



Misleading actions vs. misleading omissions under Unfair Commercial Practices Directive. National approach in context

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ABSTRACT

Unfair Commercial Practices Directive remains one of the most ambitious acts of secondary legislation adopted in the field of consumer protection over the past decade. This legal instrument seeks to establish a common European understanding of “unfairness” in business-to-consumer legal relations. Hereby Directive introduced a comprehensive regulatory regime applied to all types of commercial activities that can influence the economic behavior of consumers, covering any business-to-consumer commercial practice before, during and after a transaction, thus including marketing, negotiation, sales practices and after-sales conduct. Unfair Commercial Practices Directive into Lithuanian legal system was transposed by adopting a completely new legal act – Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania. The implementation of the Unfair Commercial Practices Directive in Lithuania led to a split-up between misleading business-to-consumer commercial practices and misleading business-to-business advertising regulation regimes. Implementing act among other rules introduced into the national legal system provisions on the prohibition of misleading commercial practices, ensuring that consumers are not misled, thus enabling them to make informed and reasonable choices. The purpose of this article is to examine the norms of national act, implementing the prohibition of misleading commercial practices into the national legal system in the context of implementing provisions of the other Member States and to reveal core national regulation and application problems. Also, having in mind that in the text of the Directive a distinction between misleading actions and misleading omissions is made, it is analyzed whether the clear line between the application of these rules is made in legal practice. In conclusion authors formulate key recommendations for consumer protection institutions and courts, applying the rules on misleading commercial practices.

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1. Introduction

Unfair Commercial Practices Directive (Directive, 2005/29/EC, 2005) (hereafter also – UCPD, Directive 2005/29/EC, Directive) approximates the laws of the EU Member States on unfair commercial practices, harming consumers' economic interests. After the adoption of this directive, EU consumer protection system was complemented with the

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legal instrument based on total harmonization principle, which can be distinguished by its horizontal character and its combination of principle-based rules with a list of specific prohibitions of certain unfair practices. What is more – Directive 2005/29/EC has a unique threefold structure: according to it, the fairness of a concrete commercial practice is tested in accordance with single, common general prohibition of unfair commercial practices, which is elaborated by prohibitions of misleading and aggressive practices and a blacklist of practices, which are in all circumstances considered as unfair.

As it was mentioned above, according to its provisions UCPD *inter alia* combats misleading commercial practices, which by deceiving consumer prevent him from making an informed and thus efficient choice. Having in mind that right to information is one of the basic consumer rights, a substantial part of the Directive aims namely at ensuring that information on the main characteristics of a product or service, on the price and key conditions are provided to consumers in a truthful, complete and timely manner. This makes it easier for consumers to understand and compare offers and has a direct impact on the marketing and advertising techniques developed by traders. Misleading practices in the text of Directive are further classified into misleading actions (Article 6) and misleading omissions (Article 7).

UCPD implementation issues have been analyzed by a number of legal scholars around the EU. As an example (but not as an exhaustive list) we can name: Jules Stuyck, Evelyne Terryn, Bert Keirsbilck, Hans-W. Micklitz, Hans Schulte-Nölke, Christoph Busch, Geraint Howells, Thomas Wilhelmsson, Willem Van Boom, etc. Whereas in Lithuania UCPD implementation topic is unfortunately rather untouched, except several analysis of the existing national laws on unfair commercial practices, which were carried out before the implementation of UCPD and works of Mantas Rimkevičius, related namely with misleading advertising as one of the possible forms of unfair commercial practices.

Considering that misleading commercial practices are most commonly met in practice, the main *objective* of this article is the prohibition of misleading commercial practices in the Republic of Lithuania in comparison with legal regulation applied in a number of other Member States. The *aim* of the research is to examine the norms of national act, implementing the prohibition of misleading commercial practices into our national legal system and to reveal core national regulation and application problems (mainly focusing on how it is dealt with the distinction between misleading actions and misleading omissions in legal practice). To achieve this objective, the following *tasks* were set: 1) to analyze national rules, establishing prohibition of misleading business-to-consumer commercial practices; 2) to analyze relevant case law examples in this field; 3) to highlight main application and interpretation problems. Together it should be mentioned that two specific prohibitions of misleading business-to-consumer actions, set in Article 6(2) of the UCPD, misleading omissions in the specific situation of an invitation to purchase as well as blacklist of misleading practices, banned in all circumstances, will not be analyzed. Present analysis

was carried out mainly by applying analytical, systematic and comparative methods.

2. Prohibition of misleading commercial practices: implementation inaccuracies

As before the implementation of UCPD, in Lithuania there was no special national legislation, prohibiting unfair business-to-consumer commercial practices ([van Dam & Budaite, 2005](#)), a new law implementing UCPD provisions essentially by using a “copy out” technique was adopted. Law on Prohibition of Unfair Business-to-Consumer Commercial Practices of the Republic of Lithuania (hereafter also – Law on Unfair Commercial Practices, implementing act) was adopted on the 21st of December 2007 and came into force on the 1st of February 2008 ([Republic of Lithuania Law on Prohibition of Unfair Business-to-Consumer Commercial Practices, 2008](#)). Therefore after the transposition of the provisions of UCPD into the national legal system, the protection against unfair commercial practices in Lithuania was based on the special legal norms, establishing the protection in Law on Prohibition of Unfair Business-to-Consumer Commercial Practices together with Law on Advertising ([Republic of Lithuania Law on Advertising, 2000](#)) and with general norms included in Law on Consumer Rights Protection ([Republic of Lithuania Law on Consumer Rights Protection, 1994](#)) and in Civil Code ([Republic of Lithuania Civil Code, 2000](#)). Though the protection was not concentrated in one legal act, the main legal instrument, establishing the protection of the economic interests of consumers against unfair commercial practices undoubtedly became newly adopted Law on Unfair Commercial Practices.³ The implementation of the UCPD in Lithuania led to a split-up between misleading business-to-consumer commercial practices (action and omission) and misleading business-to-business advertising regulation regimes (action and omission). The same kind of practice is observed in the United Kingdom, Belgium and Netherlands ([Keirsbilck, 2011](#), pp. 311–312). However, the adoption of a totally new legal act did not help to avoid implementation problems, no less challenging is applying the provisions of implementing legal act in national legal practice, in particular having in mind the notably wide scope of application and framework character of UCPD ([Navickaitė-Sakalauskienė, 2012](#), pp. 1109–1123). When analyzing how the rules on misleading commercial practices were transposed into the Lithuanian legal system, further it will be stated that they have not been implemented absolutely correctly.

Misleading actions in general sense are prohibited under Article 6(1) UCPD, stating that *a commercial practice shall be regarded as misleading if it contains false*

³ Currently legal basis, regulating commercial fairness in Lithuania consists of Law on Unfair Commercial Practices together with Law on Advertising; Law on Consumer Rights Protection, establishing general fair business practices principle and Article 6.228² (4) of Civil Code, establishing the general prohibition of unfair commercial practices together with making reference to the special legal acts regulating unfair commercial practices.

information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements,⁴ and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. According to its wording Article 6(1) UCPD explicitly identifies two ways of actively misleading consumers and thereby distorting their economic behavior: a commercial practice either: (i) contains false information and is therefore untruthful or (ii) in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct (Keirsbilck, 2011, p. 313).

It should be noted that in Lithuania national definition does not specify that first of all a commercial practice is assessed as misleading if it contains false information. In Article 5(1) of Law on Unfair Commercial Practices, implementing Article 6(1) of UCPD, the notion of misleading actions is linked solely with the presentation of misleading information and, unlike the text of the Directive, does not primarily relate the deceptiveness of information with its untruthfulness. This transposition inaccuracy was not corrected after the adoption of alterations of Law on Unfair Commercial Practices in the year 2013. Article 5(1) defines misleading actions as provision of misleading information or information which, even is factually correct, deceives or is likely to deceive the average consumer in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.

In the context of the implementing measures adopted in other Member States it is important to note that the provision defining misleading actions (Article 6(1) of UCPD) was implemented correctly in Germany, France, United Kingdom, Belgium and Netherlands. In all these Member States when defining misleading actions, both when the Article 6(1) of UCPD was simply copied into the national legal act or the definition was implemented by formulating a new definition, the deceptiveness of information is linked both with its false nature (untruthfulness, incorrectness) or deceptiveness even when the information provided is factually correct (Keirsbilck, 2011, p. 607).

Such a decision of national legislator is deemed to be not correct, because it causes unnecessary difficulties when delimitating consumer misleading in a way of using false and therefore misleading information from deceiving consumer even if the information is factually correct (Rimkevičius, 2012, pp. 180–188). What is more – such national regulation causes a risk that a notion of misleading actions will be understood too broadly by national courts and consumer protection institutions. Therefore it should be stressed that in practice misleading actions should primarily be associated with the submission of false information to consumers.

The general rules establishing the prohibition of the

second type of misleading commercial practices – misleading omissions are set in Article 7(1)–(2) UCPD, which has been implemented correctly in Lithuania. Article 6 (1) of Law on Unfair Commercial Practices accordingly states that taking into account the limitations of the means of information communication, actions that cause or are likely to cause the average consumer to take a transactional decision that he would not have taken otherwise shall be considered as misleading omissions: omission of material information that the average consumer needs to take an informed transactional decision; or omission of material information that the average consumer needs to take an informed transactional decision, or provision in an unclear, unintelligible, ambiguous or untimely manner; or failure to identify the intent of the commercial practice if not already apparent from the context. However, the correct transposition of rules on misleading omissions (as will be further seen) did not help to avoid application difficulties of these norms in national practice.

3. Principal interpretative problems in the case-law context

3.1. Misleading actions

3.1.1. The untruthfulness of commercial practices

Above mentioned implementation inaccuracies in practice create a situation, when although the information given to consumers in a concrete case is obviously false, the national consumer protection institutions (courts) do not relate the deceptiveness of this information with its untruthfulness.

For example in practice of State Consumer Protection Authority (hereafter also – Authority), which is the main administrative authority, assessing fairness of business-to-consumer commercial practices in regard to Law on Unfair Commercial Practices, the actions of event organizer were qualified as misleading when tickets to the concert of the worldwide known singer were sold almost one week after the organizer received the information that concert tour is postponed and it was obvious that the concert on the expected date is not going to take place (Judgement of the Court, 2010).

In one of the recent cases, concerning information provided to consumers in advertising leaflets (Ruling of the State Consumer Rights Protection Authority, 2014 (a)), Authority ascertained that, “JYSK Baltic” (a store for household goods) had distributed advertising leaflets, which constituted a sales offer for the pouffe (hassock). The regular price of the hassock – 99 Lt (28,67 Eur) was crossed, offering it for the reduced price – 49,99 Lt (14,48 Eur), together with the note “Save 50%”. According to the Authority, the proposal to save 50% of the price amount had a significant impact on the consumer and could cause him to take a transactional decision that he would not have taken otherwise. Although, having in mind that the same product (hassock) was sold for a regular 50% discount continuously (more than a year), the Authority had a reason to suspect that the constant price for the hassock is 49,99 Lt (14,48 Eur) and the commercial offer had no

⁴ E.g. the existence or nature of the product, fitness for purpose, usage, quantity, specification, the price or the manner in which the price is calculated, or the need for a service, part, replacement or repair, etc.

advantage. Authority in this case concluded that in such a way consumers were misled about the true price of the product and the advertising contained in the leaflets was qualified as misleading actions.

As one more recent examples of misleading actions a case concerning the supermarkets' chain practice when consumers were misled by providing misleading prices for the food products could be named ([Ruling of the State Consumer Rights Protection Authority, 2014 \(b\)](#)). In this case the consumer provided information that in the supermarket "IKI" the indicated price for 1 kg butter is 18,45 Lt (5,34 Eur), accordingly the indicated price for 170 g butter package is 3,69 Lt (1,07 Eur). However, after dividing the price from the product weight it became obvious that the price for 1 kg butter is not 18,45 Lt (5,34 Eur) (as indicated), but 21,71 Lt (6,29 Eur). The same kind of false information was provided in respect of other dairy products. Considering the calculation, which was additionally made, it became obvious that the price actually paid for these products is 10–15% higher than that offered for sale on the supermarket shelves. Authority stated that such actions, when consumers were given deceptive information about the product prices have to be qualified as misleading commercial practice (misleading actions).

It should be noticed that in all above mentioned cases in spite that the information provided to the consumers was obviously false, the Authority assessed it as deceptive not giving reference to the untruthfulness of a commercial practice.

3.1.2. *The deceptiveness of commercial practices*

The second type of actively misleading is by deceiving or being likely to deceive the average consumer. Deceptiveness is a rather vague legal concept, obviously it does not require untruthfulness ([Keirsbilck, 2011, p. 315](#)). This provision covers situations when consumer can be deceived despite the fact that information provided is factually correct.

Authority in its practice assessed the situation when in one of the supermarkets a special offer for coffee was announced ([Ruling of the State Consumer Rights Protection Authority, 2014 \(c\)](#)), offering to buy 400 g grounded coffee "Merild" package for the price of 8,99 Lt (2,60 Eur). Alongside these 400 g packages, the slightly bigger packages of the same sort of coffee weighing 500 g were placed, not announcing that the price for the 500 g package is 16,99 Lt (4,92 Eur) (no special offer was applied). Having in mind that 400 g and 500 g coffee packages were externally identical and physically hardly distinguishable, Authority stated that the arrangement of goods, when alongside the products subject to price discounts, visually similar products for which price discounts do not apply are placed can deceive consumers about the proposed price of the product.

3.1.2.1. *Introduction of the Euro*

In its Guidance on the UCPD, the Commission stressed that not only the content of the information provided, but also *the way the information is presented* can have a serious impact on how consumer respond to it ([Guidance, 2009](#)). For example, when assessing the deceptiveness of a

commercial practice, the layout of an advertisement and the size and location of the pieces of information have to be taken into account. A false impression can be created even though the correct facts are given in the text of an advertisement. This aspect became particularly relevant in Lithuania due to the introduction of the euro, especially when talking about the duty for the prescribed period to indicate prices in two currencies (both in litas and euro). According to the special legal regulation, namely Article 17 (2) of Law on the Euro Adoption in the Republic of Lithuania ([Republic of Lithuania Law on the Euro Adoption in the Republic of Lithuania, 2014](#)), *the prices displayed in euro and in litas shall be easy to understand, shall not be misleading*. In Recommendations on the Double Price Indication During Dual Price Indication Period ([Recommendations, 2014](#)) it is inter alia stated that *the size of the main currency symbols shall not be less than the size of the second currency symbols size* ([Recommendations, 2014, para 10](#)). Product prices must be *clearly visible, easily legible and comprehensible, provided in a way that does not mislead consumers* ([Recommendations, 2014, para 28](#)).

It should be mentioned that in the list of the most common violations, related to the introduction of the euro and provided in the website of Authority⁵ among such practices as not indicating prices in two currencies, application of inappropriate exchange rate, the inconformity of the price rounding with the requirements of legal acts, is alongside mentioned *indication of prices in an unclear and deceptive way*.

One of the examples of such commercial practice was the case when company "H&M" was fined for the violation of Law on the Euro Adoption in the Republic of Lithuania. The sanction was applied after Authority received consumer complaints regarding the misleading price indication in two currencies. Company "H&M" in its outdoor banner stands advertised products (clothes) indicating prices in euro in much bigger symbols than prices in litas. According to consumers they were misled by such presentation of information, indicating price (prices in euro seemed low, in comparison to prices in litas, to which the consumers were used), because after arriving to the shop it became clear that the price indicated in much bigger symbols was in euro and not in litas.

In this context it is important to mention that in such cases Law on the Euro Adoption in the Republic of Lithuania is applied, as the special legal act, however in case of repeated violations not excluding the possibility together to refer to Law on Unfair Commercial Practices.

3.1.2.2. *Misleading packages*

Together it is important to emphasize that the average market participant addressed or reached by a commercial practice may be misled not only by statements and other linguistic information. Other practices that are likely to deceive the average market participant are equally targeted by the prohibition of misleading actions (Article 6 (1) UCP Directive). A typical example is the use of boxes for products that are much larger than the amount of the

⁵ <http://www.vvat.lt/index.php?2675205059>.

product they contain. Such packaging – representing the overall presentation of the offer – may be deceptive, even if the correct quantity of the product is printed on the box (Keirsbilck, 2011, p. 316).

Though in Lithuania consumers are aware of “misleading packaging” problem, nevertheless no cases dealing with misleading packaging itself could be found in national legal practice. According to [Briefing paper on Misleading Packaging](#), the main types of misleading packaging practices in Lithuania are the following ([Briefing paper on Misleading Packaging](#)):

“Selling of air” – packaging of the product is of such size, that it seems to contain bigger quantity of the product than it indeed does. 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.

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

“Improvements” – producers start using a new packaging trying to distract consumer’s attention from the quantity of the product (optical illusion). For example the dish washer, coffee, animal food packaging has more curves, which purpose is to reduce the volume of the package.

It is important to conclude that although deceptiveness is a vague legal concept, including very different commercial practices, for the prohibition of misleading actions to apply not only the untruthfulness or deceptiveness of a concrete commercial practice should be ascertained, the second obligatory condition is the materiality condition: the commercial practice must (be likely to) cause the average consumer to take a transactional decision that he would not have taken otherwise ([Case C-281/12](#)). However, due to the limited scope of this article these conditions will not be discussed in detail.

3.2. *Misleading omissions*

When analyzing rules on second type of misleading commercial practices – misleading omissions, it is important to note that Article 7(1) UCP Directive establishes a general clause on misleading omissions, according to which commercial practices must not omit material information that the average consumer needs in order to take an informed transactional decision, accordingly Article 7(2) indicates that hidden information can render an

omission as misleading as information that is omitted altogether. As it was mentioned above rules on misleading omissions were correctly implemented in Article 6(1) of Law on Unfair Commercial Practices, nonetheless application uncertainties can be noticed when analyzing Authority practice developed in this field.

For example Authority in its practice has pointed out that companies which main activity is selling of airline tickets ([Rulings of the State Consumer Rights Protection Authority, 2014 \(d\), 2014 \(e\)](#)) must ensure that their work is organized properly, i.e. during ticket search, reservation and purchase consumers must be provided only with relevant and accurate information about the airline ticket purchase conditions. Authority, after assessing information, provided in the companies’ websites, has ascertained such violations, related to misleading omissions of information: there was no information about the service provider; the components of the final price (taxes, airport and administration fees, etc.); clear rules on how the consumer can make a complaint to the company, etc.

In this context it is important to note that when applying rules on misleading omissions every time it has to be determined which information in a concrete situation has to be considered as material and essential for the average consumer to be able to take an informed transactional decision. However, in the case of above – mentioned situations, the Authority when deciding what particular information is to be regarded as material, referred to the Article 6(3) of Law on Unfair Commercial Practices (accordingly Article 7(4) of UCPD), which contains a list enumerating the information that shall be regarded as material in the specific situation of a “commercial offer” (“invitation to purchase”). Such position of the Authority is not correct having in mind that the definition of “invitation to purchase”⁶ explicitly envisages the specific situation of a product and price-related commercial communication which thereby enables the consumer to make a purchase, and Article 7(4) defines in a more specific manner the information that the average consumer needs to take an informed transactional decision in such a situation (Keirsbilck, 2011, pp. 356–357), while general clause on misleading omissions has a broader scope. It is important to stress that the Authority when applying general clause on misleading omissions has itself to foresee what information will be required in different contexts of every concrete case.

The application of the materiality condition in case of misleading omissions as in case of misleading actions will not be further analyzed, because of the limited size of this article.

3.3. *Misleading actions versus misleading omissions*

After the analysis of UCPD and implementing act rules on prohibition of misleading business-to-consumer actions and omissions, the question can be raised whether it is possible to draw a clear line between these two sets of norms. In legal doctrine it is agreed that the wording of the

⁶ Article 2(i) of the UCPD.

Directive seems to indicate that practices that involve an active misleading component (an active use of a half-truth to create the misleading effect) should be judged according to Article 6, whilst Article 7 would be primarily related to situations in which the omission to give certain information could be regarded as unfair as such, without any positive action having created the need for (additional) information (Howells, Howells, Micklitz & Wilhelmsson, 2007, p. 125, 147). However, according to Article 7(2) of UCPD, there can be a misleading omission even though the information is given but not in a sufficiently clear manner. This provision highlights the vague borderline between misleading omissions and misleading actions (Keirsbilck, 2011, p. 342).

Authority in its practice after assessing practice pursued by UAB, “Gelgotos transportas” (Ruling of the State Consumer Rights Protection Authority, 2014 (f)), concluded that such actions when for consumers, participating in the vehicle auctions organized by company’s website, important information is provided not in the official language, by using specific abbreviations, should be qualified as misleading actions. Meanwhile application of condition that participant younger than 25 years of age has to pay a deposit, which was not included in the contract was regarded as unfair under the prohibition of misleading omissions.

Having in mind very limited delimitation opportunities of the rules on misleading actions and omissions it should be agreed that rules on misleading actions should be interpreted with due regard to rules on misleading omissions and vice versa in particular in the areas in which their scopes may overlap. However the practice of Authority when in the same case commercial practice was qualified both as misleading actions and misleading omissions raises reasonable doubts concerning its correctness. For this reason the Authority and national courts when evaluating the fairness of a commercial practice in each case should motivate more clearly why a concrete commercial practice was qualified as misleading action or misleading omission.

4. Conclusions

1. The analysis of the national regulation, implementing the Unfair Commercial Practices Directive in Lithuanian law has proved that when transposing provisions on misleading commercial practices inaccuracies and errors were not avoided. The difficulties are also faced when applying these provisions in legal practice.
2. In Lithuania the definition of misleading actions has not been implemented correctly. Unlike as in other Member States (Germany, France, United Kingdom, Belgium and Netherlands), according to the national definition, the deceptiveness of information provided to the consumer is not related with its untruthfulness. Such decision of the national legislator causes a risk that a notion of misleading actions will be understood too broadly by national courts and consumer protection institutions. That also causes unnecessary difficulties when

delimitating consumer misleading in a way of using false and therefore misleading information from deceiving consumer even if the information is factually correct. In order ensure the proper application of the national law and increase legal certainty, the authors recommend to amend the national definition of misleading actions in the nearest future.

3. Although the rules on misleading omissions have been implemented correctly, the analysis of national legal practice has revealed that application difficulties of these norms were not avoided. It should be noted that when applying rules on misleading omissions, every time it has to be determined which information in a concrete situation has to be considered as material and essential for the average consumer to be able to take an informed transactional decision. For this reason national practice, when the catalog of material information, which should be applied only in the specific situation of an “invitation to purchase” is addressed when applying general rules on misleading omissions is not compatible with the Unfair Commercial Practices Directive and should be changed.
4. Considering interpretative problems, which are faced when delimiting rules on misleading actions and misleading omissions, it is suggested that: misleading actions should primarily be associated with the submission of false information to consumers; when applying general clause on misleading omissions courts and consumer protections institutions have to foresee what information will be required in different contexts of every concrete case; rules on misleading actions should be interpreted with due regard to rules on misleading omissions and vice versa in particular in the areas in which their scopes may overlap, however in the same case commercial practice should not be qualified both as misleading actions and misleading omissions.

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