislation at European level?

2.4.1 Measures

It is of great importance to increase public awareness and promote active citizenship on consumer related issues through better-educated consumers. Vital and tangible information regarding their rights as consumers in regard to misleading packaging and product downsizing is strongly recommended.

A specific problem only for Cyprus is that a permanent communications channel with the Turkish Cypriot Association for the Protection of Consumer Rights²⁶⁸ has to be established, in order to facilitate the exchange of information, experiences and the development of

²⁶³ Official journal Number and Date: 3814/27.2.2004. Date of entry into force 1.7.2004 (apart from the Art. 2, 4 (a), 5 and 8, which were already set into force since 27.2.2004).

²⁶⁴ Official journal Number and Date: 3872/18.6.2004.

²⁶⁵ Official journal Number and Date: 3940/31.12.2004. Date of entry into force 31.7.2004

²⁶⁶ Case Number 1679/2005.

²⁶⁷ The basic Law on description of mercantile 5 (I)/1987 has been revised through the following Amendments: 201 (I)/1987, 3 (I)/1992, 64(I)/1999, 110 (I)/2001, 158 (I)/2002.

²⁶⁸ TUHAK

fruitful co-operation, so that the needs of consumers in both communities of Cyprus could be better met.

2.4.2 Market developments

The new market developments in Cyprus lately are mainly restricted to the topic of energy and natural resources.

3 The Czech Republic

3.1 Which are the main types of misleading packaging practices?

When researching the types of the infringement of the consumer protection legislative and other laws, the outputs of the activity of the so called Czech Trade Inspectorate²⁶⁹ prove to be very useful. The most problems consist in not putting price on the package, in the safety of the products or for example selling of goods, which packages contain a smaller amount than indicated.

3.2 What are consumers' awareness, attitudes and behaviour towards these packaging practices?

3.2.1 Awareness of the consumers

The consumers who are following the magazine dTest of the non- profit organization Test²⁷⁰ are acquainted with the problem, as there was a public call addressed to the consumers and published in the above mentioned periodical in July 2010 with the title "Do you buy air?" (Kupujete vzduch?). So there is a certain tiny number of consumers who are aware of the problem of oversized packages. On the whole it must be considered that an average Czech consumer is rather not aware of this problem.

3.2.2 Attitudes of the consumers

It seems that there was no litigation regarding the problem of oversized packages in the Czech Republic, so there could not be traced any jurisprudence on this topic so far. There were also no complaints to the Czech Trade Inspectorate regarding oversized packages- see the attached report of CTI to this document.²⁷¹ But here must be underlined that the beauty product packaging materials, food packaging materials, pharmaceutical packaging and packaging materials used to protect humane medical drugs are excepted from this control. In the year 2010 the Inspectorate tested 24 non food packages with a specific focus on the volume of these packages and there were no problems identified.

3.2.3. Behaviour of the consumer

The active behavior of the consumer can be demonstrated by the reaction to the public call made by Test. The consumers sent photos of oversized packages they came across. The results are displayed on the following website: <http://www.dtest.cz/nadmerne-obaly> with the contact dates of the producer/seller. There is also a database of oversized packages being prepared and should be functional at the end of October 2011. On this website there are 46 pictures of oversized packages to the date of 4.11. 2011.

3.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied?

From the legal point of view the misleading packaging could fall under the term of the "Misleading Marking of Goods and Services" which is to be found in the Czech Commercial Code No. 513/1990 Coll. (§ 46) 272 and is one of the practice of unfair competition in a broader sense.

²⁶⁹ The official website of this state governed body: <http://www.coi.cz/en/>

²⁷⁰ The non profit organization "Test"- association of consumers was founded in 1992. It conducts testing of all kind of products- food, electronic, cosmetics, transportation, finance etc. and its results publish in the magazine dTest and contributes so to the protection of the consumer. <http://www.dtest.cz/>

²⁷¹ The Czech Trade Inspectorate acts regarding the control of the packages in general on behalf of the Rule No. 477/2001 Coll. – the Packaging Law.

²⁷² The subject matter could fall under the general clause of the unfair competition - § 44/1 of the Czech Commercial Code No. 513/1990 Coll.

The European legislative on the subject was implemented in the following acts:

The directive No. 2005/29/ES was introduced into the Czech legal order in three specific public laws. The first one deals explicitly with the protection of the consumer- it is the Consumer Protection Act, No. 634/1992 Coll. (§§ 4-5a). The second one is the Advertising Act No. 40/1995 Coll. and the last one the Act. No. 231/2001 on Radio and Television Broadcasting and on Amendment to Other Acts. So far the Czech legislative on the deceptive advertising is concordant with the European law.²⁷³ The implementation of the Unit Price directive 1998/6/EC is to be found in the Price Act No. 526/1990 Coll.

With the matter of packaging deals also the Act No. 477/2001 Coll. – the Packaging Law.²⁷⁴ Its article 3 /1 states, that the person, who brings the package on the market, should ensure that the volume and the weight of the package are as small as possible, by maintaining certain standards regarding the product itself.

As a new Civil Code²⁷⁵ is being prepared in the Czech Republic, it is planned to work out a new Consumer Code as well (2014). "The primary purpose of the Consumer Code should be to ensure the standardization and transparency of the legal form of consumer legislation".²⁷⁶ There is an open question, whether the matter of oversized packages will be considered.

3.4 Which measures could help to deal with misleading packaging? In this context, are there any new developments in the market that require updating of the respective legislation at European level?

As for Czech Republic a possible change of present legislative is desirable and would be by the consumer protection agencies welcomed. Leaving private law aside (general clause No. 44/1 of the Czech Commercial Code No. 513/1991 Coll. or its special clause on Misleading Marking of Goods and Services -46/1), according to the public law (Packaging Law) there can be only the persons fined, that bring the packages on the market, but not the entrepreneurs who such package buy and their product introduce in this package on the market.

²⁷³ Rudolf Chalupa, Ivana Štenglová, Miloš Tomsa, Obchodní zákoník : komentář, 11.ed., Prague, 2006, p. 164.

²⁷⁴ This act is to be found on the website of the Czech Ministry of the Environment : <http://www.mzp.cz/www/platnalegislativa.nsf/d79c09c54250df0dc1256e8900296e32/2e3a627d45671704c1257563004137a8?OpenDocument>

²⁷⁵ Document No. 362 of the Parliament, <http://www.psp.cz/sqw/historie.sqw?o=6&t=362>.

²⁷⁶ Consumer policy priorities 2011-2014, p. 11, on the website of the Ministry of Industry and Trade under the link: <http://www.mpo.cz/zprava84448.html>

4 France

KEY FINDINGS

- The main concerns regarding packaging in France seem to be directed towards environmental and health issues.
- Misleading packaging does not appear to be recognised as a significant problem.
- The French press seems mainly preoccupied by Dir. 2007/45/EC which deregulates standard packaging sizes.
- Downsizing practices of the type described probably fall foul of the French implementation of the Unfair Commercial Practices D. However, this is particular to the French method of transposition and therefore not strictly falling foul of EU legislation.

4.1 Which are the main types of misleading packaging practices

No in-depth analysis of misleading packaging or action against it has yet been conducted by consumer associations in France. The three articles identified provide various examples of misleading packaging but without any form of analysis.²⁷⁷ They warn against what could happen. One article makes an ironic comment about “innovative” new formats which reduce the quantity sold slightly from the previous standardised quantities and could make it difficult to distinguish, for example, 900 grams from a kilo.²⁷⁸ Whilst remarking that there is nothing new about this practice, another article warns against producers who may reduce the quantity sold without reducing the price.²⁷⁹ Another practice to be aware of is the individualisation of products sold, thus rather than selling by quantity as where the producer changes to selling in “daily doses” where the price per kilo is significantly higher.²⁸⁰ Other practices relate to misleading photos of the product, as well as false and confusing indications and terminology. The latter includes suggestive names and colours relating, for example, to the provenance of the product.

4.2 What are consumers’ awareness, attitudes and behaviour towards these packaging practices? To what extent are consumers misled by these practices?

Based on the lack of general media articles addressing misleading packaging it appears that consumers are not aware of the problem, or that misleading packaging is not recognised as a problem. The possibility that the problem is recognised but not addressed by the media seems unlikely, given that a general Google search did not produce further articles.

Only a few consumer associations seem to have addressed the potential problem of such packaging practices, but this is only done in general articles which are meant to warn consumers. Most of the articles are a response to the recent deregulation of packaging size, but it is important to note that this problem is likely to have occurred before the deregulation. The sure remedy mentioned by the articles against such practices is for consumers to look for the price per unit of measurement.

Results from questionnaire:

²⁷⁷ Just a few articles on misleading packaging are accessible, see:

<http://www.quechoisir.org/commerce/actualite-emballages-libres-surveillez-le-prix-au-kilo>; <http://www.clcv.org/Liberalisation-des-formats-d-e.cp5.0>; <http://www.clcv.org/Liberalisation-des-formats-d-e.7065.0.html>; <http://www.defimedia.info/articles/5618/1/Information-des-consommateurs--Packaging-decevant--ou-trompeur/Page1.html>. Other sources include:

http://consottisier.blogs.liberation.fr/marie_dominique_arrighi/2008/03/packaging-tromp.html and <http://pundo3000.com/werbunggegenrealitaet3000.htm>.

²⁷⁸ “Libéralisation des formats d’emballage” – 17.03.2011

²⁷⁹ Emballages libres – surveillez le prix au kilo – 19 avril 2009

²⁸⁰ Emballages libres – surveillez le prix au kilo – 19 avril 2009

- Consumer awareness: French consumer awareness of misleading packaging relates to nutritional allegations, the labelling of the energy consumption of household electrical appliances and environment-friendly logos. Consumers are relatively unaware of misleading packaging practices.
- Consumer Attitudes: Information on the packaging, such as its nutritional value, is very important for making transactional decisions, particularly in relation to foodstuffs. Misleading packaging in relation to the examples and definition given is very important relative to other consumer problems.
- Consumer Behaviour: Que Choisir receives no complaints in relation to misleading packaging.

4.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied? Please provide examples.

When the price per unit of measurement is correctly stated, packaging practices do not fall foul of the Unit Prices D. Compliance with this does not seem to be a general problem.

According to article 6 *mutatis mutandis* of the Unfair Commercial Practices D., commercial practices would be misleading (*pratiques commerciales trompeuses*) where the overall presentation deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to the quantity of the product, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. However, it does not appear that the 'transactional decision' element is a condition under the French transposition for a practice to be misleading. Because this conclusion results from the structure adopted in the transposing instrument, a prior explanation of the structure of the French transposition is necessary to establish that certain packaging practices fall foul of the implementation of the directive.

The French transposition of the directive is structured in three layers. The first layer is a general prohibition of practices which satisfy two conditions. Where the two conditions are met, the practices are unfair (*pratiques commerciales déloyales*). These conditions can be summarised as practices which are contrary to industry expectations and have a causal effect upon consumers. The second layer is formed by particular types of practices which are unfair, such as misleading practices (*pratiques commerciales trompeuses*). They are subject to two conditions which for present purposes can be taken to be (1) misleading in relation to (2) the quantity of the product sold. The third layer is the blacklist from the directive and includes specific practices which are always deceptive (*trompeuses*). Because practices which fall under the second layer are automatically unfair, the conditions of the first layer do not need to be met. This is also consistent with the *effet utile* of the directive in relation to the blacklist.²⁸¹ If the conditions of the first layer were applied to the third layer, the French transposition would have effectively subjected the unfair blacklist practices to further requirements.

From the fact that the causal element is not transposed for misleading practices, where the presentation of the product, which naturally includes its packaging, is capable of misleading the consumer as to its quantity, this would fall foul of the French implementation of the Directive. It would also seem to result from the structure of the French implementation that the notion of the consumer used for misleading packaging is not the reasonably well-informed, observant and circumspect standard. However, as the *travaux préparatoires* note, this is in any case superfluous because the Directive itself only uses the concept of an average consumer and French judges already take average credulity into account when making an *in concreto* appreciation of the facts.²⁸²

²⁸¹ Annex I, Commercial practices which are in *all* circumstances considered unfair.[author's emphasis].

²⁸² Rapport n° 111 (2007-2008) de M. Gérard CORNU, fait au nom de la commission des affaires économiques, déposé le 5 décembre 2007, (<http://www.senat.fr/rap/I07-111/I07-111.html>).

Therefore, if the French judge's sovereign appreciation of the facts esteemed particular practices of downsizing 'misleading,' such downsizing practices would fall foul of the French implementation of the Directive. However, this appears to be either because France has gone beyond the minimum harmonisation of the directive or has mis-transposed the directive. There is currently no relevant case-law.²⁸³

4.4 Which measures could help to deal with misleading packaging? In this context, are there any new developments in the market that require the updating of the respective legislation at European level?

It must first be established that the packaging practices are not already sufficiently protected at the national level to respect the principle of proportionality. It may be that national law, which is outside the scope of the study, already targets some packaging practices.

²⁸³ Search conducted in September 2011 through the Public Service for the diffusion of law (<http://www.legifrance.gouv.fr/>).

5 Germany

KEY FINDINGS

- Consumers are aware of misleading packaging practices which may be concluded from the numerous complaints to respective consumer organisations
- Consumers rather don't bring actions against misleading packaging practices
- Actions against misleading packaging practices are brought to court by competitors or public authorities
- Courts mainly take into account the expectations of an average consumer when deciding if something is misleading. They also consider as well guidelines for packaging developed by public authorities as the product itself and the functioning of the package. However, since every case needs to be discussed individually, no clear line - beside these common measures - can be recognised.

5.1 Which are the main types of misleading packaging practices

- **selling "less"** of the product than before by using one of the following strategies (e.g. Minimal reduction of weight, so that the packaging can stay as it was; reduction of the pieces of toilet paper or kitchen paper; parting the product in smaller unities without having regard to the proportional change of the price; changing the placing of e.g. cookies inside the plastic package which leads to a smaller amount of cookies; changing the shape of e.g. a bottle which makes it look bigger than other bottles with the same amount of filling)
- **selling "air"** (packaging is filled with air and appears bigger; packaging is bigger than required)
- **"new formula"** (instead of changing the quantity of the product, the producer changes the formula; the price stays the same even though production costs decrease)

5.2 What are consumers' awareness, attitudes and behaviour towards these packaging practices? To what extent are consumers misled by these practices?

5.2.1 Awareness of consumer associations and conclusions to consumers' awareness and behaviour towards misleading packaging

The *Verbraucherzentrale* in Hamburg has been keeping track of consumer complaints on misleading packaging for five years and publishes a list²⁸⁴ of stealth price increases by this strategy.²⁸⁵ They also regularly inform the public about new developments on the market and in legislation on or related to misleading packaging. Furthermore, the *Verbraucherzentrale* runs some product tests in order to identify and illustrate misleading packaging.²⁸⁶

²⁸⁴ This list includes the name of the product (brand), the new and old quantity of the product as well as the new and old price, the price increase in % and comments, photos and notes on changes, see:

<http://www.vzh.de/ernaehrung/32535/09082011Versteckte%20Preiserhoehungen.pdf>; for prices increases of the "second generation" see: <http://www.vzh.de/ernaehrung/32618/2GenerationPreiserhoehung.pdf>.

²⁸⁵ <http://www.vzh.de/ernaehrung/30287/inflation-in-kleineren-tueten.aspx>; <http://www.myheimat.de/laetzen/ratgeber/mogelpackung-20-verbraucherschutz-veroeffentlicht-neue-liste-d816937.html>; <http://www.vzh.de/ernaehrung/119733/viel-luft-um-nichts.aspx>;

²⁸⁶ See e.g. the taking of X-ray pictures (with a corresponding analysis): <http://www.vzh.de/ernaehrung/119745/Gesamtergebnis%20Luftverpackungen.pdf>

On the one hand, the *Verbraucherzentrale* tries to inform and warn consumers. Consumers are asked to participate in this process actively by registering new cases of misleading packaging. On the other hand, the *Verbraucherzentrale* believes that their so-called "PR work" has an dissuasive influence on producers contemplating engaging in misleading practices, who are afraid of losing their good image.²⁸⁷

Many further articles (partly also referring to the results of the *Verbraucherzentrale*) occurred in 2009 in connection with the implementation of Directive 2007/45/EC²⁸⁸ abolishing the rules on the nominal quantities for pre-packed products which before could be found in the *Verordnung über Fertigverpackung*²⁸⁹ mostly stating, that the liberalisation of the rules on nominal quantities for packaging might diminish the level of consumer protection level and encourage misleading packaging practices.²⁹⁰

From the number of complaints as well as the number and intensity of activities it may be concluded that consumers are generally aware of misleading packaging practices.²⁹¹ Their reaction is either to boycott the product or to turn to consumer organisations or respective authorities with their complaints.

5.2.2. Conclusions on consumers' awareness, attitude and behaviour drawn from political activities

In September 2009 the *Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz*²⁹² set up an initiative against misleading trading practices called "*Klarheit und Wahrheit bei der Kennzeichnung und Aufmachung von Lebensmitteln*" (clear and honest indication and presentation of foodstuffs).²⁹³ This initiative is not only passive, informing about misleading (packaging) practices, but calls for active consumer participation in the campaign. Consumer complaints concerning potential misleading practices are collected in a database.²⁹⁴ Producers have the possibility of entering into dialogue with consumers, explaining their practices. The numerous reactions on this project show that consumers are aware of misleading packaging practices and that they are willing to fight against these practices actively. It is particularly noteworthy that the initiative plans to conduct surveys on current consumer expectations. It has been pointed out that the set of data currently available is insufficient and that its extension could help public authorities when taking measures against misleading (packaging) practices.²⁹⁵

²⁸⁷ <http://www.vzh.de/ernaehrung/30287/inflation-in-kleineren-tueten.aspx>.

²⁸⁸ Directive 2007/45/EC of the European Parliament and the Council of 5 September 2007 laying down rules on nominal quantities for prepacked products, repealing Council Directives 75/106/EEC and 80/232/EEC, and amending Council Directive 76/211/EEC, OJ L 247/17 (21.0.2007).

²⁸⁹ Fertigpackungsverordnung in der Fassung der Bekanntmachung vom 8. März 1994 (BGBl. I S. 451, 1307), see: http://www.gesetze-im-internet.de/bundesrecht/fertigpackv_1981/gesamt.pdf

²⁹⁰ <http://www.manager-magazin.de/finanzen/artikel/0,2828,618642,00.html>, <http://www.test.de/themen/essen-trinken/meldung/Mogelpackungen-Weniger-drin-als-frueher-4129048-4129059/>; <http://www.myheimat.de/laetzen/ratgeber/mogelpackung-20-verbraucherschutz-veroeffentlicht-neue-liste-d816937.html>; <http://www.baeko-magazin.de/archiv/meldung/1397-Packungsgroessen-von-EU-freigegeben/>; see also: http://europa.eu/legislation_summaries/consumers/product_labelling_and_packaging/l32049_de.htm

²⁹¹ See also: http://www.bmelv.de/SharedDocs/Downloads/Ernaehrung/KlarheitUndWahrheitInitiativeZusammenstellung.pdf?__blob=publicationFile, p. 5.

²⁹² Federal Ministry of nourishment, agriculture and consumer protection.

²⁹³ See: http://www.bmelv.de/DE/Ernaehrung/Kennzeichnung/Lebensmittelklarheit/lebensmittelklarheit_node.html.

²⁹⁴ See: <http://www.lebensmittelklarheit.de/cps/rde/xchg/lebensmittelklarheit/hs.xsl/1048.htm?keyword=verpackung>

²⁹⁵ See : http://www.bmelv.de/SharedDocs/Downloads/Ernaehrung/KlarheitUndWahrheitInitiativeZusammenstellung.pdf?__blob=publicationFile, p. 7.

5.2.3 Conclusions on consumers' awareness, attitude and behaviour drawn from jurisprudence

There are a few cases directly related to misleading packaging.²⁹⁶ Most of these cases deal with a potential violation of § 7 (2) EichG²⁹⁷ and §§ 3, 5 UWG²⁹⁸. It is usually argued that the outward appearance of packaging misleads consumers as to the factual quantity of the product. The parties taking court action are in most of the cases competitors or public authorities, but not consumers. Whether a package is misleading or not needs to be discussed individually.²⁹⁹ In each of the cases the expectations of the average consumer provide the most important test.³⁰⁰

In the case of spices packed with a lot of air in a soft package³⁰¹ the court pointed out that the package itself must have a misleading effect.³⁰² An average consumer, however, would not have had the impression that the package is full. Rather the consumer could even feel that a part of the package is only filled with air. In contrast, the court decided in the case of packages for coffee pads which also were filled partly with air³⁰³ that the average consumer – who is not meticulous – could be misled not only by the size of the package but also and in particular by its design. These cases, however, are not comparable. Whereas the consumer in the first case could even look into the package and feel how much filling was factually in the package which allowed for a comparison with other products on the market, the consumer in the second case was not able to estimate how much coffee was in the package. Not only the size of the product package, which was comparable to a 500 gr. one, but also its design could potentially mislead the consumer. It was not possible to look into the product. Even the indication of portions was not very helpful because it did not lead to the conclusion that one portion equates to one cup. This was underlined by the image on the package presenting two big cups. In this case, it was assumed that even an average consumer could have concluded that in comparison to other products, this package contained more quantity. The practice was thereby regarded as being misleading.

In the case of an Eau de toilette³⁰⁴ and also in the case of the cherry-alcohol-pralines³⁰⁵ it was also held that in order to determine whether something is misleading, the product itself needed to be evaluated. When buying luxurious products, average consumers expect the packaging to be proportionally greater.

²⁹⁶ See e.g. : OLG Frankfurt a.M., 21.10.2008 – 14 U 240/ 07 (packed spices); OLG Hamburg, 14.4.2004 – 5 U 123/03 (Jacobs coffee) ; LG Hamburg, 19.1.2004 – 315 O 313/03 (gravy bottle case) ; OVG Berlin, 24.9.2003 – OVG 1 B 16.03 (tooth paste Stomatikum) ; KG, 15.12.1987 – 5 U 5249/87 (Eau de Toilette-Spray) ; OLG Hamburg, 7.1.1985 – 3 U 90/85 (20 ml bottle of alcohol) ; OLG Koblenz, 3.3.1983 – 1 Ss 55/83 (soft cheese), KG, 21.1.1983 – 5 U 6040/82 (cherry-alcohol pralines) ; BGH, 30.10.1981 – I ZR 156/79 (Kippdeckeldose).

²⁹⁷ § 7 (2) of the Eichgesetz (non civil law regulation) prohibits the designing and filling of pre-packed products in such a manner that the package seems to be of more quantity than there factually is. Such a practice is a misdemeanour, § 19 (1) number 1 of the Eichgesetz.

²⁹⁸ § 3 of the UWG (unfair competition law) states that an unfair commercial practice is prohibited. A commercial practice is unfair if it is misleading, § 5 UWG.

²⁹⁹ Measures for what may be qualified as misleading have been developed by national authorities and may be consulted when interpreting § 7 (2) Eichgesetz, see: *Erbs/ Kohlhaus, Strafrechtlich Nebengesetze* (2011), § 7 marginal number 15; generally the permitted free space of a package should not exceed 30 %, see: *Kiethe/ Groeschke, Die Mogelpackung – Lebensmittel und wettbewerbsrechtliche Risiken der Produkteinführung*, WRP 2003, p. 962 (965), referring to: Min.Bl.fin. 1978, p. 65; also: *Zipfel/ Rathke, Lebensmittelrecht* (2011), EichG § 7, marginal number 35.

³⁰⁰ OLG Frankfurt a.M., 21.10.2008 – 14 U 240/ 07, LLRR 2008, p. 75 (76); OLG Hamburg, 14.4.2004 – 5 U 123/03, GRUR-RR 2004, p. 263 (264) OVG Berlin, 24.9.2003 – OVG 1 B 16.03, LLRR 2003, p. 106 (107); KG, 15.12.1987 – 5 U 5249/87, LMRR 1987, p. 74 (74); KG, 21.1.1983 – 5 U 6040/82, LMRR 1983, p. 2 (3) ; see also :

http://www.bmely.de/SharedDocs/Downloads/Ernaehrung/KlarheitUndWahrheitInitiativeZusammenstellung.pdf?__blob=publicationFile, p.4.

³⁰¹ OLG Frankfurt a.M., 21.10.2008 – 14 U 240/ 07.

³⁰² OLG Frankfurt a.M., 21.10.2008 – 14 U 240/ 07, LLRR 2008, p. 75 (76); OVG Berlin, 24.9.2003 – OVG 1 B 16.03, LLRR 2003, p. 106 (107). In the last case it was also pointed out that a comparison of the new package (with less quantity) with the old package is also irrelevant. Only the package as it is in the present moment is decisive when evaluating if an average consumer could have been misled.

³⁰³ OLG Hamburg, 14.4.2004 – 5 U 123/03.

³⁰⁴ KG, 15.12.1987 – 5 U 5249/87.

³⁰⁵ KG, 21.1.1983 – 5 U 6040/82.

In that case the relationship between price and benefit is not decisive. Hence, the packaging fulfils another function with respect to prestige objects and therefore does not suggest more quantity. It therefore was not regarded as being misleading.

Regarding the number of cases, it may be concluded that misleading packaging has been recognised as a problem. However, it has to be noted that the legal action was either initiated by competitors, who obviously note that the packaging practice is successful, or by public authorities inspecting packaging practices. Misleading packaging must therefore have a negative effect on consumers' transactional decisions. Consumer behaviour towards such practices, hence, seems to be limited to either switching brands or complaining to consumer organisations or respective public authorities.

5.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied? Please provide examples.

In the context of misleading packaging the provisions on the unit price indication constitute a very helpful instrument to prevent the misleading of consumers. It allows – to certain extend – to compare the available differently packed products and their prices.

Misleading packaging does thereby not fall foul of the Unit Price Directive. However, the misleading of consumers may be prevented.

Furthermore, misleading packaging may be regarded as a "misleading action" in the sense of Art. 6 of Directive 2005/29/EC and therefore fall foul of EU legislation. In order to approve a violation every case of a potential misleading action in the shape of misleading packaging needs to be examined individually. First of all, the packaging has to deceive or be likely to deceive the average consumer. In order to determine if this is the case the list of Art. 6 (1) sentence 2 can be considered. Misleading packaging usually would mislead the consumer as to the quantity (or to the quality) of a product (see Art. 6 (1) sentence 2 (b)). Furthermore, there needs to be a causal connection between the misleading action and the consumer's transactional decision which means that the consumer would not have taken the decision in other circumstances. If these pre-conditions are given, the packaging may be regarded as a misleading action even though information given on the package is correctly. Important to note is that as well the perspective of an average consumer as the packaging in the individual case and its special function in this case need to be considered very carefully. If the practice is misleading and therefore regarded as unfair in the sense of Art. 5, it constitutes an unfair commercial practice. If all pre-conditions are given, the practice falls foul with EU legislation.

The above mentioned directives were implemented into the German jurisdiction. Relevant national legislation related to misleading packaging may therefore be the implemented provisions of the Unit Prices Directive³⁰⁶ as well as the Unfair Commercial Practice Directive³⁰⁷.

EU legislation thereby is violated indirectly when a violation of the implemented provisions may be approved.

³⁰⁶ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.

³⁰⁷ 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.

5.4 Which measures could help to deal with misleading packaging? In this context, are there any new developments in the market that require the updating of the respective legislation at European level?

It seems like no legislation or updating is required since the Unit Price Directive and the Unfair Commercial Practices Directive are sufficient to prevent any violation. There rather seems to be a problem of the conduction of these provisions

For the purpose of clarification, however, “misleading” packaging could be added in the Commercial Practice Directive.

Guidelines for what is to be regarded as misleading³⁰⁸ could be developed. This goes hand in hand with the concept of the average consumer.

Self-regulation by producers could be initiated.

³⁰⁸ Like the measures that have been developed by national authorities and may be consulted when interpreting § 7 (2) Eichgesetz, see: *Erbs/ Kohlhaus*, *Strafrechtlich Nebengesetze* (2011), § 7, marginal number 15; generally the permitted free space of a package should not exceed 30 %, see: *Kiethe/ Groeschke*, *Die Mogelpackung – Lebensmittel und wettbewerbsrechtliche Risiken der Produkteinführung*, WRP 2003, p. 962 (965), referring to: *Min.Bl.fin.* 1978, p. 65; also: *Zipfel/ Rathke*, *Lebensmittelrecht* (2011), EichG § 7, marginal number 35.

6 Greece

6.1 Which are the main types of misleading packaging practices?

1. Those which are of such size, that seem to contain much bigger *quantity* than they indeed contain.
2. Those which depict many products, for instance a toy package, even though they contain only one and the other products have to be bought, but it is not stated clear.
3. Those who state that the product contained is of extra quantity in a price, but if we calculate the average price per kilo, it is the same as previously (the price also has been raised proportionately).
4. Those which are misleading themselves, namely about the properties of the package, for instance its ability to preserve the food in it or the resistance to airflow.

6.2 What are consumers' awareness, attitudes and behaviour towards these packaging practices? To what extent are consumers misled by these practices?

According to the Greek Secretary for the Consumer Protection, the majority of consumers complain about the substantial properties of a product, namely the lack of compliance with the standards set by the producer or about a default, and not for the package itself. Till now, **no complaint** about a misleading packaging has been reported.

So, their attitude does not seem to have been affected consciously. What they seem to be doing is, according to the Secretary, put gravity on the product itself, according to its properties, not influenced by its package. So, their behaviour is unaffected by the package, as for the target group of "homines consumentes" the product itself and not the "clothe" is important.

6.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied? Please provide examples.

Using a misleading package is an unfair commercial practice according to Directive 2005/29/EC (hereinafter Dir.)³⁰⁹, incorporated in GCA almost under the "copy – paste" technique, as the Dir. is of maximum harmonization.

According to Art. 9 (a) subpara. (d) of Greek Consumer Act 2251/1994 (art. 2d of the Dir.), trade practice is "*...any...commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers*", so packaging itself is a marketing method and falls into EU and Greek legislation.

Misleading packaging has to be regarded as misleading practice according to Art. 9 (d) 1 GCA (Art. 6 (1) of the Directive), if in any way, including overall presentation, for instance when the package is disproportionately larger than the contained product, the package deceives or is likely to deceive *the average consumer* – his financial behavior –, in relation to one or more of elements that the Dir. thoroughly sets, this practice is to be considered unfair.

³⁰⁹ Alexandridou, I odigia gia tis athemites emporikes praktikes, DEE 2005.641(= The directive concerning unfair business-to-consumer commercial practices, Law of Business and Companies 2005.641), Delouka – Igglesi, p. 502 in Alexandridou, Consumer Protection Law, Karakostas, Consumer Protection Law, 2nd Ed. 2008, 371 etc.

The measures of “unfair” are to be interpreted with the criterium of the average consumer, as defined by the EU Court of Justice, namely the careful and informed customer, as the above mentioned decision did.

However, the reigning opinion in Greek case law is that which considers the consumer as having the “average perception in the formation of his buying decision”³¹⁰. Added to this, we should mention the Greek Code of foods and drinks (ministerial decision 1100/1987), which in article 11 stipulates the conditions of the package of a food or drink which is offered in a market, according to the standards of Directive 89/395/EC. Its violation constitutes, in the field of consumer law, an unfair practice, apart from the administrative penalties that it can provoke. This measure should be examined substitutionally when the average consumer criterium is not enough.

However, a relevant case to mention is 1009/2008 of Multimember Court of Athens, (Chronicles of Private Law (XpID) 2008.743). There, after a sue raised by the applicant company against the defendant one, competitive in the field of oil distribution, based on the appeal that the products (packaged olive oil) of the defendant were in a disproportionate big package for the product contained, with the danger of misleading the consumers, so it was to be regarded an act of unfair competition, it was assessed that such a package, which despite her size, clearly stated its quantity in the front side (3 L) of the package, was not misleading. The average consumer was deemed to be thoroughly inspecting such products, so was likely to see the actual size and not to be deceived. However, that case was not in front of court after a consumer’s claim, which would be based on Greek Consumer Act (hereinafter GCA), but on the act 146/1914 against unfair competition. However, it must be stated that in Greek theory the “black list” of unfair practises of Directive 2005/29/EC, incorporated in GCA (articles 9a – 9g) by act 3587/2007, are also used as criteria for the specification of an unfair action.

Concerning the means of protection of the consumer, following the prediction of ar. 11 of the Directive, art. 90. subpar. 1 GCA states that every consumer misled has the right to claim the cessation and the omission of the fraudulent behavior of the producer, and of course compensation for any damage induced due to the practice. The court has the right to publicize the order of the decision, after petition of the consumer (subpar. 2), or to order the producer to publicly express a statement of regret, while the Minister of Development has the authority to order the immediate cessation of an unfair practice for reasons of great public interest (subpar. 5).

³¹⁰ Areiopag 296/2001 Law of Business and Companies (ΔΕΕ) 2001.1112, Multimember Court of Athens 1192/2002, Law of Business and Companies (ΔΕΕ) 2003.422. in Legal theory opposite View, Alexandridou, The directive for unfair commercial practises, Law of Business and Companies (ΔΕΕ) 2005.639 et., Karakostas, (n.1), 83, Apostolopoulos, comment on Multimember Court of Athens 1009/2008, Chronicles of Private Law (XpID) 2008.745.

6.4 Which measures could help to deal with misleading packaging? In this context, are there any new developments in the market that require the updating of the respective legislation at European level?

An advertising campaign which would inform consumers about the actual existence of such misleading practice throughout the union, especially in Greece, would be beneficial – similar actions have been taken in Greece to activate public essence against similar threats, like unwise usage of the internet etc. The lack of any relevant complain proves the ignorance of Greeks about this problem.

We should also mention that the expansion of e - commerce has, to a point, created a new package, the "e - package", if we could say so. The virtual context in which a product is presented. That kind of package shall fulfill certain specifications, set by the European and the national legislator in order to avoid the deception of the consumers, especially about size, colour and of course functionality of the product. Taking into consideration those facts, it would be useful if an update of the appendix 1 of Directive 2005/29/EC was made, so that the "misleading packaging" is explicitly named as an unfair practice in the "black list".

7 Hungary

7.1 Which are the main types of misleading packaging practices

In Hungary the main types (groups) of misleading packaging practices are the following three (results below based on cases investigated - dealt with - by the National Authority for Consumer Protection, Regional Directorate Budapest)³¹¹

- So-called 'gift promises' meaning that to a product is attached an additional good which is indicated as a gift for the consumer (e.g. a mop is attached to cleaning supplies indicating that the mop is a gift – Decision KMF – 07421-7/2009).
- Two or more different products are packed and offered for sale jointly conveying the impression that the consumer acquires one or more of the attached products for free or at least (e.g. to one piece of liquid soap is also attached a refilling bag and the joint packaging is indicating that the refilling bag is for half price – Decision BPF-00285-1/2011; to twin pack of toothpaste is also attached a toothbrush which is declared as a gift, however the price of two separate pieces amounted HUF 478, and the twin pack with toothbrush HUF 579 – Decision KMF-1125/1/2010; three packages of coffee).
- Re-labelling information concerning the weight or size of the product (e.g. piece of packaged bacon labelled twice, of which one indicated 0,381 kg – price HUF 628 and the other 0,600 kg – price HUF 989 - Decision KMF-09760-2/2009).

It shall be stated additionally, that this practices are particular in the period prior to major bank holidays (Eastern, Christmas, etc.).

7.2 What are consumers' awareness, attitudes and behaviour towards these packaging practices? To what extent are consumers misled by these practices?³¹²

The average consumer will not look after (investigate) and compare the different packages offered for purchase, where this consumer behaviour is rather of psychological nature. Conclusively, in cases of misleading packaging the consumer very likely sustain damage due to such practice.

7.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied? Please provide examples.

Both the national and EU rules on unit prices provide a good functioning framework to deal with these cases. The regulation in force provides a good basis to deal effectively with cases (e.g. misleading practices in manipulating with, deriving from non-comply with the duty of indication, or misleading in any other way, etc.) violating the provisions on the indication of the unit price. According to the opinion of the National Authority for Consumer Protection ('NFH') – Regional Directorate Budapest,³¹² the fact that „unfair” commercial practices in connection with the product's unit price are not included in the Directive on the Prohibition of Unfair Commercial Practices (UCP), does not cause any difficulty applying the law. In Hungary the rules on the indication of unit prices are laid down in the Consumer Protection Act³¹³ (§ 2 lit. n); § 14), and not in the UCP national implementation law.³¹⁴

³¹¹ The exemplificative decisions were provided by the National Authority for Consumer Protection, Regional Directorate Budapest

³¹² Opinion (in writing) of the Legal Department of NFH – Regional Directorate Budapest from 26 October 2011

³¹³ Act CLV of 1997 on consumer protection (1997. évi CLV. törvény a fogyasztóvédelemről) as amended

All the same, on EU level the issue of unit price is not covered by the UCP Directive but by a separate directive.

The legal basis for measures taken against misleading packaging practices is commonly provided by Art. 6(1)(c) UCP national implementation law (compare Decisions KMF-00814-3/2009, KMF-07421-7/2009, KMF-09760-2/2009, KMF-1125/1/2010, BPF-00285-1/2011): *"It is considered misleading the commercial practice, which contains untrue information, or visualises a true fact – having regard to all circumstances of its appearance – in a manner which misleads or is able to mislead the consumer with regard to one or two of the below facts and therewith motivates the consumer to such a decision in the issue whether or not to conclude a contract which she or he has not been taken otherwise: (...) c) price, respectively fee of the goods [product], method of assessment [fixing] of the price, respectively fee, circumstance of awarded special discount or price advantage, (...)."*

When assessing the "unfair nature" the focus is not on the packaging itself, but on certain information, statements, indications on the package (price, weight, certain product related information, etc.). If, after assessment of the individual case by the NFH the practice turns out to be "misleading" under UCP national implementation law, it will fall foul with EU legislation. EU legislation is infringed indirectly when a violation of the implementation law is assessed by the NFH (National Authority for Consumer Protection).

7.4 Which measures could help to deal with misleading packaging? In this context, are there any new developments in the market that require the updating of the respective legislation at European level?

One may think on the practice of product 'down-sizing': Regarding such practices it seems useful to complete the current regulation at EU level by inserting a special (additional) provision in the UCP Directive prohibiting practices which lead to confuse a product with another product (or is suitable thereto).³¹⁵

³¹⁴ Act XLVII of 2008 on the prohibition of commercial practices that are unfair to consumers (2008. évi XLVII. törvény a fogyasztókkal szembeni tisztességtelen kereskedelmi gyakorlat tilalmáról)

³¹⁵ Opinion (see footnote 1)

8 Ireland

KEY FINDINGS

- It is submitted that Piecemeal protection of consumers misled by misleading packaging under national legislation.
- Lookalike products regulated by national legislation.

8.1 Which are the main types of misleading packaging practices

In Ireland, the main types of misleading packaging practices are:

- Grocery Shrink Ray where, in a price sensitive market, manufacturers introduce a downsized version of their product for the same price. It is apparent that consumers are more swayed by the overall visual impression of the package (including total package size) and do not always consult the statement of net quantity on package or notice that the package has shrunk. The consumer would seem to be placed in a vulnerable position owing to this asymmetric exchange of information³¹⁶
- Non- functional “slack fill” whereby consumers are misled into thinking that the packet contains more product than is actually the case due to oversized packaging.
- Misleading packaging where the shape of the package deceives the consumer as to the product’s true capacity.
- Lookalike products or copycat packaging where one manufacturer copies another’s packaging which may mislead consumers into thinking they are buying a premium brand. The “copycat” producer thereby avoids investing in brand development and free riding or “piggybacking” on its rival’s customer base.³¹⁷ It has been stated that consumers base their purchasing actions on first impressions of the product exterior and do not engage in a considered examination of the product³¹⁸ or indeed the product labeling. However, it would appear that, in general, the average consumer should be able to distinguish between premium and rival brands despite the similarities in packaging. It may be different in the case of exported Irish goods in other EU jurisdictions where English may not be the first language and where the product “get up” may be accorded more weight.

8.2 What are consumers’ awareness, attitudes and behaviour towards these packaging practices? To what extent are consumers misled by these practices?

The National Consumer Agency of Ireland, a statutory body established in 2007 gets little or no complaints from Irish consumers on the issue of misleading packaging.³¹⁹ It is therefore very difficult to assess the Irish consumer’s general awareness, attitude and behaviour without having first conducted an extensive countrywide market research. There is no prescribed definition of misleading packaging.

³¹⁶ Package downsizing: is it ethical? Omprakash M K. Gupta, Sudhir Tandon, Sukumar Debnath, Anna S. Rominger, p.241; See cf, <http://www.valueireland.com/2009/06/businesses-giving-smaller-portions-but-charging-the-same/>; <http://www.rte.ie/tv/theconsumershow/s2p4.html>

³¹⁷ Lookalike Products. How close is too close, Aine Matthews, <http://www.lkshields.ie/htmldocs/publications/pub299.htm>

³¹⁸ *Jacobs v Fruitfield Group Ltd* [2007]IEHC 368 at para.3.1

³¹⁹ Information contained in a response to an email enquiry sent on the 8th of November 2011

Methodology:

It can only be surmised based on internet research, a perusal of newspaper articles, social media outlets, anecdotal evidence and advertising campaigns that Irish consumers are aware of this issue, particularly the issue of grocery shrink ray. In this respect, it is noteworthy that a major selling point of the English language marketing campaign of the French cosmetics company Nuxe is the company's statement that it is against misleading packaging practices. This would seem to point to an awareness of this issue on the part of consumers.

Attitude/Behaviour of Irish consumers:

Irish consumers are becoming more price conscious and seek value for money in these recessionary times and research conducted for this study based on social media outlets and press articles indicates however, that the Irish consumer does not appear to be unduly fazed about the empty space ratio in packets (or non-functional slack fill) and has not resorted to the making of an official complaint to a statutory body. Instead, encouraged by consumer associations and the media, the Irish consumer tends to compare unit prices, votes with their wallets and shops around for better value.³²⁰ Mandatory unit pricing may have had a positive effect in this regard as it enables consumers to compare the prices of products which come in different sizes, and thereby influences purchasing decisions. An increasingly competitive market may also influenced consumer behaviour in this respect. It is possible that the Irish consumer may feel short-changed by the purchase of e.g. an oversized package and once bitten, is twice shy, and is thus encouraged to switch brands. Indeed, it could also be mooted that the consumer has come to expect non-functional empty spaces in packaging and this may explain the lack of complaints in this regard³²¹. Anecdotal evidence and media reports would suggest that concerns have surfaced about the practice of grocery shrink ray which, even for the discerning consumer, is a practice which is difficult to detect and is regarded as a stealth price increase. It might also be conjectured that the Irish consumer may perceive over-packaging as a health and safety issue (protection against tampering) and may therefore not make an official complaint.

The connected problem of excess packaging and the corresponding environmental impact is a source of disquiet.³²² There are plans afoot at governmental level (Irish Government programme for national recovery 2011-2016) to introduce a packaging levy and extend producer responsibility as regards waste reduction. Potentially, a spin-off effect of these measures could be a reduction in slack fill in packaging, reducing the scope for misleading packaging.

It is also noteworthy that other jurisdictions such as Australia and California have legislated to prescribe the amount of empty space permitted in packaging³²³ which may provide a template for the EU legislator. These rules vary according to the product type and also take account of the functions served by product packaging (hygiene, safety etc).³²⁴

Copycat packaging which can be regarded as another type of misleading packaging has been the subject of litigation in Ireland.³²⁵

³²⁰ <http://www.independent.ie/lifestyle/good-buys-products-hit-by-shrink-ray-1460229.html>

³²¹ http://www.ehow.com/list_6811482_deceptive-packaging-tricks.html

³²² See e.g. http://www.irishtimes.com/newspaper/finance/2011/0422/1224295253217.html:www.recyclenore.ie/files/press_releases/Packaging_Tax_June_2011_.pdf

³²³ Overview of Environmental Packaging Practices in North America; Author: Catherine Goodall, presented at the 13th Annual European Packaging Law Conference, Brussels, March 14 2006; available at <http://www.repak.ie/files/Catherine%20Goodall.pdf>; California Business and Professions Code, Chapter 6, Fair Packaging and Labeling Act (§12606.2)

³²⁴ Incopen Factsheet on Excessive Packaging: <http://www.packagingfedn.co.uk/images/fact%20sheets/Excessive%20packaging.pdf>

³²⁵ *Jacobs Fruitfield v United Biscuits supra; Irish Distillers Ltd v Cooley Distillery PLC* [2008]IEHC 236

8.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied? Please provide examples.

It appears that piecemeal protection is available to combat misleading packaging. Article 2 of Directive 2000/13/EC prohibits misleading presentation of foodstuffs and this also extends to the presentation of food (including shape, appearance, packaging or packaging materials used and the setting in which food is displayed) which must not mislead the consumer as to the quantity on offer.³²⁶ This was implemented in Ireland by European Communities (Labelling, Presentation and Advertising of Foodstuffs) Regulations 2002. Examples given by legal scholars of “presentation” include artificially flavoured fruit products packaged in fruit shaped containers.³²⁷ It is submitted that this legislation would also appear to embrace misleadingly shaped packaging, e.g. slack fill but not grocery shrink ray. However, the author is not aware of any reported case. Copy cat packaging³²⁸ may be redressed by the tort of passing off, Trade Marks Act 1996 which transposes Directive 89/104/EEC, supplemented by the Trade Marks Rules and the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 implementing Directive 2006/114/EC which prohibits misleading advertising. The latter Regulations extends to statements on packaging and to the presentation of the product and provide redress for brand owners who may take a private prosecution seeking injunctive relief and also serve to protect the interests of consumers who may be deceived by lookalike packaging leading to a distortion of their commercial behaviour. The Consumer Protection Act 2007 which implements the Unfair Commercial Practices Directive may also be invoked in this context (Section 44, under the Act (Section 71) any individual (including competitor or consumer) may apply to the court in civil proceedings upon giving Notice to the National Consumer Agency and trader to prohibit continuation of the prohibited practice, under section 74, a consumer who has been materially affected can apply for exemplary damages under the Act, other civil and criminal sanctions also exist). However, Recital 14 of the UCP Directive provides that it is not its intention to prohibit the promotion of products that look similar to other products unless this leads to consumer confusion as to the commercial origin of the products and is therefore misleading. The benchmark is the average consumer who is regarded as reasonably well informed and circumspect.

Section 43 (2) of the Consumer Protection Act 2007 provides that a commercial practice is misleading if it would be likely to cause the average consumer to be deceived or misled in relation to any matter set out in subsection (3) and to make a transactional decision that the average consumer would not otherwise make. Matters set out in subsection (3) include being misled as to the main characteristics of a product including quantity, weight or volume which may embrace some elements of misleading packaging. It is questionable whether package downsizing can be identified as an unfair or misleading commercial practice under the Act, given the consumer is not misled as to the net quantity of the product but there is indeed an (material?) omission to disclose that the product has shrunk. Whether a practice is misleading will depend on whether the average consumer was induced to make a transactional decision that they would otherwise not have made. Moreover, it is important to note that in this context, packaging may be functional and may not be an attempt to deceive. Section 43 (5) of the same Act provides that the factual context and circumstances of any putative misleading practice must be considered. Thus, there is a high legal threshold to prove that the misleading packaging prompted the consequential purchase by the average consumer. This represents a high evidential bar.

³²⁶ See generally The Labelling of Food in Ireland 2007, published by the Food Safety Authority in Ireland, available at <http://www.fsai.ie/assets/0/86/204/5dfb809a-7902-4f03-bb6a-6e25a5a09736.pdf>

³²⁷ <http://www.bordbia.ie/industry/services/brandforum/events/BrandProtectionApril2010/Labelling%20and%20Packaging%20-%20Larry%20Fenelon,%20Leman%20Solicitors.pdf>

³²⁸ Protecting the goods: dealing with the lookalike phenomenon through the enforcement of IP rights in the United Kingdom and Ireland. Gerard Kelly, *2. E.I.P.R.* 2011, 33(7), 425-434

The author is not aware of any reported action involving slack fill, misleading packaging or downsized packages taken under the CPA 2007 under Section 43 (2)³²⁹. A list of enforcement actions taken in the time period August 2010- January 2011 related to failures to correctly display prices and charging more for the product at the cash desk.³³⁰

Other relevant statutes in the context of misleading packaging include the Packaged Goods (Quality Control) Act 1981, Packaged Goods (Quality Control) Regulations 1981, the Metrology Act 1996 (as amended) and Regulations made thereunder. These legislative enactments regulate correct quantities of net produce. The Merchandise Marks Act 1970 (as amended) prescribes the quantities at which certain prepackaged goods are packed. Orders made under this Act have been revoked owing to intervention by the EU legislator to facilitate free movement of goods. Thus, range of sizes legislation mandating minimal package sizing now only applies to wine and spirits. The relevant Statutory Instrument implementing EU Directive 2007/45/EC deregulating mandatory package sizes are Merchandise Marks Act 1970 (Prepacked Goods) (Marking and Quantities) (Revocation) Order 2008 and European Communities (Prepacked Products) Regulations 2008 regulating the indication on the packaging of the nominal total capacity for aerosols. On the whole, the market has therefore been left to its own, self-regulatory, devices. The Legal Metrology Service which is responsible for enforcing weights and measures has stated that it rarely receives complaints from Ireland relating to pre-packed products but it sometimes receives complaints from abroad about Irish pre-packed products.³³¹

Moreover, the consumer is protected under the EC (Requirements to Indicate Product Price) Regulations 2002 which implements the Unit Prices Directive. The retailer must show the unit prices for product sold by weight, volume or measure which assists the consumer in comparing products and may counteract the effect of misleading packaging. Misleading packaging may already be embraced by the Essential Requirements in the Annex II of the Packaging Directive (implemented in Ireland by Waste Management (Packaging) Regulations 2007) which stipulates that the volume and weight of the packaging must accord with hygiene, safety and consumer acceptance, given that in a study conducted by the EU on the Essential Requirements, a major role in consumer acceptance of packaging is "misleading packaging, suggesting more content than it contains".³³² In Ireland, a producer must be able to demonstrate compliance with the Essential Requirements by providing technical documentation to the local authorities upon request who are appointed to enforce the Regulations and have the power to conduct inspections.³³³ To date, these inspections have not been geared towards assessing compliance with the Essential Requirements. A potential counterargument may be that the consumer may not be accepting of smaller sized packs which was the case of computer software manufacturers who were reluctant to reduce the size of the packaging arguing consumer (non) acceptance.³³⁴ The applicable CEN standards which create a presumption of conformity with the Essential Requirements are I.S. EN 13427, I.S. EN 13428, I.S. EN 13429, I.S. EN 13430, I.S. EN 13431 and I.S. EN13432 and are available to packaging producers through the National Standards Authority of Ireland, established under the National Standards Authority of Ireland Act 1996.

³²⁹ High Court cases where the Consumer Protection Act 2007 was invoked include a case on misleading advertising: see e.g. *Tesco Ireland v Dunnes Stores* [2009] IEHC 569

³³⁰ http://www.nca.ie/eng/Media_Zone/Press%20Releases/NCA_publishes_latest_Consumer_Protection_List.html

³³¹ http://www.nca.ie/eng/Research_Zone/Reports/CSG_section3.pdf

³³² http://ec.europa.eu/environment/waste/packaging/pdf/report_essential_requirements.pdf, at page 44.

³³³ http://ec.europa.eu/environment/waste/packaging/pdf/report_essential_requirements.pdf at page 103-105; <http://www.repak.ie/files/PDFs/EssentialRequirementsOfPackaging.pdf>

³³⁴ <http://www.preventandsave.ie/documents/Guides%20and%20Reports/Report%20on%20Packaging%20Supply%20Chain%20%28Packaging%20Prevention%29,%20February%202008.pdf> page 26

8.4 Which measures could help to deal with misleading packaging? In this context, are there any new developments in the market that require the updating of the respective legislation at European level?

Proposed Measures

It has been suggested that the introduction of a voluntary code of practice with the establishment of an independent "Packaging watchdog" to hear consumer complaints with the power to name and shame could potentially constitute an effective mechanism to curb misleading packaging³³⁵, particularly the increasingly popular practice of grocery shrink ray. This Code of Practice could be endorsed by the relevant national consumer agency. It is a truism that consumers are likely to switch brands, if of the view that the company in question is engaging in a misleading packaging practice and this method has been deemed to be more cost effective than prosecution.

In light of the onus placed on producers to reduce waste (minimise packaging and volume) under the Packaging Directive, it would appear to be in the industry's best interest to reduce empty space ratios and over-packaging. Specific rules mandating the empty fill ratio in packaging along the lines of Australia and California may provide a solution but would appear to be difficult and costly to enforce and may already be covered within the scope of Directive 2000/13/EC. Another suggestion would be to amplify the CEN standards on Packaging which create a presumption that the Essential Requirements which are geared towards a minimisation of waste are complied with, namely, to amplify the consumer acceptance criteria with reference to over-packaging in the Annex of the Packaging Directive. The CEN standards could in any event be utilised in the management and at the design stage of packaging. A common European approach to misleading packaging would also facilitate the free movement of packaging. There is room for manoeuvre at the level of essential requirements to meet the twin goals of reducing waste and consumer protection. It is important that the requirement of consumer acceptance is not utilised by manufacturers to justify excess packaging for marketing purposes.³³⁶ For example, the CEN Standards could be extended to include empty space ratios. This would have to be weighed against safety and hygiene requirements which must be accorded priority.

Along the lines of an earlier legislative proposal in the USA, legislation could be introduced requiring manufacturers to label downsized packages with the words "reduced", "decreased" or "less" for a period of 6 months following the introduction of a downsized product to draw the consumer's attention to downsized packaging.³³⁷

³³⁵ In the context of excessive packaging: <http://www.preventandsave.ie/documents/Guides%20and%20Reports/Report%20on%20Packaging%20Supply%20Chain%20%28Packaging%20Prevention%29,%20February%202008.pdf> (at page 8).

³³⁶ <http://www.preventandsave.ie/documents/Guides%20and%20Reports/Report%20on%20Packaging%20Supply%20Chain%20%28Packaging%20Prevention%29,%20February%202008.pdf> at page 24.

³³⁷ <http://leda.law.harvard.edu/leda/data/444/Wall.pdf> at page 44, citing Judann Dagnoli, State AGs Attack Downsized Brands, 62 Advertising Age 8, 2 (1991).

9 Italy

KEY FINDINGS

- Misleading packaging
- Misleading information on package
- Packaging and information on quantity / quality

9.1 Which are the main types of misleading packaging practices

Lot of researches demonstrate how much, packaging influence consumer's choice.

In Italy it seems that the problem concerns more a misleading message conveyed by the package (for instance quality or untrue information about the country of origin), than the tinned quantity.

According to the opinion of consumers' associations the problem of a few quantity of product in a big package is most concerned with cosmetics, while the misleading information about quality is more concerned with food packaging.

We can summarize misleading packaging practices listed by consumers' associations as follow:

- a) with regard to cosmetics:
 - 1) packaging can be confused with the competitor's one (colours, design, images),
 - 2) bigger packaging than other competitors for the same quantity of product sold at an higher price,
 - 3) fewer products in a package with the same size of others and sold at the same price.
- b) with regard to food:
 - 1) packaging can be confused with the competitor's one (colours, design, images),
 - 2) packaging misleads about product quality,
 - 3) packaging misleads about the origin of the product,
 - 4) images of the product on the packaging are misleading,
 - 5) bigger packaging than other competitors for the same quantity of product sold at an higher price,
 - 6) fewer products in a package with the same size of others and sold at the same price.

9.2 What are consumers' awareness, attitudes and behaviour towards these packaging practices? To what extend are consumers misled by these practices?

9.2.1. Consumers' awareness and behaviour

In Italy there is barely information on misleading packaging. Furthermore, neither concrete consumer reactions nor consumer association initiatives nor governmental actions and administrative decisions could be identified. Hence, it may be concluded that consumers in Italy are not aware of misleading packaging. For this reason they are particularly vulnerable, even because, while purchasing, they normally do not put attention at what it is written on the package, they buy what it seems to be the product they want and, in this context, packaging plays a decisive role.

9.2.2. To what extend are consumers misled

According to European legislation (last but not least directive 05/29 concerning unfair business-to-consumer commercial practices), only an "average consumer", when misled or deceived, shall be protected.

The question is who can be considered an “average consumer” in case of misleading packaging. In other words, is the “average consumer” the customer who buys with care and controls meticulously all information printed on the package or the one who buys quickly, only after a brief control of the package?

According to consumers’ psychologists, in this context, the “average consumer” is not particularly meticulous, but he is a purchaser that, after a *prima facie* control, puts the product in the cart. For this reason we should consider misleading every packaging that, after this fast and superficial *prima facie* analysis, remains misleading.

Maybe it should be appropriate to increase the protection to the consumer who, knowing the sale price, but not the unit price of an item, goes unnoticed of the variation of quantity if the sale price and the package size remain unchanged.

Some Italian cases in matter of competition law can be useful to understand better how the consumer purchase. These cases are related to the so called “look alike” phenomenon. Italian judges say that to mislead a consumer, is enough that the packing could be confused with the competitor's one for size, colours and images, because consumers purchase automatically, putting in the cart what it seems they want. I think that this criterion can be followed with misleading packaging too. So a consumer is misled when packaging can be easily confused with another one that, for the same price, contains much product, or has more qualities.

According to Italian consumers’ association opinions consumers are misled by size of package, by its form and colours, by images evoking qualities that the product has not. Packaging persuade them to purchase and they realise to be misled, only after a careful control once at home.

9.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied? Please provide examples.

In Italy, at the moment, there are not specific rules about misleading packaging and consumer's protection. Indeed we can say that misleading packaging could fall among unfair practices regulated by provisions implementing directive 05/29. Even provisions on unfair competition can, even if only accidentally, carry their effects on consumers. It is not a case if the only decisions about misleading packaging are connected with package which can be easily confused with the competitor's one.

9.4 Which measures could help to deal with misleading packaging? In this context, are there any new developments in the market that require the updating of the respective legislation at European level?

In consideration of the low value of consumer goods, it is quite improbable that a consumer, even if he has been deceived, proceeds judicially against the producer for a misleading packaging practice. Consequently an individual judicial remedy will be useless. At the moment, misleading packaging, even if well-known, is not seriously fought by Italian consumers’ associations, so even a class action will be pointless. On the contrary, it would be helpful to stimulate the administrative authority established according to directive 29/05 and competent to fight misleading practices.

10 Lithuania

KEY FINDINGS

- The main types of misleading packaging practices in Lithuania are: *"selling of air"*, *selling "less"*, *"improvements"*, *the lack of information/deceptive information on the package*.
- Consumers are aware of "misleading packaging" problem, nevertheless the jurisprudence concerning this problem is poor. Only few examples of cases, regarding deceptive information stated on the package (label) of the product can be provided.
- In following cases national laws, implementing EU legislation on advertising and/or unfair commercial practices are applied.

10.1 Which are the main types of misleading packaging practices

The main types of misleading packaging practices in Lithuania are the following³³⁸:

- ***"selling of air"***- packaging of the product is of such size, that it seems to contain bigger quantity of the product than it indeed does³³⁹;
- ***selling "less"*** – placing products into the packages, containing less weight of the product, while leaving the same appearance of the package. That means that the quantity of a product was diminished, leaving the same price as before. The consumer, who is used to concrete products and their fixed quantity, does not recognize the changes immediately³⁴⁰;
- ***"improvements"*** – producers start using a new packaging trying to distract consumer's attention from the quantity of product (optical illusion)³⁴¹;
- ***the lack of information/deceptive information on the package*** – the information, which is crucial for the consumer in order to make a decision to buy or not the product is written in small letters or does not conform real situation and is misleading³⁴².

³³⁸ There is a number of articles on internet, related to 'misleading packaging' problem. See for example: <http://www.pinigukarta.lt/patarimai-3/verslas-ir-ekonomika-patarimai-3/prekyba-verslas-ir-ekonomika-patarimai-3/preke-sumazejo-kaina-pakilo>;
http://www.alfa.lt/straipsnis/182559/Pakuote..panasi..bet.produkto..maziau=2008-05-12_09-16/;
<http://verslas.delfi.lt/business/article.php?id=14743605>

³³⁹ For example the product is placed into the bigger package, not changing the quantity of the product. When the product is placed into a bigger package it is more likely that the buyer will notice it on the shelves of the supermarket. This tactic is used when selling for example chemical products for household.

³⁴⁰ In marked appeared 0.9 l (or even smaller – 0.9 kg) packagings for milk and yogurt, when usual packaging is 1 l; cereals or pasta are sold in 800 g packagings, when usual packaging is 1 kg; flour is sold in 1.75 kg packagings, when usual packaging is 2 kg; butter or curd is sold in 180 g packagings, when usual packaging is 200 g; curd cream package is 130 g instead of 150 g, etc.

³⁴¹ For example the dish washer, coffee, animal food packagings have more curves, which purpose is to reduce the volume of the package.

³⁴² There has been a number of complaints regarding frozen fish, when the quantity of ice was bigger than stated on the package. See for example: <http://nevertok.lt/2-maisto-produktai/perki-zuvi-%E2%80%93-moki-uz-leda/>;
<http://www.diena.lt/dienrastis/ekonomika/ledas-uz-zuvies-kaina-115376>

10.2 What are consumers' awareness, attitudes and behaviour towards these packaging practices? To what extent are consumers misled by these practices?

10.2.1 Consumer organisations/associations

State Consumer Rights Protection Authority³⁴³ (thereafter – SCRPA) confirmed by E-Mail that they have not yet received any consumers' complaints regarding misleading packaging's (cases when producers diminish the quantity of a product not changing its price).

Only one example, regarding the information provided on the package of sour cream and fat mixture was named: SCRPA in the year 2011 received consumer complaint regarding the package of sour cream and fat mixture. On the package the word "sour cream" was written in larger letters, while the phrase "and fat mixture" – in smaller. It was stated that in this case the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania was not violated.

SCRPA noted that considering the fact that according to the law requirements producers are obliged to provide not only the price of the product itself, but also its 1l or 1kg price, the law is not violated as long as consumers have possibilities to compare prices of different products. However, SCRPA assured that every concrete complaint regarding the unfair packaging would be analysed individually examining its conformity with Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania.

NGO Consumers' Rights Protection Centre³⁴⁴ on its internet page emphasizes problems related to deceptive labelling of products (particularly statements on the package such as "no preservatives", "no E additives"), not specifying the misleading packaging problem.

In conclusion the following reasons for the passivity of consumer organisations and individual consumers, when handling in complaints regarding misleading packaging, can be named:

1. the lack of human resources in consumer protection organisations/associations;
2. the ineffective national legal protection mechanisms (claims in order to protect public interest are not widely used and unpopular, little amount of damage faced by individual consumer, not developed institute of the class actions).

10.2.2 Consumers

Nevertheless it can be stated that in Lithuania consumers are aware of "misleading packaging" problem. Consumers are informed about misleading packaging *via* press or internet³⁴⁵ Their awareness and concern towards misleading packaging problem can be seen from internet comments and participation in forum discussions, following the articles mentioned above. Several private initiatives suggesting not to buy products which are pre-packed in a misleading way can be found on internet as well³⁴⁶ (these initiatives are not coordinated, expressed by single individuals, so their effectiveness is really questionable).

³⁴³ <http://www.vvtat.lt/index.php?1513433377>

³⁴⁴ <http://www.vartotojucentras.lt/view.php?id=27>

³⁴⁵ See for example: <http://www.pinigukarta.lt/patarimai-3/verslas-ir-ekonomika-patarimai-3/prekyba-verslas-ir-ekonomika-patarimai-3/preke-sumazejo-kaina-pakilo>;
http://www.alfa.lt/straipsnis/182559/Pakuote..panasi..bet.produkto..maziau=2008-05-12_09-16/;
<http://verslas.delfi.lt/business/article.php?id=14743605>

³⁴⁶ <http://dali.us/2011/aktualijos/siulau-akcija-nukreipta-pries-lietuviskus-maisto-fasuotojus/>
<http://www.qiedresblogas.lt/?p=673>

The main and only solution, in order to combat with misleading packaging problem, suggested in media and private forums is to ignore such products or to look for substitutes, which are not pre-packed in a misleading way.

10.2.2.1 Consumers' attitude towards misleading packaging drawn from case law

The economic behaviour of a consumer has been analysed in several cases, related to misleading advertising (i.e. misleading information stated on the package of the product):

1. National meat processing companies produced and sold meat products on which labeling (packaging) it was stated "for children", "childish" and (or) "suitable to use for children older than 3 years of age", "made specially for children". These products were more expensive than usual ones, however their ingredients (composition) were identical (i.e. not better) in comparison to widely consumed meat products. Competition Council of the Republic of Lithuania stated that this kind of information provided on the labels (packages) of meat products is advertising as it is set in Art 2 (7) of the Law on Advertising of the Republic of Lithuania.

When assessing the the impact of such information on the consumer's choices (the likelihood of consumer confusion) Competition Council of the Republic of Lithuania *inter alia* stated that when considering the information stated on the labels (packaging) it is clear that consumer presumes that the ingredients (composition) of such product will be of a better quality in comparison to the other meat products. This perception is strengthened by a circumstance that the price of these products in comparison to other is 24 percent higher. The price of the product is one of the most important factors influencing decision to purchase. It was concluded that such kind of information was a misleading advertisement and could mislead consumers (2009-11-12 Ruling Competition Council of the Republic of Lithuania No 2S-25).

2. National companies AB "Vilniaus duona", BĮ UAB "Sanitex", UAB "Vilniaus prekybos mažmena" ir BĮ UAB "Norfos mažmena" sold waffles "Bingo". On the package of these waffles it was stated "Take part in the game, win!", when the game at the moment of selling was already over. Competition Council of the Republic of Lithuania stated that such actions mislead consumers, because incorrect information about the product characteristics was provided. These actions were in breach of Art. 7 (1) subpara. 2 of Law on Competition of the Republic of Lithuania (this provision at present is not longer in force).

When assessing the consumer's attitude towards such a misleading information on the package Competition Council of the Republic of Lithuania stated that a link "Game inside the package" on the waffles packaging had a significant impact on consumer's choice and decision to buy these waffles. The buyer, buying waffles "Bingo" on which package there was information about the possibility to take part in the game hoped that their consumption characteristics will be more useful than the ones of other waffles, because he will have the opportunity to participate in the game, and maybe win a prize (2000-06-29 Ruling Competition Council of the Republic of Lithuania No 9/b).

10.2.2.2 Consumers' behaviour towards misleading packaging

As it has been mentioned above, no surveys carried out by consumer organisations/associations specifying solely on misleading package problem could be found.

However, in this context it is important to mention survey (of 2010) "Survey on Consumer Attitudes towards Information Presented on the Labels of Food Products and on Food Safety" carried out by Lithuanian Veterinary Academy, Kaunas University of Technology and State Food and Veterinary Authority³⁴⁷.

³⁴⁷ http://www.lmai.lt/failai/44_1_Stankeviciene.pdf

The aim of the study was to ascertain consumers' attitudes towards the choice of food and food safety. More than 400 consumers of different age and education from various cities in Lithuania were surveyed. The research revealed that 91.5 % of the respondents always or often buy food products in supermarkets. A common information on food labeling is read by 49.2 % of customers, and only 17.3 % of the consumers always read the information. The majority of the respondents (74.2 %) claimed that producers information on product label is partially clear, and only 20.14 % of the respondents think that the information on the label is completely clear.

While selecting food products the first thing the consumers take into account is discounts (60.0 %). Even 77.2 % of the respondents revealed that in most cases or always the consumers primarily look at the price of the product and its expiry date (69.3 %). Research showed that the freshness (96.0 %), taste and flavour (86.6 %) of the product are important to consumers. More than half of the respondents in most cases or at least sometimes (69.3 %), take notice to the health factors of product's ingredients

10.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied? Please provide examples.

Only few cases regarding the misleading information on the package can be named. No cases dealing with misleading packaging itself could be found³⁴⁸.

When information provided on the package conform the advertisement definition, Law on Advertising of the Republic of Lithuania implementing Directives on misleading and comparative advertising³⁴⁹ and Unfair Commercial Practices Directive³⁵⁰ is applied (see examples provided when answering a previous question).

When information provided on the package does not conform with the advertisement definition its deceptiveness is assessed applying Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania implementing Unfair Commercial Practices Directive. (Example: State Consumer Rights Protection Authority in the year 2011 received consumer complaints regarding the package of sour cream and fat mixture. On the package the word "sour cream" was written in larger letters, while the phrase "and fat mixture" – in smaller. It was stated that in this case the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania was not violated).

³⁴⁸ It is assumed that in cases dealing with the question whether packaging is misleading the Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania would be applied.

³⁴⁹ 84/450/EEC: Council Directive of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the member states concerning misleading advertising; Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising.

³⁵⁰ 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').

10.4 Which measures could help to deal with misleading packaging? In this context, are there any new developments in the market that require the updating of the respective legislation at European level?

When dealing with misleading packaging Art. 6 of the Unfair Commercial Practices Directive as well as an average consumer standard could be applied. The main problem is the lack of clarity of the provisions of this Directive. National courts and consumer protection institutions often are not sure about the regulatory limits of the Directive. Commission Staff Working Paper, Guidance on the Interpretation / Application of Directive 2005 / 29 / EC on Unfair Commercial Practices, SEC(2009).1666 does not provide much information regarding misleading practices problem as well.

11 Poland

KEY FINDINGS

- Misleading packaging practices in Poland are either not recognised as a problem or do not constitute a problem due to sufficient regulations and actions (indirectly) against these practices.
- Once a misleading packaging practice is approved as being misleading it is regarded as an unfair commercial practice and therewith falls foul with EU legislation, in particular with the Unfair Commercial Practice Directive.
- The Unit Price Indication Directive is an effective instrument to prevent a consumers' deception.

11.1 Which are the main types of misleading packaging practices

- **selling "less"** of the product than before by using one of the following strategies (e.g. Minimal reduction of weight, so that the packaging can stay as it was; reduction of the pieces of toilet paper or kitchen paper; parting the product in smaller unities without having regard to the proportional change of the price; changing the placing of e.g. cookies inside the plastic package which leads to a smaller amount of cookies; changing the shape of e.g. a bottle which makes it look bigger than other bottles with the same amount of filling)
- **selling "air"** (packaging is filled with air and appears bigger; packaging is bigger than required)³⁵¹
- **"lookalikes"** (in this case product packaging is similar to the packaging of a competitor)

11.2 What are consumers' awareness, attitudes and behaviour towards these packaging practices? To what extent are consumers misled by these practices?

11.2.1 Awareness, attitude and behaviour

11.2.1.1 Awareness of consumer associations and conclusions to consumers' awareness and behaviour towards misleading packaging

Misleading packaging was already mentioned (but not particularly recognised as a problem) in 2005 by the Federation of consumers.³⁵² They, however, came to the conclusion that misleading packaging does not infringe the law since package information corresponds with the content. Therefore, they suggested these two solutions. Either consumers should boycott the products and companies applying the strategy of "downsizing" or they should inform producers about their negative experience and enter into discussions. The problem, however, was left to the consumer.

The intensity of the debate peaked in 2010. ProTest.pl started actively campaigning against misleading packaging (which so far appears to be the only action taken against misleading packaging). This action was co-financed by the European Union.³⁵³

³⁵¹ <http://www.vzh.de/ernaehrung/119742/Luftpackungen%20Top9.pdf>.

³⁵² See : Federacja konsumentów, "Ile listków ma twój papier toaletowy? Czyli czym jest downsizing w marketingu" (9.6.2005)

³⁵³ Pro-Test przeciw **oszukiwaniu opakowaniami** in: PRO-TEST: Nr 9 (102) wrzesień 2010, http://www.pro-test.pl/article_article/110112,0/Akcja+Pro+Test+przeciw+oszukiwaniu+opakowaniami.html.

The attention of media was drawn to misleading packaging. In this context many articles and some TV-reportages appeared on misleading packaging.³⁵⁴ These texts have many references to German articles³⁵⁵ and also to the results of the German *Verbraucherzentrale* in Hamburg that has already done some research on the field of misleading packaging.³⁵⁶

Even though Pro-test reports that many of their readers have been very disappointed because of misleading packaging practices³⁵⁷, not many consumers reacted on Pro-test's initiative by which consumers were asked to send in photos of misleading packaging. It is not really clear what happened to the campaign of pro-test.pl. One can find a list of product packages which are presumed to be misleading. However, the list is not very long. The campaign seems to have stopped without success. Participation in forum discussions on the internet is very poor.

Furthermore, it seems that following Protest's campaign, the problem "misleading packaging" has rather disappeared from the public eye. Consequently, not many articles on misleading packaging can be found from 2011.

Nevertheless, even though Pro-test and the Polish media were obviously inspired by the work of the German *Verbraucherzentrale* in Hamburg, there is, however, no comparable equivalent in Poland.

11.2.1.2 Awareness by the Office of Competition and Consumer Protection (UOKiK) and conclusion for consumers' awareness and behaviour

The UOKiK³⁵⁸ is an important administrative body of the Polish government for competition and consumer protection. However, it does not run any surveys on particularly misleading packaging practices. The UOKiK has confirmed this review result by E-Mail. However, surveys (of 2009 and 2007) on the "awareness of consumer rights and analysis of barriers preventing consumers from safe and satisfactory participation in the market"³⁵⁹ could be found. The survey focuses on six different groups of persons of different gender, age, education and place of residence. In the wording of the survey, the "typical" consumer³⁶⁰ is a person who purchases in a "thought-through" manner (plans what to buy before going to the shop) rather than being led by an impulse.³⁶¹ Furthermore, the most important motive for buying a certain product is its price.³⁶² On the other hand, packaging as well as advertisement³⁶³ does not play a decisive role in most cases.³⁶⁴

³⁵⁴ Federacja konsumentów, "Ile listków ma twój papier toaletowy? Czyli czym jest downsizing w marketingu" (9.6.2005), see: <http://www.federacja-konsumentow.org.pl/story.php?story=409>; "Triki producentów: mniejsze opakowania, cena ta sama" (12.4.11), see:

http://wyborcza.biz/biznes/1,101562,9418921,Triki_producentow_mniejsze_opakowania_cena_ta_sama.html;

"Duże opakowanie, mała zawartość – jak płacimy za powietrze" (6.5.11), see:

http://wyborcza.biz/biznes/1,101562,9551222,Duze_opakowanie_mala_zawartosc_jak_placimy_za_powietrze.html ; „Dzien dobry” on TVN (see: <http://dziendobry.tvn.pl/video/oszukancze-opakowania,109,newest,8790.html> (11.10.2010), *Dziennik Polski* "Oszukańczę opakowania" (18.10.10), see:

<http://www.dziennikpolski24.pl/pl/magazyny/konsument/1074898-oszukancze-opakowania.html>; Pro-Test przeciw oszukańczę opakowaniom in: PRO-TEST: Nr 9 (102) wrzesień 2010, http://www.pro-test.pl/article_article/110112,0/Akcja+Pro_Test_Pro_Test+przeciw+oszukanczym+opakowaniom.html.

³⁵⁵ like in *Der Spiegel*, "Viel dran, wenig drin" (5.5.11), see:

<http://www.spiegel.de/wirtschaft/service/0,1518,760912,00.html>

³⁵⁶ See: <http://www.vzh.de/ernaehrung/30287/inflation-in-kleineren-tueten.aspx>; see also above (Report Germany).

³⁵⁷ http://www.pro-test.pl/article_article/110112,0/Akcja+Pro_Test_Pro_Test+przeciw+oszukanczym+opakowaniom.html

³⁵⁸ <http://uokik.gov.pl/>.

³⁵⁹ <http://www.uokik.gov.pl/publications.php#faq1132>.

³⁶⁰ See the study p. 10.

³⁶¹ 74 % of 1000 persons interviewed (although it has to be taken into account that this percentage rate may vary when distinguishing between gender, education and age); see page 29, 30 of the survey.

³⁶² 86 % of 1000 persons interviewed about their motives of choice when buying food; 79 % of 1000 persons interviewed about their motives of choice when buying cosmetics; see the survey on p. 21; see also in "Idą święta – kupuj świadomie" (30.3.2007) to be found on: http://www.uokik.gov.pl/aktualnosci.php?news_id=286 and "Święta w promocji" (18.3.2008) to be found on: http://www.uokik.gov.pl/aktualnosci.php?news_id=396.

³⁶³ 21-22% of 1000 persons interviewed, see the survey p. 21, 22.

(In comparison to the motive "price") Only 39 % of 1000 persons interviewed about their motives of choice when buying food said that packaging is decisive and only 29 % of 1000 persons interviewed admitted that packaging is decisive when buying cosmetics.³⁶⁵ Also, only 39 % of the persons interviewed think that advertisements are a good source of information.³⁶⁶ Furthermore, the majority claims that they can distinguish true from false information in advertisements.³⁶⁷ Even though 78 % of the persons interviewed confirmed that their purchases are "thought-through", 43 % of all persons interviewed admitted that they usually choose the particular products in the shop³⁶⁸. For that reason, misleading packaging can have an enormous effect on the consumer's choice of a specific product, notwithstanding the rational approach to purchasing. From the fact that only 39 % of the interviewed persons think that packaging could be decisive, it could be concluded that consumers are not sufficiently aware enough of misleading packaging practices. Otherwise packaging would play a more important role for their purchase choices. This assumption, however, needs to be proved. For that purpose "price" as the main motive for consumers' choices needs to be analysed. There are two possibilities of interpreting this: Consumers, who state that the price is their main reason for purchasing a product, also could take the unit price into consideration. Hence, if considering the price also includes the comparison of unit prices, it could be concluded that consumers are aware of misleading packaging. Such packaging strategies would then be ineffective in most cases. This would also mean that behaviour towards misleading packaging – namely avoiding products which are misleadingly packaged- could be identified.

However, this conclusion cannot be drawn from the survey.

Hence, there are two possibilities left: Either consumers do not take unit prices into consideration or the study does not reveal any valuable information on consumer awareness because the meaning of "price" was not determined before the survey was conducted.

Also, the fact that only 39 % of persons regard advertising as a good source of information and that the majority claims it can estimate which information is false and which is correct (which might be regarded as a deliberation over the producers' practices), may not be projected on the problem of misleading packaging. Whereas advertisement serves the function of promoting the product in a subjective manner and thereby by its nature needs to be questioned, misleading packaging often remains unnoticed, having a somewhat unconscious effect on the consumer. In case of misleading packaging the state of questioning the practice is usually even not reached.

It is also noteworthy that misleading packaging practices do not play any role in the consumer policy for 2010-2013³⁶⁹. The same is true for the UOKiK. Most of the press releases of the past two years deal either with misleading information (especially concerning certain promotional campaigns) or misleading advertisements.³⁷⁰ The same can be concluded for the past activities of the Office.³⁷¹ Also, the inspections conducted were mainly confined to investigating the regularity and honesty of the organisation of promotional campaigns.³⁷²

³⁶⁴ The consumers' federation (*Federacja Konsumentów*), however, points out that the packaging of a product is one of the basic factors deciding about our market choices. The shape and functionality of the package may both help as well as harm the image of the product. According to them the package itself is a statement addressed to the customer, see: <http://www.federacja-konsumentow.org.pl/story.php?story=409>.

³⁶⁵ See the survey on p. 21.

³⁶⁶ 39 % of 1000 persons interviewed, see the survey p. 77.

³⁶⁷ See the survey p. 78.

³⁶⁸ 43 % of 1000 persons interviewed ; see the survey p. 29.

³⁶⁹ See : <http://www.uokik.gov.pl/publications.php#faq1466>.

³⁷⁰ See e.g. "Idą święta – kupuj świadomie » (30.3.2007) and "Święta w promocji" (18.3.2008).

³⁷¹ See the Report on Activities 2010, p. 34-41, which may be found on: <http://www.uokik.gov.pl/publications.php#faq1466>.

³⁷² See: Informacja o wynikach kontroli prawidłowości i rzetelności organizowania promocji przez przedsiębiorców (BK/ AŻ – 034 – 4/ 08/ AJ) which can be found on:

However, in all of these documents checking the unit price indications play a major role. Assuming that misleading packaging practices take place, the obligation to indicate unit prices could be an effective solution and thereby also the reason why the "problem" of misleading packaging practices does not attract great attention in Poland.

Further to what has been said in point 11.2.1.1., there is one remaining point which can be derived from the survey concerning consumers' behaviour. Consumers expect corresponding institutions or authorities to take action against the practices violating their best interest rather than taking the initiative themselves.³⁷³ The reasons listed are lack of awareness of their rights³⁷⁴, fear of the sellers' reaction³⁷⁵ the relative benefit to gain from possibly costly and lengthy court proceedings³⁷⁶. This means that the consumer's alternative would be either to accept the practice, to complain to the producer directly or to switch brands.

11.2.1.3 Conclusions on consumers' awareness drawn from jurisprudence/ administrative decisions

There are several administrative decisions of the President of the Office of Competition and Consumer Protection. These decisions, however, are not directly related to misleading packaging practices. Most of them deal with wrong or incomplete information in connection with promotional campaigns or misleading advertising.³⁷⁷ However, the practices used in these cases were always regarded as infringements of common consumer interests. Each infringement was deemed to be an unfair market practice (here in the sense of Directive 2005/29/EC) or/ and an example of unfair competition. The test for determining whether a practice is misleading, is that the "average consumer", who in Art. 2 (8) of the Polish legislation transposing the directive³⁷⁸ is defined according to EU legislation and case law.³⁷⁹ No "average consumer", understood as a consumer who is well informed, attentive and circumspect,³⁸⁰ was regarded as misled by the practice in question. However, beside the fact that the measure for a practice being misleading or not is the "average consumer", unfortunately no conclusion could be made as regards consumer awareness.

11.2.2 Conclusions

The conclusion which may be drawn from this research is that misleading packaging practices exist in Poland; they also have been recognised. Even though some campaigns against misleading packaging practices occurred³⁸¹ and there is a lot of information (e.g. in media releases) available, it cannot be concluded that consumers in Poland are aware of misleading packaging practices. It was observed that participations in the campaigns as well as in forum discussions on the internet are very poor.

<http://uokik.gov.pl/szukaj.php?szukaj=Informacja+o+wynikach+kontroli&x=0&y=0>; and Informacja o wynikach kontroli prawidłowości wprowadzania do obrotu produktów żywnościowych oferowanych w promocjach w dużych sieciach handlowych (BK/ AŻ – 034 – 1/ 07/ AJ).

³⁷³ This is what 76 % of 1000 persons interviewed are convinced of, see the survey p. 11, 35.

³⁷⁴ 75 % of 1000 persons interviewed say that they do not know their rights ; 65 % claim this would be due to the complexity of the respective regulations, see the survey p. 33, 34.

³⁷⁵ See the survey p. 46.

³⁷⁶ See the survey p. 11, 44, 45.

³⁷⁷ Decision no RPZ 12/ 2011 from the 13.7.2011 (Aflofarm Fabryka Leków) about a misleading advertisement; in the television claiming that the person recommending the product has an academic title even though she had not; Decision no RPZ/2011 from 7.7.2011 about a television competition (One-2-One S.A.); Decision no RWR 12/2011 from 1.7.2011 about incomplete information within the framework of a promotion campaign (E.Wedel sp. z o.o.) ; decision no DDK – 2/ 2011 from 20.4.2011 about a promotion campaign which in fact was not really a promotion campaign but only assigned as one (Agros Nova sp. z o.o.).

³⁷⁸ Ustawa z dnia 23 sierpnia 2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym implementing the Unfair Commercial Practice Directive (2005/29/EC).

³⁷⁹ See e.g.: Decision no RPZ 12/ 2011, p. 11 and Decision RWR 12/ 2011, p. 8.

³⁸⁰ See Art. 2 (8) of the act of 23 September 2007 implementing the Unfair Commercial Practice Directive (2005/29/EC) (Ustawa z dnia 23 sierpnia 2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym, Dz. U. z dnia 20 września 2007 r.).

³⁸¹ Pro-Test przeciw oszukańczym opakowaniom in: PRO-TEST: Nr 9 (102) wrzesień 2010, http://www.pro-test.pl/article_article/110112,0/Akcja+Pro+Test+przeciw+oszukanczym+opakowaniom.html.

Furthermore, there were no administrative decision and no case law available where consumers take action against misleading packaging practices.

The analysis of a survey related to misleading packaging practices did also not reveal any transferable information on the awareness of misleading packaging practices.³⁸² A survey directly addressing misleading packaging practices is recommendable.

11.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied? Please provide examples.

The reports of the commercial inspection³⁸³ show that there are many violations of the obligation to indicate unit prices.³⁸⁴ One of the core points of the consumer policy for 2010-2013³⁸⁵ also is the counteraction against these violations respectively the conduction of the existing provisions on unit price indication. In the context of misleading packaging the provisions on the unit price indication constitute a very helpful instrument to prevent the misleading of consumers. It – to a certain extend – allows to compare the available differently packed products and their prices. Misleading packaging does thereby not fall foul of the Unit Price Directive. However, the misleading of consumers may be prevented.

Furthermore, misleading packaging may be regarded as a “misleading action” in the sense of Art. 6 of Directive 2005/29/EC and therefore fall foul of EU legislation. In order to approve a violation every case of a potential misleading action in the shape of misleading packaging needs to be examined individually. First of all, the packaging has to be deceive or likely to deceive the average consumer. In order to determine if this is the case the list of Art. 6 (1) sentence 2 can be considered. Misleading packaging usually would mislead the consumer as to the quantity (or to the quality) of a product (see Art. 6 (1) sentence 2 (b)). Furthermore, there needs to be a causal connection between the misleading action and the consumer’s transactional decision which means that the consumer would not have taken the decision in other circumstances. If these pre-conditions are given, the packaging may be regarded as a misleading action even though information given on the package is correctly. Important to note is that as well the perspective of an average consumer as the packaging in the individual case and its special function in this case need to be considered very carefully. If the practice is misleading and therefore regarded as unfair in the sense of Art. 5, it constitutes an unfair commercial practice. If all pre-conditions are given, the practice falls foul with EU legislation.

The directives were implemented into the Polish jurisdiction. EU legislation thereby is violated indirectly when a violation of the implemented provisions may be approved.

³⁸² See general remarks above.

³⁸³ See: Informacja o wynikach kontroli prawidłowości i rzetelności organizowania promocji przez przedsiębiorców (BK/ AŻ – 034 – 4/ 08/ AJ) which can be found on:

<http://uokik.gov.pl/szukaj.php?szukaj=Informacja+o+wynikach+kontroli&x=0&y=0>; and Informacja o wynikach kontroli prawidłowości wprowadzania do obrotu produktów żywnościowych oferowanych w promocjach w dużych sieciach handlowych (BK/ AŻ – 034 – 1/ 07/ AJ).

³⁸⁴ In 2006 46,3 % of the 1650 controlled parties did either not at all indicate prices or did not indicate unit prices or units; 15, 3 % of 1311 parties did not calculate the unit prices correctly. In 2007 an improvement was notable.

³⁸⁵ See : <http://www.uokik.gov.pl/publications.php#faq1466>.

11.4 Which measures could help to deal with misleading packaging? In this context, are there any new developments in the market that require the updating of the respective legislation at European level?

It seems like no legislation or updating is required since the Unit Price Directive and the Unfair Commercial Practices Directive are sufficient to prevent any violation. There rather seems to be a problem of the conduction of these provisions

For the purpose of clarification, however, “misleading” packaging could be added in the Commercial Practice Directive.

Guidelines for what is to be regarded as misleading³⁸⁶ could be developed. This goes hand in hand with the concept of the average consumer.

Self-regulation by producers could be initiated.

³⁸⁶ Like the measures that have been developed by national authorities and may be consulted when interpreting § 7 (2) Eichgesetz, see: *Erbs/ Kohlhaus*, Strafrechtlich Nebengesetze(2011), § 7, marginal number 15; generally the permitted free space of a package should not exceed 30 %, see: *Kiethe/ Groeschke*, Die Mogelpackung – Lebensmittel und wettbewerbsrechtliche Risiken der Produkteinführung, WRP 2003, p. 962 (965), refereeing to: Min.Bl.fin. 1978, p. 65; also: *Zipfel/ Rathke*, Lebensmittelrecht (2011), EichG § 7, marginal number 35.

12 Portugal

KEY FINDINGS

- misleading information on package
- duty to inform the consumer expressly includes packaging

12.1 Which are the main types of misleading packaging practices

In Portugal the problem of “misleading packaging” has been partially recognised. The examples given by DECO (*Associação Portuguesa para a Defesa do Consumidor* / Portuguese Association to the Consumer Protection) are available in press releases in internet (www.deco.proteste.pt) and suggest misleading sales strategies, which are recognisable in the packages of products.

The following packaging practice can be identified as being misleading referring to quantity:

- E.g. the omission of the net drained weight by frozen products, which misleads the consumer, as he pays for ice instead of the product (package of frozen shrimp).

The following packaging practices can be identified as being misleading referring to omission or misleading information on the package:

- E.g. when the product does not correspond to the description and picture of the package - the most common examples given by consumers include digital cameras and mp3-players;
- cosmetics that are intentionally sold in green packages in order to give emphasis on nature-based ingredients, even if they are mostly based in synthetic substances;
- omission of the appropriate age to the use of children tooth pastes, so that a package of children tooth paste without reference to the age can mislead the consumer to buy a paste that is not appropriate or even unhealthy for his or her child, who can suffer dental fluorosis .

The Constitution of the Portuguese Republic largely protects consumer rights, including the right to information as stated in Art. 60 (1). Furthermore, according to the Consumer Protection Act the consumer has the right to information (Art. 3 (d)), which can be in general (Art. 7) or in particular (Art. 8). The right to information in; the duty to inform the consumer lasts during all the cycle from production till consume, which includes packaging, as stated in Art. 8 (1) and (2). It is thus to conclude that the consumer has a right to [correct] information which involves also packaging. Legislation on specific issues on misleading packaging is not available, except for the prohibition of misleading commercial referred about “the price or the manner in which the price is calculated, or the existence of a specific price advantage”, as stated in Directive 2005/29/EC of 11 May 2005, in its Art. 6 (1) (d), which corresponds to Decreto-Lei 57/2008 of 26 March 2008, Art. 7 (1) (d).

12.2 What are consumers’ awareness, attitudes and behaviour towards these packaging practices? To what extent are consumers misled by these practices?

12.2.1 Consumers’ awareness

Consumers in Portugal and their association DECO are aware of misleading sales strategies due to wrong or insufficient information on the package. Focus is given on the right of information, which is protected by law, as stated in Art. 60 no. 1 of the Constitution and in Art. 3 (d) Consumer Protection Act (*Lei de Defesa do Consumidor*, Lei no. 24/96 of 31 July 1996).

The duty to inform the consumer lasts during all the cycle from production till consume, which expressly includes packaging, as stated in Art. 8 (1) and (2) of Consumer Protection Act.

12.2.2 Consumers' attitudes

Consumers do not go to courts in case of misleading packaging, even not to the *Julgados de Paz*, a first instance court which applies for most consumers issues. In the official site of the General Direction of Consumers (*Direcção-Geral do Consumidor*) belonging to the Portuguese Ministry of Economy and Employment, no case law can be found in the case law search engine with the key word « *embalagem enganosa* ». But consumers do make complaints to consumers' associations, especially DECO.

12.2.3 Consumers' behaviour

Consumers are represented among others by DECO, a well known organisation in Portugal that gathers and diffuse their complaints in online press releases and in its printed magazine.

12.2.4 Consumers' extension of misleading

Consumers are used to comparing the features of different products, but not to comparing different sizes and smaller quantities that a single product has passed. DECO e.g. does not include in their comparative tests (see <http://www.deco.proteste.pt/testes-comparativos-p100201.htm>) the tests available in the Verbraucherzentrale Hamburg on <http://www.vzhh.de/ernaehrung/32535/20092011Versteckte%20Preiserhoehungen.pdf>.

12.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied? Please provide examples.

In Portugal one of the complaints about frozen shrimp packages without the information on the package to the net drained weight refers to practice of misleading package in breach of the regulations. Compare Art. 6 (1) (d) Directive 2005/29/EC, so that « the price or the manner in which the price is calculated, or the existence of a specific price advantage » can figure out a misleading action, as stated in Decreto-Lei 57/2008 of 26 March 2008, Art. 7 (1) lit. d. Furthermore, according to Art. 4 (2) of the Directive 98/6/EC of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers: "(...) Where national or Community provisions require the indication of the net weight and the net drained weight for certain pre-packed products, it shall be sufficient to indicate the unit price of the net drained weight." Art. 4 (2) corresponds to Art. 1 (4) of Decreto-Lei no. 162/99 of 13 May 1999, which transposed Directive 98/6/EC and according to the press release has not been properly applied.

12.4 Which measures could help to deal with misleading packaging? In this context, are there any new developments in the market that require the updating of the respective legislation at European level?

12.4.1 Measures (this is just a suggestion)

More control by government institutions.

12.4.2 Market developments

To follow the example of the German Verbraucherzentrale Hamburg, as mentioned above.

13 The United Kingdom

KEY FINDINGS

- There is a lack of UK press coverage concerning packaging whereby the consumer is fooled into thinking that products contain larger quantities than they actually do or tricks employed when indicating unit prices.
- Either consumers are not aware of the problem, or misleading packaging is not sufficiently recognised as a problem in the UK.
- It is not clear whether the packaging practice of downsizing is an unfair commercial practice

13.1 Which are the main types of misleading packaging practices

There is a lack of press coverage concerning packaging whereby the consumer is fooled into thinking that products contain larger quantities than they actually do or tricks employed when indicating unit prices.³⁸⁷ From this, it could be concluded either that the issue is not sufficiently problematic, the practices go unnoticed, or that the press is not interested in the “problem”. There are, however, a greater number of articles concerning food inflation in general and reductions in packaging to comply with environmental regulation.

There is evidence to suggest that one possibly misleading practice in the UK is the reduction of weight without changing the price.³⁸⁸ This also applies to portions of meat, for example, whereby the packaging formerly containing four filets of chicken is then reduced to contain three filets for the same price. The consequences of turning metric are apparently still being felt as products which were sold, for example, in half-pounds then converted to 227g are subsequently reduced to 200g. There are, however, two sub-categories of this practice. In the first, the amount of packaging is proportionally reduced in line with the reduction in quantity, whereas in the second the amount of packaging remains the same.

Given that there is little information available on the subject of the downsizing practices, it is debatable to what extent they can be considered ‘main’. More common forms of misleading packaging practices could concern products which imitate competitor’s products or competitor’s distinctive packaging.³⁸⁹ Because trademarks are often integrated into the packaging of a product, such ‘misleading packaging’ may be more commonly litigated.

³⁸⁷ A press review was carried out through internet website search engines for the following UK newspapers and journals: the Guardian, the Economist, the Daily Mirror, the Observer and the Independent. The following terms were entered into the search engines: “Inflation disguised in smaller packaging”; “smaller packages”; “product downsizing”. The first three pages of results were checked for relevance for each newspaper. Such an internet-based review of the press is thus limited by the efficiency of the search engines as well as the fact that certain internet versions of newspapers (The Times, The Sunday Times) are pay to view. This search revealed only one article written specifically on the problem (<http://www.mirror.co.uk/news/top-stories/2011/03/21/food-packages-shrink-but-prices-stay-the-same-115875-23004566/>); Daily Mirror, Josh Layton, 21/03/2011) and another in which the practice of “experimenting with smaller packages sold at the same price” was mentioned in relation to the implications of rising food prices for manufacturers (<http://www.economist.com/node/17970938>; Jan 20th 2011). As a consequence of the very few results a wider “Google-search” was conducted along the same lines. This only resulted in a request for information from members of the public about the problem on a website dealing with consumer issues (<http://forums.moneysavingexpert.com/showthread.php?t=1065719>) and a notice from a drinks manufacturer which had decided to reduce the size of its cartons for sale from the original 1 l to 750ml and 1.25 l which resulted in a greater price per ml (http://innocentdrinks.typepad.com/innocent_drinks/2011/06/big-and-slightly-smaller-change-is-afoot.html).

³⁸⁸ Cadbury Dairy Milk: 99p bar down from 140g to 120g; Tropicana Fruit Juice: PepsiCo 1.75 litres to 1.5 litres; Maltesers: A £1 box was 146g, then 120g; TOBLERONE: £1 for 200g, then 170g; Tetley Teabags: £1 box from 100 bags to 88 bags. Cited from Daily Mirror article. Note on website about changing from 1l (£2.85) cartons to 750ml (£2.79) and 1.25l, (£3.69): http://innocentdrinks.typepad.com/innocent_drinks/2011/06/big-and-slightly-smaller-change-is-afoot.html.

³⁸⁹ The infamous case of *United Biscuits (U.K.) Ltd. v Asda Stores Ltd.* [1997] RPC 513 in which a supermarket had started selling a chocolate biscuit range by the name of ‘Puffin’, the packaging of which also resembled the market-leading brand ‘Penguin’, and was found liable under the tort of passing off.

13.2 What are consumers' awareness, attitudes and behaviour towards these packaging practices? To what extent are consumers misled by these practices?

Based on the lack of general media articles addressing misleading packaging relative to quantity, it appears that consumers are not aware of the problem, or that this is not recognised as a problem in the UK.

There are numerous counter-arguments brought against reductions in quantity without proportional price decreases in the public domain of the UK. Sometimes quantity is reduced to substantiate advertising claims such as fewer calories ("20 percent less fat"). Environmental concerns are sometimes put forward. Even changing consumer considerations are used (from a family of four to two people, e.g. a smaller family struggling to finish the previously packaged quantity). Excess packaging is claimed to increase freshness. In reference to the practice of reducing the quantity whilst not the price, the argument that "people may prefer to buy a smaller amount at the same price rather than pay more" is used to mean that otherwise the prices would increase. This is supposed to lighten the effects of inflation. One tabloid newspaper referred to "sticker shock" as a psychological phenomenon where, should the product price rise suddenly, consumers will reduce consumption or not buy the product at all and that this leads supermarkets to endeavour that prices remain the same, however, quantity may be reduced.³⁹⁰

Results from questionnaire:

- Consumer awareness: consumer awareness relates to environmental issues, product brand imitation and illegal copies. Consumers are relatively aware of these practices.
- Consumer Attitudes: Quantity related issues are unimportant relative to the aforementioned misleading packaging practices. Misleading packaging is unimportant relative to other consumer problems.
- Consumer Behaviour: The OFT receives complaints in relation to misleading packaging, however, they are low in proportion to other complaints. Consumers react badly to hidden price increases, however, it is difficult to distinguish anger towards inflation in general (especially given the economic climate) and hidden price increases.

13.3 Do misleading packaging practices fall foul of EU legislation? How is the EU legislation being applied? Please provide examples.

When the price per unit of measurement is correctly stated, packaging practices do not fall foul of the Unit Prices D. Compliance with this does not seem to be a general problem.

If commercial practices such as product downsizing can be characterised as unfair under the Unfair Commercial Practices Directive, they would infringe EU legislation. As such practices are not mentioned in the blacklist of commercial practices which are always unfair, it would need to be established in the UK, firstly, that the practices are misleading or misleading commercial practices and, if not misleading commercial practices, whether they fall under the general prohibition of unfair commercial practices. The UK regulations, which implement the substance of Art. 6 of the Unfair Commercial Practices D.³⁹¹ state that,

³⁹⁰ citing a conflict between *Tesco* and *Hovis* (a British bread manufacturer).

³⁹¹ 2005/29

'[the] overall presentation [must]... deceive or [be] likely to deceive the average consumer in relation to [the quantity], even if the information is factually correct; and it [must] cause or [be] likely to cause the average consumer to take a transactional decision he would not have taken otherwise.'

Given the lack of quantitative research in the affirmative, whether such practices are misleading commercial practices depends therefore upon whether (a) the average consumer would be likely to be misled and (b) there is a causal link between the practice and the average consumer's behaviour.

(a) Misleading the average consumer.

There is currently no case-law in point treating the law under the Directive.³⁹² Whether an average consumer is likely to be misled is predominantly a question of fact to be established by the judge. However, there could be legal discussion in the UK as to whether the fact that the price per unit of measurement is correct should be admitted in establishing whether the average consumer is likely to be misled. In view of the lack of case-law, it is tentatively submitted that the English courts³⁹³ would first query whether the average British consumer would be misled if the actual quantity sold and price per unit of measurement were correctly indicated. This approach would seem to be consistent with the ECJ's case-law³⁹⁴ as a reasonably well-informed, observant and circumspect British consumer may be expected to notice an increase in the price per unit of measurement.

(b) The causal link.

The issue of causation may also be difficult to establish. Given the context of increasing product differentiation employed by producers, it could be convincingly argued that even had the packaging not been of a misleading nature the average consumer's transactional decision would not have changed on the balance of probability because of factors other than direct price comparison, such as goodwill, organic ingredients, environmental concerns, quality and so on.

In the second sub-category of product downsizing, where the amount of packaging remains the same, a case could be made for claiming that it would be an unfair omission for the producer not to inform the consumer that the quantity sold has fallen.³⁹⁵ However, it would need to be established that the consumer needed that piece of information and also, as above, the causal element.

If the commercial practices fall through the net of deception, they may still qualify as unfair where, contrary to the requirements of professional diligence, they are likely to appreciably impair the average consumer's ability to make an informed decision and as a result cause (or are likely to cause) the average consumer to take a different (transactional) decision.³⁹⁶ In setting the objective standard of professional diligence, the guidelines note that,

'poor current practice that is widespread in an industry/sector cannot amount to an acceptable objective standard. That is because this is not what a reasonable person would expect from a trader who is acting in accordance with honest market practice or good faith.'³⁹⁷

³⁹² Search conducted in September 2011 through the British and Irish Legal Information Institute (<http://www.bailii.org/databases.html>), which contains the judgements of all cases of the High Court, Court of Appeal and Supreme Court as well as the United Kingdom Competition Appeals Tribunal.

³⁹³ No claim is made in relation to the Scottish courts.

³⁹⁴ 210/96 and C-220/98.

³⁹⁵ Art. 6, Unfair Commercial Practices Directive; UK Regulation 6.

³⁹⁶ See Regulation 3(1) and 3(3); 'Consumer Protection from Unfair Trading – Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive' issued by the Office of Fair Trading (OFT) and the Department for Business, Enterprise and Regulatory Reform, in particular, the 'Table for Assessing Unfairness'.

³⁹⁷ Guidelines, [10.5]

Thus, the fact that numerous occasions of the commercial practice of downsizing can be found³⁹⁸ is not conclusive of meeting the professional diligence requirements. In deciding whether a practice is professionally diligent, a court would be likely to make reference to soft-law guidelines, such as the BERR Pricing Practices Guide. However, such guidelines do not make any reference to a positive obligation to indicate price per unit increases.

It seems only professionally diligent when a comparative claim about price is made. It is therefore debatable whether such practices fall under the general prohibition of unfair commercial practices in the UK. In conclusion, whether the core packaging issues of the study's scope infringe the UK's implementation of the Directive is moot.

Imitating the packaging of a competitor would, however, fall foul of the black list of commercial practices which are in all circumstances considered unfair under Annex I of the Unfair Commercial Practices Directive³⁹⁹ as this would count as 'such a manner'.

13.4 Which measures could help to deal with misleading packaging? In this context, are there any new developments in the market that require the updating of the respective legislation at European level?

It must first be established that the packaging practices are not already sufficiently protected at the national level to respect the principle of proportionality. It may be that national law, which is outside the scope of the study, already targets some packaging practices.

If a necessarily political decision deems packaging practices such as downsizing to be 'misleading', the Unfair Commercial Practices Directive could be amended to include those practices in the black list annexed to the Directive, or the misleading elements listed in Art. 6. The second political decision to be made relates to whether or not the party enforcing the legislation should have to prove that the practice would cause consumers to take a transactional decision that they would not otherwise have taken.

If the existing framework of the Unfair Commercial Practices Directive is to be left unchanged, the European institutions may wish to issue guidelines on which packaging practices should be considered misleading, or encourage the Member States to do so at national level. An even more deregulatory approach would be to encourage producers to draft such guidelines themselves. These are both soft-law approaches.

³⁹⁸ See above, Fn. 387.

³⁹⁹ Annex I, 15

NOTES

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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