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CONSUMER PROTECTION AGAINST UNFAIR COMMERCIAL PRACTICES IN THE LIGHT OF DIRECTIVE 2005/29 CONCERNING UNFAIR BUSINESS-TO-CONSUMER COMMERCIAL PRACTICES IN THE INTERNAL MARKET (SELECTED ISSUES)

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Abstract. *The aim of the Directive 2005/29 on unfair commercial practices is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by way of approximation of the laws, regulations and administrative provisions of Member States relating to the elimination of these practices. As announced to the European Commission's Green Paper, the Commission felt that the existing regulations in the Member States in that the regard to show significant differences causes legal uncertainty and barriers to the operation of the internal market, including building consumer confidence in cross-border transactions. The advantage of the full unification of the law is to strengthen the autonomy of Community law, the achievement of effectiveness. It is questionable whether it is due to the subject matter which is the maximum harmonization discussed act will actually serve to protect economic interests of the consumer. In particular, it undermines the treaty-legal basis, which clearly is aimed at strengthening the single market. Also changes in the Lisbon Treaty, particularly Article 3 TEU, are aimed at establishing the internal market. In*

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the last judgments, like on 9 November 2010 we find that Directive 2005/29 must be interpreted as precluding a national provision, which lays down a general prohibition on sales with bonuses and is not only designed to protect consumers but also pursues other objectives. Does the new act in consequence of the implementation of the national member states give great scope for the flexible operation and may become an effective instrument of pressure to improve business practices?

Keywords: *maximum harmonization, unfair commercial practices, consumer protection, european contract law.*

Introduction

European consumer law is undergoing a transformation nowadays, clearly heading towards maximum harmonization of selected areas of law the weaker party of contract protection and towards the promotion of horizontal legislation. In consumer law Directive 2005/29 represents a novel measure for several reasons. For the first time, issues of fairness have constituted of entrepreneurs competing in the category of protective mechanisms, directly benefiting consumers. The aim of the Directive on unfair commercial practices[1] is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by way of approximation of the laws, regulations and administrative provisions of Member States relating to the elimination of these practices. The Green Paper on Consumer Protection of the European Union on 2 October 2001[2], which prepared the ground for the said act of secondary Community law perceived the need to raise standards of consumer protection against increasingly sophisticated fraudulent practices and their non decreasing scale. As announced to the Commission's Green Paper, the Commission felt that the existing regulations in the Member States in that regard to show significant differences causing legal uncertainty and barriers to the operation of the internal market, including building consumer confidence in cross-border transactions. Contained in the Green Paper proposals point towards the desirability and the necessity of preparing a new European Act and the selection of the best options for regulating. The fine piece in recital 5, the preamble to the Directive, it was found that obstacles to the functioning of the single market can only be guaranteed through the establishment of uniform Community rules to ensure a high level of consumer protection, and this goal can best serve the Framework Directive designating the nature of the maximum standards of substantive legal. Legal provisions defining the maximum harmonization of regulations impose content standards, leaving national authorities of

1 Directive of the European Parliament and the Council of 11 May 2005 concerning unfair commercial practices used by firms to consumers 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 Council Regulation (EC) No 2006/2004 of the European Parliament and the Council, OJ of 11 June 2005, L 149, p. 22.

2 COM 2001/531.

Member States the freedom to incorporate the method in the national agenda and the procedures of the Directive.[3]

In comparison to the minimum of the maximum-regulated mainly characterized directive to protect the weaker party to a contract means, on the one hand, the requirement for Member States to ensure the protection of the designated Act[4], while allowing the national agenda of higher standards of consumer protection that it has been notified[5]. The expectations of consumers as to the standard of protection in individual countries are different and the minimal nature of the Directive allows for the maintenance of most domestic orders in the corresponding model.[6] Part of doctrine and opinion undermines[7] any real possibility of achieving the convergence of private law harmonization agendas of Member States in the case of directives based on the minimum standards. Such a presented view, especially for supporters of further codification of private law, points to the limited nature of the integration performed by means of directives, in particular the standardization of a minimum of protection.[8] A future instrument of European Contract Law could range from a non-binding instrument, aiming at improving the consistency and quality of EU legislation, to a binding instrument that would set an alternative to the existing plurality of national contract law regimes by providing a single set of contract

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3 In extreme cases, the method of maximum harmonization could take the form of a mechanical multiplier. Bator, A. Normy wtórnego prawa europejskiego z perspektywy teorii prawa. In *Teoria prawa europejskiego* Kaczora, J. (ed.). Wrocław, 2005, p. 47; Howells, G.; Twigg-Flesner, Ch. What sort of Europe do consumers want? *Consumer Policy Review*. 2005, 5: 170−171; Smits, J. Full harmonization of consumer law? A critique of the draft directive on consumer rights. *European Review of Private Law*. 2010, 1: 8 and n.

4 Staudenmayer, D. The Place of Consumer Contract Law with the process on European Contract Law. *Journal of Consumer Policy*. 2004, 27: 271.

5 According to Wejmanna, F.; Zolla, F. (*Potrzeba i kierunek nowelizacji kodeksowego ujęcia problematyki wzorców umownych*. Przegląd Legislacyjny, 1997, p. 11) so as to respect the regulations allow equity to harmonize the rules on competition. On the possibility of raising the standard of consumer protection in the event of a minimum of regulation in the Directive, Cf. also Rott, P. Minimum harmonization for the completion of the internal market? The example of consumer sales law. *Common Market Law Review*. 2003, 5: 1108; Kurcz, B. *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*. Kraków, 2004, p. 311. With regard to national borders legislator Łętowska, E. *Europejskie prawo umów konsumenckich*. Warszawa, 2004, p. 13 and n.; Łętowska, E. Antynomie ochrony konsumenta w prawie wspólnotowym. *Prace z Wynalazczości i Ochrony Własności Intelektualnej*. 2004, 88: 397; Hesselink, M. Towards a sharp distinction between b2b and b2c? On consumer, commercial and general contract law after the Consumer Rights Directive. *European Review of Private aw*. 2010, 1: 77; Mak, V. Review of the Consumer Acquis—Towards Maximum Harmonisation? Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems. *Working Paper on Comparative and Transnational Law*. 2008, 6: 8−9.

6 Zob, H.; Micklitz, W. Zur Notwendigkeit eines neuen Konzepts für die Fortentwicklung des Verbraucherrechts in der EU. *Zeitschrift Verbraucher und Recht*. 2003, p. 2 [interactive]. [accessed 11-09-2010]. <http://www.vur-online.de/beitrag/36.html>.

7 Podrecki, P.; Zoll, F. Odpowiedzialność z tytułu rękojmi i gwarancji w umowach sprzedaży z udziałem konsumentów. In Traple, E.; du Vall, M. *Ochrona konsumenta cz. I, opracowanie analityczne Urzędu Komitetu Integracji Europejskiej*. Warszawa, 1998, p. 115; Wiewiórowska-Domagalska, A. Europejskie prawo konsumenckie—rozwój, problemy, pytanie o przyszłość. In *Europejskie prawo konsumenckie a prawo polskie*. Nowińskiej, E.; Cybuli, P. (eds.). Kraków. 2005, p. 46.

8 A review of these positions represents Kamiński, I. C. Kontrowersje wokół pojęcia europejskiej kultury prawa prywatnego. *PiP*. 2000, 1: 39. However, this position is becoming less popular in the opinion wheels bodies, which are beginning to perceive the differences in the strength of competition.

law rules.[9] The area covered by the Directive 2005/29 is not left to the national legislation at substantive law freedom in the way of implementation.[10] The advantage of the full unification of the law[11] is to strengthen the autonomy of Community law in order to achieve effectiveness.[12] It is questionable whether this is due to the subject matter, which is the maximum harmonization discussed act,[13] will actually serve to protect economic interests of the consumer.[14] In particular it undermines the treaty-legal basis, which clearly is aimed at strengthening the single market. Also changes the Lisbon Treaty, particularly Article 3 TEU are aimed at establishing the internal market.[15]

1. *Ratio Legis*. The Constitutional Base of the Directive 2005/29

The literature generally it is understood that since the Treaty of Maastricht of 7 February 1992 policy pro-consumer has become one of the main purposes of their own actions. European consumer policy increasingly places emphasis on the role of information in allowing consumers to protect themselves and consequently promoting a competitive economy. Increasing the transparency information available to consumers is

9 Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, Brussels, 1.7.2010, COM(2010)348 final.

10 Mokrysz-Olszyńska, A. Swoboda promocji a ochrona przed nieuczciwymi praktykami handlowymi w projektach prawa Unii Europejskiej. *PiP*. 2005, 2: 54. Howells, G.; Twigg-Flesner, Ch. What sort of Europe do consumers want? *Consumer Policy Review*. 2005, 5: 172.

11 Simon, J. European contract law: coming out. *Law and Financial Markets Review*. 2010, September: 485.

12 Żuławska, Cz. Rozwój polskiego prawa konsumenckiego w ramach implementacji. *PiP*. 1999, 9: 73.

13 More Case C-522/08, *Telekomunikacja Polska SA*; C-304/08, *Plus Warenhandelsgesellschaft mbH*; joined Cases C-261/07 and C-299/07, *VTB-VAB NV and Galatea BVBA, ECR* 2009 p. I-2949; Case C-540/08, *Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG v Österreich'-Zeitungsverlag GmbH*. In the last judgment on 9 November 2010 we find that Directive 2005/29 must be interpreted as precluding a national provision, which lays down a general prohibition on sales with bonuses and is not only designed to protect consumers but also pursues other objectives. The possibility of participating in a prize competition, linked to the purchase of a newspaper, does not constitute an unfair commercial practice within the meaning of Article 5(2) of Directive 2005/29, simply on the ground that, for at least some of the consumers concerned, that possibility of participating in a competition represents the factor which determines them to buy that newspaper.

14 According to E. Łętowska (*Europejskie*, *supra* note 5, p. 74) in conjunction with the full harmonization with the Directive referred to including a ban on certain business practices shift in emphasis occurred in the pattern of consumer assessment of his common sense (a reasonable measure of activity) to assess the appropriate notice.

15 Kurcz, B. Lizboński miszmasz. Wpływ traktatu lizbońskiego na prawo konkurencji. *In Prawo i ekonomia konkurencji.* Wybrane zagadnienia. Kurcza, B. (ed.). Warszawa, 2010, p. 32. In opinion N. Reich (Full harmonisation of EU consumer law—fiction or friction—Some problem areas. In *Aktualne tendencje w prawie konsumenckim*. Stefanickiego, R. (ed.). Wrocław, 2010, p. 124) what is also problematic is the fact that again legislative and judicial power is taken away from Member states in the interest of the internal market and against consumer interests.
Member States are reluctant to the complete harmonization of private law sphere, which is reflected in the last debate of the European Parliament on the proposal on consumer rights: <http://ochronakonsumenta.prawo.uni.wroc.pl/forum> link Europeanization of consumer law and next The new directive on consumer rights.

de lege lata undoubtedly beneficial. Important in consolidation of the autonomous to the Treaty of Amsterdam does.[16] In place of art. 129a Treaty introduced Article 153 (art. 169 i 12 TEU)[17], which was developed the concept of "contributing" to ensure high standards of consumer protection with the wider promotion of their interests through legal and regulatory measures including non-action by the various organizational and propagators.[18] Article 153, paragraph 3 differentiates consumer protection measures for those that can be taken for achieving the single market—such acts shall be a reference to Art. 95—and instruments which directly support and complement the policies pursued by Member States in the development of high standards of consumer protection. As a rule, the measures taken under Article 153 in the form of acts of secondary Community law are to shape the legal standards of consumer protection only for a minimum of harmonization.[19] The measures within the competence issued by the Article 95 (art. 114 TEU) may have both the minimum and maximum character. Directive 2005/29 as well as the majority of acts of secondary Community law governing pro-consumer aspects was based on Art. 95 EC (art. 114 TEU). The doctrine calls into question the validity of adoption as the basis for the secondary European laws, establish high standards of consumer protection in the latter provision.[20]

It is worth mentioning the fact that, since the Maastricht Treaty the principle strongly accented in the agenda of the European Community is the principle of subsidiarity as set out in Article 5 EC. This directly relates to the provision, which in the Preamble recital 23 of Directive justifies itself that set targets for the Directive ensure a high level of consumer protection, and can be best achieved at a Community level, by being set up by the body. Fragment of the end of the recital indicates that, in accordance to the principle of proportionality laid down in art. 5 of the Treaty Directive does not go beyond what is necessary to eliminate barriers and achieve a high common level of consumer

16 Draft Treaty of 19 June 1997 was set by a conference of representatives of the Governments of the Member States, entered into force in the final version 1 May 1999. Betlem, G.; Hondius, E. European Private Law after the Treaty of Amsterdam. *European Review of Private Law*. 2001, 1: 3−20. On the importance of the Treaty also Łętowska, E, *Europejskie*, *supra* note 5, p. 32; Basedow, J. The communitarization of the conflict of laws under the Treaty of Amsterdam. *Common Market Law Review*. 2000, 3: 687; Boele-Woelki, K. Unification and Harmonisation of Private International Law in Europe. In Basedow, E. A. (ed.) *Private Law in the International Arena: From National Conflicts Rules Towards Harmonisation and Unification*. Den Haag, 2000, p. 61; on the importance of solidarity Amsterdam Treaty Popławska, E. *Zasada subsydiarności w Traktatach z Maastricht i Amsterdamu*. Warszawa, 2000, p. 76.

17 Compare Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TEU), OJ 2010, C 83, p. 1. The article retained numbering in accordance with the cited existing acts and the case law.

18 More on the importance of this provision Łętowska, E., *supra* note 5, p. 392.

19 The model of minimum harmonization Directive by national authorities to leave the actual exercise of the right approximation. Weatherill, S. Articles in Honor of Professor Alan Watson. Can There Be Common Interpretation of European Private Law? *Georgia Journal of International and Comparative Law*. 2002, Autumn: 142; Mak, V., *supra* note 5, p. 10; Cf. also Vaqué, L. G. La Directiva 2005/29/CE relativa a las prácticas comerciales desleales: entre el objetivo de una armonización total y el *enfoque de plena armonización* en materia de protección de los consumidores. *Derecho de los Negocios*. 2005, 181: 8.

20 In the respect Consumer Policy Strategy (2007-2013) it is necessary also to have regard to the wider project of armonization of European contract law, especially Common Frame of Reference, Mak,V., *supra* note 5, p. 5.

protection. It is worth mentioning that, in connection to the principle of subsidiarity, bodies must weigh very carefully whether or not there are in a particular case exceed the limits of their responsibilities, of course, beyond the legislative sphere, which was their sole responsibility. Member States to undermine the basis for the time taken by the authorities of the Community legislative measures.[21] From the point of view of consumer protection in national systems of law and the law of the Union, it will develop best if the rule will maintain a reasonable balance between the activities of Member States and activities of Community legislation.[22]

2. *Scire leges non hoc est verba earum tenere, sed vim ac potestatem*[23]

The Directive regulates the matter of unfair trade practices used by business-to-consumer commercial transaction in relation to the product, during and after the conclusion. Adjustment includes the whole of the relationship between professional and non professional contractor. The Community legislature aims to achieve the purposes of the Directive by amending the discussed act's necessary definitions, among them a broad view of both business practices (Article 2d) and unfair practices, which are referenced in art. 5. Particularly noteworthy is the fact that the protection of consumers against unfair trading practices creates art. 76 of the Constitution. The provision of this code is addressed to public authorities, their shaping legislative and regulatory policy, but its importance to the protection of consumers is undeniable. As a result, the Directive is possible to build a coherent definition of adequate on both grounds of national and European law[24], subject to interpretation in accordance with European standards.[25] For the purposes of art. 2d Directive trade practice of business-to-consumer means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, which are directly associated with the promotion, sale or supply of a product to consumers. The directive introduces the term "commercial communication", which some benchmarks contained in the above-cited definition of commercial practices. The Green Paper of the European Commission on 8 May 1996 entitled "Communication in the commercial property market" referred to "commercial communication" as any form of communication that are intended to promote the sale of goods and services, or building on the market perception about the company or organization, including all forms of

21 An example is the German casus undermines the basis for the adoption of Directive 98/43 art. 95 EC. Particularly noteworthy is the ECJ ruling in Case C-376/98 of 5 October 2000, *Germany v. Parliament and Council* (ECR 2000, SI-8419) and the decision to C-74/99 on 5 October 2000 (Imperial Tobacco, ECR 2000, p. I-8599) in which the ECJ accepted that the choice of the base Directive conditions may not provide sufficient legitimacy for the activities of the Community.

22 Reasonably accept Dauses, M. A.; Sturm, M. Prawne podstawy ochrony konsumenta na wewnętrznym rynku UE. *KPP*. 1997, 1: 57.

23 Knowing the laws does not mean knowing their words, but their intent and purpose.

24 Cf. ruling of the Constitutional Court, TK 33/03 OTK-A 2004, no 4, p. 31.

25 Cf. consistent interpretation of the Mik, C. *Wykładnia zgodna prawa krajowego z prawem Unii Europejskiej (w:) Polska kultura prawna a proces integracji europejskiej*. Kraków, 2005, p. 132.

direct marketing, sponsorship,[26] sales promotion, including the finishing of the product and its packaging. Widely recognized is in the Commercial Communications Regulations of the European Parliament and Council to sell advertising on the internal market,[27] is defined as all forms of communication aimed at promoting, directly or indirectly, of goods, services or image of the company engaged in commercial, industrial, craft or profession.[28] Essential for the stimulation of market outlets is primarily advertising business, which constitutes an integral part of a market economy, businesses compete for customers. In European law, it is seen primarily as providing information enabling the buyer to take optimal decisions in the economic conditions.[29] Consumer interest has been dictated by the legalization of comparative advertising, in the interest of this group of entrants and transparency in the transactions to protect the communication of sound, based on objective considerations.

The Directive applies only to those forms of unfair commercial practices, which have economic importance to the consumer. The purpose of regulation is to protect the consumer against the effects of the decision-making in terms of erroneous perceptions about the product or the benefits associated with the transaction, as well as its implementation. Economic interests of consumer protection are a common denominator of consumer, although the regulation does not cover the whole European personae in this respect. Normalization of the narrow economic interests to protect the consumer means that it is not as it relates to the requirements of the "sense of taste and decency." Community legislator aware of significant differences in the approach to these issues in the systems of the Member States leaves a relatively large clearance at the national regulation of this matter. This is reflected in recital 7 of the preamble: "Member States should continue to be able to prohibit the practice in your business because of the sense of taste and decency in accordance with Community law, even where such practices do not restrict the freedom of consumer choice." Together with the generally expressed approval of the reservation contained in recital 25 of the preamble, it follows from it directly, that this Directive respects fundamental rights and principles recognized in particular by the Charter of Fundamental Rights of the European Union.

Directive as a framework for regulation is without prejudice to the provisions of the acts of a sector in detail substantive law governing consumer protection. By design, the Directive (recital 10), respectively, and its art. 3 paragraph 2-4 show that this Directive shall apply only to the extent that there are no specific rules of Community law govern-

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26 Accordingly reported, attracting a potential recipient of public communication sponsor, the program is sponsored by a particular manufacturer of spring water from the cleanest sources may be sufficient assurance of product characteristics (unless most important for this kind of things) within the meaning of art. 4 paragraphs. 3.

27 The project on October 2, 2001, OJC 075 E, 26 March 2002, p. 11-16, as amended.

28 More Mokrysz-Olszyńska, A., *supra* note 10, p. 52.

29 Kruisinga, S. What do Consumer and Commercial Sales Law Have in Common? A Comparison of the EC Directive on Consumer Sales Law and the UN Convention on Contracts for the International Sale of Goods. *European Review of Private Law*. 2001, 2/3: 181; Nowińska, E. *Zwalczanie nieuczciwej reklamy. Zagadnienia cywilno-prawne*. Kraków, 1997, p. 20; Preussner-Zamorska, J.; Traple, E. Interes konsumenta oraz instrumenty jego ochrony w dziedzinie reklamy. *KPP*. 1996, 1: 18.

ing the specific aspects of trade in them, the provisions of contract law in particular on the validity, formation or effect of the contract. Article 3.5 of the Directive includes deregulation, namely for a period of 6 years from 12 June 2007.[30] Member States are harmonized in this Directive and continue to apply national rules that are more restrictive or prescriptive than this Directive and to implement directives containing minimum harmonization clauses. These measures must be necessary to ensure adequate protection of consumers against unfair trade practices and must be proportionate to the objective pursued. It is worth mentioning the fact that at the time of intensive on the directive of the European Parliament under the amendment (Amendment 4) out of the project[31] has added only one word "continue." In support of the adjustment Parliament stated that the article clearly indicates that the plan is to gradually move up to a maximum harmonization, and this excludes the measures taken in the future, more stringent, increasing the difference between the existing national legislation, and this Directive.[32]

Bearing in mind the necessity to support further harmonization in the field of Parliament also pushed through an amendment (No. 11) to the draft Article 18 Paragraph 1. Review, the Commission shall submit to the Council no later than four years since the beginning of this Directive, and shall be subject to the matter referred to art. 3 Paragraph 9. In support of the amendments introduced by Parliament notes that the extension of the scope of the implementation of the Directive, including a comprehensive financial report will answer the question whether such services should continue to be subject to additional rules at national level.[33] The Community legislator and the ECJ case law when interpreting European legislation strongly emphasizes the dynamics of this right. Thus, maintenance of the implementation of the directives in the Member States shall designate, to some extent, the direction of future regulations. In the preamble to the Directive (recital 8) note the existence of trade practices detrimental to competitors and their clients a professional and not harming the consumer. This fact should determine whether there is a need for further action in the field of unfair competition arising from the subject of the regulation. In the literature it is stressed that the formal separation of the legislation in the last issue of the protection of fair trading (fair competition) and consumer protection is artificial, because this is another matter and passes together.[34] In addition, the consistency of the ECJ case law in the protection of market integrity and consumer protection from competition is always accented. Under the influence of the

30 This is the correct term to implement the national agenda commented directive.

31 Draft European Parliament Legislative Resolution on the Council common position for adopting a European Parliament and Council Directive on unfair commercial practices of undertakings to customers in the common market, 11630/2004-C6-0190/2004-2003/0134 (COD).

32 Smits, J. Full harmonization of consumer law? A critique of the draft directive on consumer rights. *European Review of Private Law*. 2010, 1: 7.

33 This is a more restrictive or prescriptive requirements which national authorities can impose in the interest of the consumer under the regulation of a minimum of Directive 2002/65 EC of 23 September 2003 on financial services provided at a distance, OJ L 271/16 of 9 October 2002 r. See. However, in a fragment of fine paragraph 9 of the preamble to Directive 2005/29.

34 More Mokrysz-Olszyńska, A. Reforma prawa o nieuczciwej konkurencji w Niemczech (w świetle projektu dyrektywy WE o nieuczciwych praktykach handlowych). *PiP*. 2004, 6: 28.

added demands of the German recitals of the act, the Directive directly protects consumer indirectly protect honest traders against their competitors and thus protect fair competition.[35]

3. *Aequitas non facit ius, sed iuri auxiliatur*[36]

Said, expressing the principle of art. 4 of the Directive confirms the priority rule Treaty free movement of goods and services within the single market. Projects of this Directive, typify the right priority to the functioning of the Community market without internal barriers to further strengthen the principle of country of origin.[37] This rule developed in ECJ case law has become the cornerstone strategy for meeting the standards for the characteristics of goods (and then also services) in favour of economic freedom and open markets. With respect to the link, however, the choice for a professional standard of the lowest remains clearly in conflict with the interests of the consumer.[38] In light of this rule meeting the requirements of the internal (in the country of origin) it is crucial for the release of goods or services on the single market in the Community. Work on the consumer directives in this regard raised disputes so strong that, with regard, inter alia, Directive governing electronic commerce[39] this principle excluded in an annex (Annex I) in relation to consumers.

The country of origin involving the mutual recognition of national law by Member States in relation to the directives providing for full harmonization—and such is the nature of the Directive on unfair commercial practices—has lost focus on what is not equivalent to the total loss of functions performed by it, especially because the directive for the controlled substance, operates with indeterminated phrases and equity clauses that may cause variation in standards of consumer protection in the Member States. As a result of major opposition organizations mentioned principle has been removed despite persistent business lobbying for the re-introduction of the Directive.[40] This is only the first step in the harmonisation of unfair commercial practices. Unfair commercial practices law and competition law should not live separate lives, but should be better integrated in order to avoid conflicts.[41]

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35 Mokrysz-Olszyńska, A., *supra* note 10, p. 63.

36 Equity does not constitute or make the law, but gives aid, assistance to the law.

37 Cf. art project. 4 of the Directive of 18 June 2003, a translation Nestoruk, I. B. Europejskie prawo o zwalczaniu nieuczciwej konkurencji? (prezentacja projektu dyrektywy o nieuczciwych praktykach handlowych). *Prace Instytutu Prawa Własności Intelektualnej*. 2005, 89: 175.

38 Łętowska, E., *supra* note 5, p. 398.

39 Directive 2000/31, OJ L 178/1 dated 17 July 2000, widely Łętowska, E. *Europejskie*, *supra* note 5, p. 253.

40 Mokrysz-Olszyńska, A., *supra* note 10, p. 54.

41 Stuyck, J. The interaction between the Unfair Commercial Practices Directive and Competition Law. In *Aktualne tendencje w prawie konsumenckim*. Stefanickiego, R. (ed.). Wrocław, 2010, p. 184.

4. General Clauses

Sphere of regulation covering business practices used in trade is characterized by high dynamics. For this reason, the legislator cannot be defined in a comprehensive manner all the behavioural and must be general clauses allowing for adaptation to the changing of its environment. In the same material the Green Paper proposals for stronger reliance on the rules of marketing codes of conduct have already been appointed. Setting out the scope of the Directive, Article 3 in paragraph 8 states that the said Act shall be without prejudice to the professional codes of conduct or other specific standards governing regulated professions in order to ensure the maintenance of high standards of integrity, which Member States may, in accordance with Community law, impose on the person carrying out this profession. In the literature argues[42] that the directive giving compliance with the requirements of professional diligence practices of fairness as a criterion recognizes the important role in the fight against unfair trade practices adopted by voluntary self-regulatory codes of conduct (including deontology codes). Place a code of conduct sets out above all art. 10 of the Directive. This is a provision introduced in an amendment (No. 9) of the Parliament. In support of his authority indicates that the reference to the Code of Conduct is voluntary and cannot replace the resources or the administrative court of appeal provided for in art. 11. It is not possible in the interpretation of the provision omitted in the preamble recital 20 in view of the fact that European law justify such acts meet the enormous role. They allow it in order to read the functional interpretation of European law, the preamble referred to the result could be achieved. Whereas the preamble to a theme, it is clear that the importance should be given to the appropriate codes of conduct, which enable traders to apply the principles of this Directive in the various areas of the economy. The control exercised by the code owners at national and Community level to eliminate unfair commercial practices may avoid the need for recourse to administrative or judicial action and should therefore be encouraged. Therefore, in view of the justification for it must be assumed that there is no general prohibition on the substitution of the self-judicial and administrative measures in the provision of Article. 10 terms, but rather guarantees that the consumer does not shut down the road to an effective remedy.[43] Another approach to the role of codes of conduct would mean their marginalization.[44] It is worth mentioning the fact that the trade practices deemed unfair in all circumstances, named below, do not to mention the actual state, and thus mislead the appointment as being a signatory to the Code of Conduct or the Code for approval by an authorized body in this when, in fact, it did not place. This is to prevent the misuse of codes for the purpose of reaping unfair benefits from them, especially the use of consumer confidence related to the ethical regulators, professional activities in the market.

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42 Mokrysz-Olszyńska, A., *supra* note 10, p. 57; Nestoruk, I. B., *supra* note 37, p. 167.

43 Cf. art. 47 of the Charter of Fundamental Rights of the European Union.

44 Cf. also Art. 17 of the Directive. On the role of codes of conduct in the light of the Directive Mokrysz-Olszyńska, A., *supra* note 10, p. 57; Nestoruk, I. B., *supra* note 37, p. 168.

5. The Prohibition of Unfair Market Practices

Comments on the directive Article 5 Paragraph 1 contain a general prohibition of unfair market practices, and in the following paragraphs specify the provision. You can talk in light of the existence of four roads leading to the recognition of the prohibition of the practice[45] being considered as such on the basis of a general clause, by showing the characteristics of the unfairness in the form of misrepresentation or recognition of aggressive commercial practices, or for the catalog of unfair practices prohibited under all conditions.[46] Introducing a general clause of Article 5 Paragraph 2 in the light of commercial practice, it is unfair if it meets the two conditions cumulatively included: it is contrary to the requirements of professional diligence and materially distorts, or is likely to distort, the economic behaviour of the average consumer.[47] The usually accepted view[48] that the clause is a general phrase in semantic indeterminated legal language and not a provision which it contains. This is the case referral to the general public and non-standard[49], up to a certain value non-defined directly by the normative text, providing individual assessment in the process of applying the law. Ratings made by the adjudicating body on the ground must be specific, designated by the content of a decided case. Commenting on the concept of directive compliance with the requirements of professional diligence (Article 2H), business activity falls to the consumer equity criteria in the form of fair market practices and/or the general principle of good faith. The possibility of using the clause, and reap the benefits from it depend on the technical characteristics of the act. Undoubtedly, the greatest impact in clauses contained in the pre-general of the act[50], and upon leaving the legislator from casuistic method for regulating the open.[51] The Directive defines in detail the unfair practice of misleading and aggressive practices, which are the legitimate objectives of regulation and the assumed results of implementation. Therefore, the reference to the clause as a basis for evaluating the actions of the contractor will be significantly reduced, but the mere fact of its adoption of the directive[52] is a breakthrough in the process of consolidation in the law on the

45 Łętowska, E., *Europejskie*, *supra* note 5, p. 203.

46 N. Reich (Full harmonization) said that different judgments of the BGH show that seemingly the "Vorverständnis" of judges on the adequacy and fairness of the relevant clauses is more important in deciding a case that the conceptual framework under which they are put. Such a method may not help legal clarity, but at least allows an open deliberation of approaches aimed at finding a just result in a specific case before the judge.

47 Łętowska, E. *Europejskie*, *supra* note 5, p. 202; Mokrysz-Olszyńska, A., *supra* note 10, p. 55; Nestoruk, I. B., *supra* note 37, p. 159.

48 Preussner-Zamorska, J. Problematyka funkcjonowania klauzul generalnych na tle ustawy o zwalczaniu nieuczciwej konkurencji. *KPP*. 1997, 1: 100.

49 Wójcik, K. Klauzule generalne a pojęcia prawne i prawnicze (zasady prawa i społeczne niebezpieczeństwo czynu). *Studia Prawno-Ekonomiczne*. 1990, XLV: 63.

50 Leszczyński, L. Właściwości posługiwania się klauzulami generalnymi w prawie prywatnym. Perspektywa zmiany trendu. *KPP*. 1995, 3: 290.

51 Preussner-Zamorska, J., *supra* note 48, p. 98

52 Cf. on existing systems, the differences in civil law and common law in the approach to the criteria słuszności ciowych. Blair, W.; Brent, R. A single European Law of Contract. *EBLR*. 2004, 1: 7; Schlechtriem, P.; Coen,

integrity of market relations.[53] The literature contends that it also applies primarily to cases not included in the Directive, art. 5 Paragraph 4, and subsequent legislation. Directive 2005/29 on the prohibition of unfair trade practices amended provisions of certain acts of secondary Community law, including Directive 84/450[54] by a change—when it comes to personal field of protection—of a fundamental nature. Article 1amended of Directive 84/450 states that its purpose is to protect traders against misleading advertising and its negative effects and to determine the conditions under which comparative advertising is permitted. A basic change is to exclude from the regulation and to protect consumers, in light of the aim of this act in an indirect way and take over the protection by the provisions of the UCP, as well as current Directive 1999/44.[55]

6. Misleading Actions

Practice of confusion among the most delicts occurring in business practice are a consistent target. A large breakthrough in the regulation of consumer protection from such actions is set out in Directive 1999/44. Comments on the material in this directive are a very important link in protecting the consumer against the effects of actions or omissions of a professional market participant harming the consumer and as a result of fair competition. For the purposes of art. 6 Paragraph 1 of Directive 2005/29, commercial practice shall be regarded as misleading if it contains false information and is therefore incompatible with the truth or by any means including all the circumstances of its presentation, deceives or is likely to mislead the average consumer, even if the information of those in relation to one or more of the following elements[56] are in line with reality, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken. It is my opinion that it is the most tight and precise definition in Community law practice of confusion[57], especially innovative to the extent that it explicitly recognizes the listing for the prohibited practice of confusion, the ones that are based on real information, but in such a manner chosen that they form the wrong idea about the actual product or take advantage of the transaction.[58]

Ch.; Hornung, R. Restitution and unjust enrichment in Europe. *ERPL*. 2001, 2/3: 389.

53 Mokrysz-Olszyńska, A., *supra* note 34, p. 29.

54 Council Directive of 10 September 1984 for the Unification of the legal and administrative Member States concerning misleading advertising, OJ L 250 of 19 September 1984, p. 17.

55 In the literature (Mokrysz-Olszyńska, A., *supra* note 34, p. 27 and presented to the German literature by the author) is rightly argues that the unfair trade practices harm not only consumers but also honest producers. Thus, the divisions seem artificial regulation.

56 These elements are listed in subparagraphs of Article ag. Paragraph 6. 1 of this act. Cf. more broadly on the criteria of confusion within the meaning of Directive 2005/29. Mokrysz-Olszyńska, A., *supra* note 10, p. 58.

57 Cf. also Nestoruk, I. B., *supra* note 37, p. 161.

58 See reference for a preliminary ruling from the Okresný súd Prešov lodged on 16 September 2010, Case C-453/10: Are the criteria determining what is an unfair commercial practice in accordance with Directive 2005/29 … such as to permit the conclusion that, if a supplier quotes in the contract a lower annual percentage rate (APR) than is in fact the case, it is possible to regard that step by the supplier towards the consumer

Prohibition of confusion has been correlated with the economic interests of the consumer, because the legally relevant are such transfers, which have a certain weight to the potential buyer[59], or have the power to influence his decisions in the market.[60] With that in view of legal protection against unfair competition, and Directive 2005/29, we are dealing with the protection and prevention. The Directive provides for the distribution of practice on misleading actions as defined above, and to refrain from misleading, contains a reference to art. 7. Thus, in the provisions of Directive 2005/29, with those of equivalent misleading omissions in the legal profession. In accordance with paragraph 1 Article 7, commercial practice shall be regarded as misleading if, in the particular case, taking into account all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs to take an informed transactional decision and thereby causes or may be taken by the average consumer's decision on the transaction, which otherwise would not have been taken. On the other paragraphs 2 out of a misleading omission also are considered when taking account of the provisions of paragraph 1, a trader hides[61] or provides in an unclear, unintelligible, ambiguous or untimely manner such material information or not to disclose commercial practice if not already apparent from the context, and if this causes or is likely to cause the average consumer's decision on the transaction, that he would not have taken. This is a shot similar to the concept of a significant error. Significant error is one that at the conclusion of the contract was so important that it is possible to conclude that a reasonable person placed in the same situation as the will of the person making the statement in the knowledge of the facts would have entered the contract on different terms, or would not have proceeded[62].

When defining misleading omission as highlighted in the context of Directive provision, not a formal requirement,[63] contextual approach is used to examine the specific cases of misleading, by taking into account all the circumstances of the facts that have

as an unfair commercial practice? If there is a finding of an unfair commercial practice, does Directive 2005/29/EC permit there to be any impact on the validity of a credit agreement and on the achievement of the objective in Article 4(1) and Article 6(1) of Directive 93/13, if invalidity of the contract is more advantageous for the consumer?

59 It could be noted that legal economic relations should be accompanied by such phrases expressing an understanding of duty of conduct that may be construed as an expression made intentionally rational economic decisions and these decisions as a premise for the future. Thus, as the only standard treatment for the setting of a firm addressee or prohibited content prescribed behavior is insufficient.

60 Rubio, M. P. G.; Koppensteiner, H. G. BGH, Urteil vom 20.10.1999–Orient–Teppichmuster–Zur Frage der irreführenden Gestaltung einer Werbebeilage. *European Review of Private Law*. 2002, 5: 705; Namysłowska, M. Reklama porównawcza w świetle najnowszego orzecznictwa Europejskiego Trybunału Sprawiedliwości, Studia z gospodarczego prawa Unii Europejskiej. *Stan obecny i perspektywy rozwoju.* Królikowskiej-Olczak, M. (ed.). Kraków, 2004, p. 92.

61 The case law of the ECJ will have the meaning specified solutions adopted, as in the European consumer protection law adopted the principle of objective, not subjective fault. In other words, the omission of required information need not be intentional on the part of entrepreneurs.

62 Fuchs, B. *Lex mercatoria w międzynarodowym obrocie handlowym*. Kraków, 2000, p. 80; Górnicki, L. *Nieuczciwa konkurencja w szczególności przez wprowadzające w błąd oznaczenie towarów i usług, i środki ochrony w prawie polskim*. Wrocław, 1997, p. 50; Rajski, J. *Prawo o kontraktach w obrocie gospodarczym*. Warszawa, 2000, p. 82.

63 Łętowska, E. *Europejskie, supra* note 5, p. 204.

been introduced by the European Parliament under the amendments to the draft discuss provision. This also applies to the requirements of the offers, which is a reference to the paragraph 4 Article 7. Although the Directive does not use the term "offer" and the construction of "an invitation to purchase"[64], but with the benchmarks contained therein it clearly shows that it is a binding proposal for a trader market[65]. For such a character, points 5 and 6 list prohibited trade practices under all circumstances. In the case of the invitation to purchase something based on the significance within the meaning of art. 7 Paragraph 4 of the Directive, the following information, if not already apparent from the context[66]: a) the main characteristics of the product to the extent that it is appropriate for the medium and the product b) the address and identity of the operator[67], c) the price inclusive of taxes, or where the nature of the product cannot be reasonable prior to the calculation of prices, the way in which the price is calculated, as well as any appropriate additional charges for freight, delivery or postal service or in a situation where previous calculation of these fees is not reasonably possible to the fact of such additional costs[68], d) the arrangements for payment, delivery, performance and the complaint, if they depart from the requirements of professional diligence, e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right. The axiological core of European consumer law—which the Directive is a coherent part—is the principle of protection of information. The right to transparency on both the commercial communication, as well as its substantive content. There is the Constitutional Court ruling of 26 January 2005[69], which stresses the importance of support of the Directive on unfair market practices in terms of consumer protection in the compensation information deficit. In support of the decision signals no longer work on the transposition of the Directive. This is important information, especially since the latter process was accompanied by the implementation of European law over-haste[70] and the lack of legal discourse[71], which is essential in creating good legislation. With the discussed work on the Directive indicates that its provisions are based on many compromises, including concessions to the business. These include Article 6 Paragraph 1f removed the ban on

64 Collins, H. Harmomisation by example: European laws against Unfair Commercial Practices. *The Modern Law Review*. 2010, 1: 106.

65 Cf. advertising the tender summary Kocot, W. *Zawieranie umów sprzedaży według Konwencji Wiedeńskiej*. Warszawa, 1998, p. 84; Nestoruk, I. B., *supra* note 37, p. 165.

66 See indications of confusion in the art. 3 of Directive 84/450/EEC.

67 Information on the manufacturer may have a significant impact on the decision of the consumer market, if the identity of the tied product is the reputation and/or companies.

68 Price is one of the most common elements of the battle for the consumer is used in a fraudulent way. Szwaja, J.; Mika, I. B. Darmowe publikowanie ogłoszeń i reklam a prawo konkurencji. *Kwartalnik Prawa Prywatnego*. 1999, 3: 564; cf. including UK Court ruling of 19 December 1994. *Consumer Law Today*. 1994, 12, I refer for Szostak, J. *Nieuczciwe klauzule w prawie umów konsumenckich.* Łętowskiej, E.; Osajdy, K. (eds.). Warszawa, 2005, p. 174.

69 TK P10/04, OTK-A 2005, no 1, p. 7.

70 An example of such a transposition can be Fast work on the incorporation into Polish law of Directive 99/44. There are assumed to regulate the breaking load of the traditional system of law has been extremely rapid process implementation.

71 For his role, see Zirk-Sadowski, M. Wykładnia i rozumienie prawa w Polsce po akcesji do Unii Europejskiej. In *Polska kultura prawna a proces integracji europejskiej*. Kraków, 2005, p. 102.

the name of the product claims that merchant cannot prove it. This is a step back to Directive 84/450[72] and Directive 1999/44. Although paragraph 21 of the preamble states that although that law indicates what the burden of proof rests, the courts and administrative bodies should be able to require traders to provide evidence as to the accuracy of claims they have the facts, the question of burden of proof is left open during the act.[73]

7. Aggressive Commercial Practices

These issues have been dealt with in art. 8 and 9 of the Directive, and some of these practices included a list of prohibited unfair in all circumstances (Annex I) in the literature referred to as "black list" in the light of art. 8 of the commercial practice and shall be deemed to be aggressive in a particular case, taking into account all its features and circumstances, by harassment, coercion, including the use of physical force or undue pressure significantly reduces the likelihood of creating or restrictions on the freedom of choice of the average consumer or his behaviour with respect to the product and thereby causes or is likely to lead to take the decision on the transaction, which otherwise would not have taken. Any forms of stress affect the law protected the sovereignty of the consumer[74], to interfere with the freedom of the optimal decision in the market conditions. Ban aggressive marketing efforts stems directly from the legislation governing the fairness of competition.[75] A clear example of distortion of the essence of regulation by the defective interpretation of the law of 16 April 1993 on combating unfair competition[76] is the argument the Court of Appeal ruling in Lublin from 30 September 1998 [77], in which the court ruled that "the submission of bids, and even its best to urge the adoption of is not in conflict with morality. When it should be noted that Article. 3 of the Act on combating unfair competition, not about the general concept of morality, but morality of merchant, i.e. such as are adopted and accepted in the business." Reducing the impact of these practices in any material actual or potential impact on consumer decisions poses

72 Council Directive of 10 September 1984 for the Unification of the legal and administrative Member States concerning misleading advertising, OJ L 250 of 19 September 1984, p. 17.

73 Article 6. 1 draft regulation on sales promotion states that call for the court or authority "promoter" should provide evidence confirming the accuracy of the information required by art. 4. More Łętowska, E. *Europejskie*, *supra* note 5, p. 207.

74 In those terms they are also seen in the Directive 2005/29. More Łętowska, E. *Europejskie*, *supra* note 5, p. 157.

75 See art. 16 ust. 3 i ust. 5 UZNK. More Stefanicki, R. *Prawo reklamy w świetle przepisów o zwalczaniu nieuczciwej konkurencji na tle prawnoporównanwczym*. Poznań, 2003, p. 153 i n. 203 i n. by the author, and the doctrine and jurisprudence.

76 See also judgment of the Court EU of 9 November 2010 in case C-137/08 *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider*, that Article 267 TFEU must be interpreted as meaning that the jurisdiction of the Court of Justice of the European Union extends to the interpretation of the concept of 'unfair term' used in Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that Directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case.

77 I ACa 281/98, *Apel-Lub* 1999, no 1, p. 1.

a problem for their evaluation in terms of other values and, above all from the point of view of protection of privacy of individuals, its integrity. The omission of these issues in the Directive does not mean the plan for the further exclusion of those rights, because the boundaries of the freedom to determine, inter alia, sectoral directives, the more specific provisions.[78] The directive—as indicated above—is without prejudice to the specific regulations, and respects the fundamental rights and principles recognized in particular by the Charter of Fundamental Rights of the European Union.

8. Consumer Pattern and the List of Practices in all Circumstances be Regarded as Unfair

In light of the provisions of the Directive the consumer means any natural person who, in commercial practices covered by this act of acts outside his trade, business, craft or profession. Commented a consumer determines the two main determinants[79]: 1) personal item (individuals), 2) the item. The definition of a consumer item was worded in a negative provision - the contract is to be included in the target, which cannot be attributed to a business entity subject-matter. In order to achieve the result specified by Directive should be extended to the concept of business all these forms of economic activity, to which the said act of the Community. Introduced into the directive outlines is a fairly narrow definition of the protected person[80], but the tendency of legislators is to evolve in this direction. The Directive also contains a notion of the scope of its business to include any natural or legal person who under the trade practices act for purposes relating to his trade, business, craft or profession and any person acting on behalf of a trader.[81]

For the evaluation of unfair practices[82], it is necessary to use an objective criterion of the average consumer.[83] The draft Directive 2005/29 contains the definition of a model of the average consumer in this way, raising the level of regulation of and a test developed in ECJ case law to build a model of the average consumer. The average consumer may be described as an interesting, anti- paternalistic view based on his sovereignty and, to some extent, useful notion because of asymmetry in the allocation of information.[84] It is, on the other hand, an overly one-dimensional concept with little correspondence

78 See Łętowska, E. *Europejskie*, *supra* note 5, p. 27.

79 Wejmann, F.; Zoll, F., *supra* note 5, p. 37.

80 The same definition contained in the Directive 1999/44. See also dyrektywa 2005/29 a 1999/44. Stefanicki, R. *Nieuczciwe praktyki handlowe w świetle ustawodawstwa Unii Europejskiej.* Warszawa, 2007, p. 71.

81 Excerpts in fine definition is included in the final work on this one. This is important since the scope of the concept were included in the Advertiser.

82 Lazauskaitė, R. Susitarimų dėl sutartinės atsakomybės ribojimo teisinė prigimtis [The legal nature of exemption clauses]. *Social Sciences Studies*. 2010, 1(5): 170.

83 Williams, J.; Hare, C. Average consumer is defined as one of three types. See Early Experiences of the Enforcement of the Unfair Commercial Practices Directive in Scotland. *Journal of Consumer Policy*. 2010, 4: 382.

84 See Howells, G.; Weatherill, S. *Consumer Protection Law (Markets and the Law)*. Second edition. Ashgate, 2005, p. 2.

with the real world of individual consumer behaviour (behavioural decision theory offer a more realistic view) and should be reinterpreted more flexibly, or even abandoned to mirror the weak contractual party behaviour more effectively.

The problem of legitimacy of the act included in the definition of universal standard has raised a number of consumer disputes in the course of work on the project. It was eventually deleted definition[85] recognizing that the very concept of the dynamic nature needs to be clarified by the Court for specific regulatory and determinants of multilateral and changing needs in the protection of weaker contract parties. By not placing the definition of a consumer model in the glossary of basic concepts of the Directive, they do not mean to sacrifice the Community legislator from the objective point of reference. The criterion legislator refers to the average consumer in art. 5 Directive and recital 18 in the preamble. In the light of the latter in accordance with the principle of proportionality, and to enable the effective application of the protections contained in this Directive to be considered as a benchmark the average consumer who is reasonably informed, reasonably observant and circumspect. At the same time, for the first time in this act shall be the level of consumer protection that requires special treatment, and extracted taking into account social, cultural and linguistic factors. Article 5. 3 states that practices which are likely to materially distort the economic behaviour only clearly identified group of consumers, particularly vulnerable to the practice or on the product you are concerned because of the physical or mental disability, age or credulity in a manner reasonably possible to foresee, to be judged from the perspective of the average member of that group. Thus, the same message can be varied depending on the assessment categories of recipients, which reaches. It is worth mentioning that the isolation category of consumers to be given particular protection is only in the final stage of work on the Directive.[86] The fragment at the end of that provision states that the termination is without prejudice to the common and legitimate advertising practice of propagate exaggerated claims or statements that cannot be understood literally. This solution is based on the assumption that the average informed and educated consumer marketing communication should properly decrypted exaggeration contained in particular in advertising. Adoption of such a priori still seems to be at odds with the practice in many western countries that consistently oppose particular judicial decisions through the line promotional communications exaggerated[87] values promoted a product or a (non-existent) benefits from the transaction.

In order to provide greater certainty in the law—it was stated in the preamble, recital 17—it is desirable to identify those practices that are considered unfair in all circumstances, and therefore without the need to assess them in a particular case in light of the conditions set out in art. 5-9 Directive. The list of unfair practices which are considered to be included in Annex I to the Directive during the work on this piece and evaluate both on the content of the clauses contained therein, as well as its nature. In an

85 Mokrysz-Olszyńska, A., *supra* note 10, p. 56.

86 Cf. also recital 19 of the preamble, which reflects the changes the wording of art. 5 paragraph. 3.

87 Cf. Commission Decision of 14 December 2004, the number C (2004) 4772, OJ L of 28 December 2004.

earlier stage of work on this piece is narrated by the open nature of the list in the form of a non-calculation, reflecting the dynamic processes in business practice and perverse. However, it has been the closed nature of the list of clauses in all circumstances to be regarded as unfair by adopting the principle that it is updated to be made solely on a legislative amendment of the Directive.[88] The solution is a concession for entrepreneurs.[89] Do not close the road to recognition of the needs of a particular case and with reference only to the clause to be unfair, which satisfies the conditions of Article. 5 of the Directive. Doctrine is critical of the closed nature of the Annex I of this concept because it bans not allow rapid response to new threats in circulation and maintain best practices in the exclusion of certain Member States. ECJ restrictive approaches to specify the 31 practices prohibited *ex lege* considering other bans *ipso iure* incompatible with the Directive.[90]

Conclusions

Directive 2005/29 is regulated by a framework for a very substantial area of protection of consumer interests before taking his decision on the erroneous perception of the transaction and the benefits associated with its implementation. The new act in consequence of the implementation of the national member states gives great scope for the flexible operation and may become an effective instrument of pressure to improve business practices. The practical meaning of transposition of the Directive will be implemented primarily as a result of the use of appropriate legal measures and instruments of self in order to ensure that consumer law has been implemented in accordance with its contents. The provisions of the Directive (Articles 11-13), as well as defining the set shows the results of the preamble to the responsibility of the Member States to establish sanctions for violation of that act. These penalties should be effective, proportionate and dissuasive. Discussion has begun on the adoption of national legislation to implement the Directive criminal instrument for a new regulation called aggressive practices. The issue is probably the most important from the point of view, the proper implementation of the Directive is to ensure that such procedures in the national agenda in order to achieve the assumed result. As the information society evolves, new forms of commercial communications will undoubtedly assume greater importance in this field. Implementation process does not end with the adoption of new regulations, if not identical with the law, as it opens up the transposition of the long-term and difficult process of building the actual standards of protection. This process can be facilitated to the extent that the directive is based, to some extent on the regulation contained in the Act on combating unfair competition. The problem however is that potential standards set by this act does

88 Nestoruk, I. B., *supra* note 37, p. 166.

89 Mokrysz-Olszyńska, A., *supra* note 10, p. 59.

90 Case C-522/08 *Telekomunikacja Polska SA*; C-304/08 Plus Warenhandelsgesellschaft mbH; joined Cases C-261/07 and C-299/07 *VTB-VAB NV and Galatea BVBA*, ECR 2009 p. I-2949; Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v. Österreich'-Zeitungsverlag GmbH*.

not sufficiently the efficiency of this law. Static standards, prescribed positive law, must be accompanied by adequate judicial practice and effective enforcement. All these elements build consumer confidence and loyal market operators to other participants.

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