

**TO THE SELECTED MISLEADING COMMERCIAL PRACTICES
ACCORDING TO THE BLACK LIST OF THE DIRECTIVE
NO. 2005/29/EC**

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Abstract

Misleading commercial practices mean distinctive danger for proper commercial choice of the consumer, because they can force the consumer to make such an economic decision which he would have never done if there was no misleading practice. Unfair business practices are regulated **at level of the European union** by the Directive of the European Parliament and Council 2005/29/EC. The prohibition of application of misleading commercial practices is regulated **in national legal orders of the member states** of the European Union in law against the unfair competition, in special legal regulation regulating (forbidding) unfair commercial practices or in general codes protecting consumers. The subject of this contribution is a more detailed casuistic description of partial actions marked as misleading commercial practices described in so called Black list of unfair commercial practices (Annex to the Directive 2005/29), namely ten from those which are most frequently practiced in practice.

Keywords: misleading commercial practices, consumer protection, Black list of unfair commercial practices, regulation

Topic Groups: Law and business, Marketing and consumer behavior

CONCEPTUAL DETERMINATION OF MISLEADING COMMERCIAL PRACTICES AND THEIR LEGAL REGULATION

Misleading commercial practices try to incur a benefit to a competitor by means of untruth or distorted truth, alternatively by means of misleading forms of tempting the consumers, which he would not probably have obtained without this advertising (or he would not in a such easy way, effectively or quickly). Misleading can incur by **active behavior** (for example by giving false data), but also by **passive behavior** (marked

¹ This contribution arose during the solution of research within the Grant Agency of the Czech Republic „The influence of the law of the European Union on the Czech regulation of unfair competition and unfair business practices“, No. GA14-20147S.

as misleading omission which can incur for example by not giving data which is relevant for the average consumer without regard to intention or negligence of entrepreneur). According to the European Court of Justice (C-281/12) “*commercial practice is misleading if it contains false information or is likely to deceive the average consumer, and in either case causes or is likely to cause a consumer to take a transactional decision that he would not have taken otherwise.*” According to the Supreme Court of the Czech Republic “such data can be considered for misleading which is likely to cause a notion in consumer which does not correspond in a given data with described reality” (comp. 33 Odo 428/2003).

Misleading commercial practices are regulated **at level of the European union** by the Directive of the European Parliament and Council 2005/29/EC from 11th May 2005 on Unfair commercial practices against the consumers at inner market and on change of the Council Directive 84/450/ECC, Directive of the European Parliament and Council 97/7/EC, 98/27/EC and 2002/65/EC and the Regulation of the European Parliament and Council No. 2006/2004 (hereinafter referred as to “Directive 2005/29”). The Directive 2005/29 regulates misleading commercial practices in the Article 6 and 7 (so called the small General clause of unfair commercial practices)² and further in so called Black list of unfair commercial practices (Annex to the Directive). The Directive No. 2005/29 is based on conception of so called full harmonization of the rules concerning unfair commercial practices made against the consumers, the member states of the European Union (hereinafter referred as to “EU”) cannot adopt or apply a stricter regulation concerning unfair business practices than it is stated by this Directive (compare the Article 4 of the Directive), not even with aim to reach a higher level of consumer protection (compare for example the decision of the European Court of Justice in case C-261/07, C-299/07 or C-304/08).

The prohibition of application of misleading commercial practices is regulated **in national legal orders of the member states** of the European Union in law against the unfair competition³, in special legal regulation regulating (forbidding) unfair commercial practices⁴ or in general codes protecting consumers.⁵ In Czech legal environment misleading commercial practices are regulated in Section 5 of the Act No. 634/1992 Coll., on consumer protection as amended (hereinafter referred as to “ZOS”), and in the Annex No. 1 to this Act, legal regulation of unfair competition concerns also the prohibition of misleading within the business action (compare Section 2976 sub-section 1 and Section 2977 and 2979 of the Act No. 89/2012 Coll., Civil code) and so called advertising law (compare for example Section 2 subsection 1 point c) of the Act No. 40/1995 Coll., on regulation of advertisement as amended)⁶.

² According to the Decision of the European Court of Justice (C-435/11) is a rule that „*in case when commercial practice fulfills all criteria stated in the Article 6(1) in order to be qualified as misleading practice against the consumer , it is not necessary to verify whether such practice is also in contradiction with requirements of proper professional care in the meaning of the Article 5(1) letter a) to be duly considered for misleading, and thus for forbidden.*”

³ For example Germany, Austria, Denmark, Spain. See Mišúr, P. The European Commission submitted a review of the Directive on unfair commercial practices. *Obchodněprávní revue*, 2013, No. 5, page 149.

⁴ For example the United Kingdom, Portugal, Romania, Hungary, Poland, Slovenia, Slovakia etc., where special acts on unfair business practices were adopted. See the same.

⁵ For example in Consumer legal code (France, Italy, Bulgaria, Malta) or in Civil code (the Netherlands). See the same.

⁶ Prohibition of misleading is regulated also in sectoral regulations of labelling and advertising for food, food supplements, pharmaceutical human means etc.

The subject of this contribution is a more detailed casuistic description of partial actions marked as misleading commercial practices described in so called Black list of unfair commercial practices (Annex to the Directive 2005/29), namely ten from those which are most frequently practiced in practice (with regard to limited extent of this contribution).

MISLEADING COMMERCIAL PRACTICES ACCORDING TO THE BLACK LIST OF UNFAIR COMMERCIAL PRACTICES

Commercial practices are considered to be misleading whenever if they fall under points 1 up to 23 of the Annex to the Directive 2005/29. Their enumeration is enumerative, even further practices can be considered for misleading, namely such practices which fulfill so called small general clauses regulated in the Article 6 (misleading action) and in the Article 7 (misleading omission) of the Directive 2005/29.

Commercial practices are then always considered for misleading, if entrepreneur makes some (or more) from twenty three actions. For the purpose of this contribution I select the following the most frequent misleading commercial practices:

1. So called Codes of behaviour

“Assertion that businessman signed the Code of behavior, though it is not the case.”

For example situation falls under a given point when entrepreneur asserts that he keeps ethical codes of a given field or own ethical code⁷, though it is not the case and he does not respect relevant decisions (recommendations) of a relevant authority entitled to supervise the observance of such codes (for example the existing Arbitrage Commission of the Council for advertisement or professional chambers in the Czech Republic).

Codes of behaviour which contain obligations on environmental protection and their breaches by a company which obliged itself to follow such a Code, can be also solved according to this stipulation. The example is the situation when businessman obliged himself to follow a binding Code of behavior which supports sustainable use of wood and it publishes its logo of this Code on its web sites. There is an obligation in the Code that parties which decided to follow the Code shall not use hard wood from forests which are not sustainably cultivated. However, it shall be found out that products advertised on this internet web site contain wood from deforested area.⁸

⁷ For example entrepreneurs engaged in advertisement, advocacy, medicine, journalism (these Codes are then binding in a given field for all persons falling within the given field). However, Ethical Code can be accepted by any individual entrepreneur for its employees, then it shall be binding internally.

⁸ From instructions to the regulation of the United Kingdom (May 2008) by which the Directive on unfair commercial practices – consumer protection against the dishonest commercial procedures (Consumer Protection from Unfair Trading). Anti-trust Office of the United Kingdom (*Office of Fair Trading*), department for business companies and regulatory reform (*Department for Business Enterprise and Regulatory Reform*), 2008.

2. So called quality marks and similar markings

“Use of trust mark, quality mark or equal mark without acquisition of necessary permission.”

Cases fall under the enumerated action when entrepreneur for example use a mark “Klasa” (Czech quality), “Ecologically saving product”,⁹ “Safe toys”, mark of conformity “CE”, “without GMO”¹⁰ etc. without existence of real entitlement.

Also the Commission of the EU¹¹ points out to misuse of so called ecological assertions¹² (type marking “ecological”, “biological”, “decomposable”, “sustainable” and “natural”) which emphasizes that given expressions are used vaguely, unseriously and inaccurately in practice.¹³

3. So called bait advertising

“Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).”

The Commission of the EU¹⁴ states an official example to a given point – advertising for cell phone for a very low price in comparison with other offers at the market without the fact that the offering person should have an appropriate supply with regard to demand which can be expected on the basis of advertising.

Lots of practices of commercial chains fall under the mentioned point which try to tempt customers for goods which is not subsequently available or is available under different conditions than they were advertised. The City Court in Prague expressed itself to it (case number 9 Ca 66/2003) which found a given behavior as legally unacceptable (misleading): “

⁹ For example marking „Ecologically saving product“ is characterized by knowledge of 61 % consumers. See http://www.npj.cz/tmce/aktuality%20soubory/vysledky_18-_pruzkumu_ams_p_cr.pdf

¹⁰ Without genetic modification

¹¹ Comp. The First Report of the Commission to the European Parliament, Council and European economic and social Committee on the application of the Directive on unfair commercial practices 2005/29/EC. COM (2013). Available at http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_cs.pdf.

¹² Ecological markings are defined and regulated by the regulation of the Council (EC) No. 834/2007, on ecological production and marking of ecological products and on dissolution of the regulation (ECC) No. 2092/91. This regulation states the list of expressions and abbreviations (as “bio” or “eco” are), which can be used. Entrepreneurs are particularly obliged to submit ecological assertions which are concrete, exact and unambiguous. To support their assertions entrepreneurs must have a scientific proof and they must be prepared to provide its results in an understandable way in case if their assertion is called into question.

¹³ The company Consumer Focus published a study from which it results that 58 % of consumers think that many companies pretend ecological behavior only for reason to be able to charge higher prices. Closer see <http://www.consumerfocus.org.uk/publications/green-expectations-consumers%E2%80%99-understanding-of-green-claims-in-advertising>.

¹⁴ See http://ec.europa.eu/justice/consumer-marketing/unfair-trade/unfair-practices/is-it-fair/pdf/ucp_cs.pdf (quoted on 11th August 2015).

Consumers lured by advertising came to the shops of plaintiff in order to buy the goods, namely to a greater extent than they usually did. And even if none of these consumers would have bought anything else in shops of the plaintiff, which is considered for improbable by the Court, the capacity of the concerned advertising can be seen in taking a benefit to a plaintiff in economic competition to the detriment of the other competitors – sellers in the same field and just in capturing attraction of great amount of consumers to the shops of plaintiff. During the visit of the shop these consumers could undoubtedly get acquainted with offer of the other goods sold by a plaintiff and the name and place of the plaintiff's shop remained in their minds as well. Familiarization of considerable number of possible customers with this data is indisputably a prerequisite for some of them to buy really certain goods just in plaintiff's shops, thus during the first or some other visits. Plaintiff made more visible its business name by the concerned advertising, connection of this name with sale of certain products and the place of its business premises. The plaintiff as business competitor highlighted its position at the market and he was caught in awareness of consumer of advertising in connection with certain products beyond usual attention”.

Further example, which has appeared in the practice, was an advertising practice of the airborne company which organized a special event for its all flights to Barcelona. This campaign was advertised for a period of one month in many magazines and on internet but in reality only a small section of seats was for a reduced price. The majority of the customers who tried to use this offer did not get reservation.¹⁵ The airborne company should have been able to offer a reasonable number of seats and should have taken into account an extent of advertising and/or (at least) to state a number of seats which are at disposal for action price.

For example practice of some internet servers falls in this field which offer a certain price for a hotel room for a person and night, consumer orders this room and when he confirms the order, the price is increased without a special notification to the consumer (to an enquiry of an active and bright consumer it is stated by the entrepreneur that a given room was not at disposal anymore and this is the suite with increased price). Similarly there is a practice of travel agencies – confirmation of a room in the selected hotel and after arrival to a given destination at the airport a subsequent assertion that capacity of the hotel was exceeded and a room in other hotel shall be offered to the consumer (which have not to fulfill former images of the consumer).

4. So called to bait and switch

“Making an invitation to purchase products at a specified price and then refusing to take orders for it or deliver it within a reasonable time or demonstrating a defective sample of it, with intention of promoting a different product (type of advertising - bait and switch).”

Cases in the practice are concerned when entrepreneur advertises a certain product for a very advantageous price within the advertising and when the consumers enters the shop and is interested in purchase, trader refuses to accept the order, alternatively he refuses to show a given product to a consumer or he intentionally shows him a defected product for which he offered other product (typically more expensive) to the consumer.

¹⁵ Closer details to it see <http://www.malepenize.cz/2011/03/07je-to-poctive-nekale-obchodni-praktiky.html>

Situation can appear when consumer on the basis of advertising campaign looks for a certain trader to order the concrete goods, for example very high-efficiency vacuum cleaner for household. He is told in the shop that supplies are sold out in all branches and no other pieces shall be at disposal in future either, nevertheless he offers him industrial vacuum cleaners as substitution, which do not fulfill weight and size parameters of the promised vacuum cleaner and are not so designed, nevertheless their output is the same.

5. So called limited offers: special offer only today!

“Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.”

Cases when the entrepreneur creates a pressure caused by falsely stating that an extremely advantageous time-limited offer is concerned (for example “only the last piece of the goods remains” or “special offer ends today”), where such discount shall not be repeated. In fact such a special offer shall be prolonged and it is so called all year-round tactics of the trader.

The Czech Business Inspection¹⁶ sanctioned the company which used the following practice within the television advertising: “Attention, sensation now, if you call and order immediately.”

6. So called hidden advertising

“Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer. (Paid advertising in the form of the newspaper articles, advertorial).”

The typical case of so called hidden advertising is concerned or advertising which does not behave as an advertising against the consumer. Various forms of articles on update problems are concerned where the most suitable products for their solution – diseases, gardening etc. are mentioned, which are not marked as advertising, even if it is in reality and it is provided against the payment.¹⁷

¹⁶ More see <http://www.coi.cz/userdata/files/prilohy-ke-106/15-03-17-ri-brno.pdf>

¹⁷ According to the decision of the Czech Highest Administrative Tribunal case No. 7 As 24/2010 an advertising is hidden: „if an operator of television broadcasting disseminates a certain notification with awareness that it has an advertising character“. According to the same decision „if a top sportsman performs in a television broadcasting in a dress characterized for sport which he does, or for life style which is generally connected with a given sport, the hidden advertising is not usually concerned, even if certain elements of this dress are bearers of advertising notification. Hidden advertising could be concerned if sportsman takes such a dress with aim to address a hidden advertising message to spectators by means of television broadcasting, though he does not wear such a dress during the sports actions or opportunities connected with this kind of sport or this life style.“ According to the decision of the Highest Administrative Tribunal 6 As 47/2009 a hidden advertising has three features:

1. presentation in programme which does not have a character of advertising, it follows an advertising goal
2. presentation intentionally follows an advertising goal
3. presentation is capable to mislead the public as for its character

The Commission of the EU states the official example:¹⁸ an article in travel magazine on travelling in Norway containing a description of it how a certain kind of camping equipment excellently suits for this trip, due to which the producer of camping equipment financially contributed to the article, if readers are not informed about it.

7. So called pyramid schemes

“Establishing, operating and promoting a pyramid scheme where a consumer gives consideration for the opportunity to receive compensation that is derived from the introduction of other consumers into the scheme rather than from the sale or consumption of products.”

Pyramid scheme is “a business model in which its participants pay entry fee for the opportunity to become members of this business model. Members of the pyramid scheme reach a profit in such a way that they actively get further members of this business model – they are entitled to receive reward for every new acquired member.¹⁹

The Commission of the EU²⁰ states the following example falling under the stated point: persons who want to be involved as distributors, must pay entry fee which is disproportionate to the value of costs for the received instructional material (for example information on products) or to administrative costs for the involvement into the net and if the main source of reward is reached by recruitment of other persons into the net.

The European Court of Justice was engaged with this issue in case C-515/12 from 3rd April 2014: “pyramid scheme presents unfair business practice under all circumstances only then, if such scheme requires from consumer to pay any sum for the possibility to receive reward which is particularly dependent on acquisition of new consumers into the scheme and not on sale or consumption of products”.

8. So called falsely claiming on healing power

“Falsely claiming that a product is able to cure illness, dysfunction or malformations.”

Frequent assertions of traders of usual food and food supplements on their influence on healing of illness are concerned (for example cancer, allergy), though these effects have never been proven.²¹

¹⁸ See http://ec.europa.eu/justice/consumer-marketing/unfair-trade/unfair-practices/is-it-fair/pdf/ucp_cs.pdf

¹⁹ Švásta, P. in Pyramid scheme and Ponzi schemes in Czech law. See <http://www.epravo.cz/top/clanky/pyramidove-programy-a-ponziho-schemata-v-ceskem-pravu-86517.html>. The Supreme Court was engaged in criminal-law level of such practice in case 6 Tdo 1280/2007.

²⁰ Viz http://ec.europa.eu/justice/consumer-marketing/unfair-trade/unfair-practices/is-it-fair/pdf/ucp_cs.pdf (quoted on 11th August 2015)

²¹ Even if they had been proven, such assertions (for example „product XY cures the flu and cold; you are without symptoms within two days!“ are unacceptable according to the European and Czech legal regulation. In *European legal environment* for example the Directive of the European Parliament and Council 2000/13/EC from 20th March 2000 on the approximation of the laws of the member states concerning the marking of the foods, their business regulation and connected advertising or the Regulation of the European Parliament or the Council (EC) No. 1924/2006 from 20th December 2006 on nutritive and health Assertions within the marking of the foods prohibit assertions on approximation of food supplements (foods) to medicines. In *Czech legal environment* it is for example the Act on advertising regulation – compare Section 54 subsection 2 letter d). See rich decision practice of the

There were picked up offers of various goods in Czech Republic which can cure various disorders and illnesses (ordinarily at medicinal level incurable) – magnetic bracelet on hand (helping against the muscle and joint pains), child flax pants (which should help to mitigate muscle pains, to influence favourably cardiovascular system etc.), clothes (helping to cure eczema), healing mugs²² etc.

The stated point shall not be fulfilled (and unfair commercial practice shall not be concerned), if trader proves that a given product can really cure illness (it concerns human curative products, not supplements of nutrition or food).²³

9. So called falsely creating of impression of gratis offers

“Describing a product as “gratis”, “free”, “without charge” or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item. ”

It results from the above stated that trader is not entitled to add costs for package, handling or administration to the price of the product.²⁴

For example practices like these fall under the given point: “cosmetic bag to the magazine as a gratis gift” and supplemented by small script in other part “for only 120,- CZK” or assertion “sunglasses for free to the purchase”, where these ones are provided only in case when the customer orders summer accessories over 4.000,- CZK. Or various offers for free when the consumer must call not standard chargeable phone number.²⁵

It was found out by the Czech Business Inspection²⁶ during the demonstration selling campaigns that seven consumers (participants of the campaign) should receive a gratis set of products (memory pillow, induction cooker or convection oven and 2 bedlinen sets – blankets and pillows), however a purchase of one set was a condition to receive these gifts, i.e. blankets and pillows in price of 9.900,- CZK.

Highest Administrative Tribunal – to the forbidden assertions within the supplements of the food - compare for example 7 As 49/2007, 7 As 48/2008. From the decision practice of the European Court of Justice see C-544/10 or C-195/14.

²² The Czech Business Inspection sanctioned their sale. See <http://www.coi.cz/userdata/files/dokumenty-ke-stazeni/vyrocní-zpráva-o-cinnosti/2009-vyr-zprava-cinnost.pdf>, page. 34

²³ Closer to it The First Report of the Commission to the European Parliament, Council and European Economic and Social Committee on application of the Directive on unfair commercial practices 2005/29/EC. COM (2013). Available at http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_cs.pdf.

²⁴ Compare The Commission of the EU : Instructions for implementation/application of the Directive 2005/29/EC on unfair business practices. Available at http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_cs.pdf

²⁵ According to the European Court of Justice it is „*indecisive that costs imposed on the consumer as price of postage stamp, are insignificant against the value of price or no profit results from them to a trader.*” See C-428/11.

²⁶ See page 2 the Report of the Czech Business Inspection „Unfair Commercial Practices at demonstration campaigns are winning“. Available at <http://coi.cz>.

10. So called not ordered products

“Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product, though he has not.”

Practices marked as so called catalogue frauds. According to the official statement of the European Parliament this practice consists in the fact that “company issuing catalogue of economic entities contacts enterprises, mostly by post and ask them to fill in or update its business name and its contact data, at the same time it arouses their false impression that they will be stated in the catalogue for free; with regard to the fact that these enterprises will later find out that in reality - without intention to do it – they signed the contract which usually binds them to it that they shall be stated in the catalogue of economic entities at least for free years for annual fee approximately amounting to 1.000 EUR”²⁷ The European Parliament further emphasized that these misleading commercial practices are particularly aimed at small enterprises, even professional and non-profit entities are contacted, for example non-governmental organizations, charitable organizations, schools and libraries and local social, for example associations of interest (compare point I of the same resolution) are contacted.

CONCLUSION

Misleading commercial practices mean distinctive danger for proper commercial choice of the consumer, because they can force the consumer to make such an economic decision which he would have never done if there was no misleading practice.

The Directive 2005/29/EC (just as the Act on Consumer Protection) prohibits misleading commercial practices within the small general clause of misleading commercial practices (Article 6 and 7), as well as in enumerative enumeration of misleading commercial practices contained in so called Black list of unfair commercial practices (point 1 up to 23).

Nowadays there is decision practice of the European Court of Justice to several points of misleading commercial practices according to the Black list of the Directive 2005/29, factually in relation to so called pyramid schemes (C-515/12) or competition without acquiring prize (C-428/11). The European Court of Justice expresses itself to general questions of unfair commercial practices in its judicature (to its application – compare for example C-391/12, C-59/12 or C-559/11), to application of the general clause of unfair commercial practices (compare for example C-435/11) and unacceptable extension of enumeration of always unacceptable unfair commercial practices according to so called Black list (compare for example C-206/11, C-522/08, C-343/12 etc.).

Qualitative interpretation by courts of single member states of the EU shall be essential until constant decision practice of the European Court of Justice for single points of the Black list of the Directive 2005/29 is created.

²⁷ Compare point D of the resolution of the European Parliament from 16th December 2008 on unfair catalogue companies (C 45 E/17)

In order to get a sufficiently effective system for elimination of misleading commercial practice it is necessary to have a sufficiently working system for imposing and enforcing of sanctions for such behavior.²⁸

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²⁸ For example Czech National Bank imposed fine amounting to six millions CZK for procurement of unsuitable Products in the field of insurance industry, non-informing of clients on fee structure, no consideration taken during the analysis of requirements and needs of clients. More at www.cnb.cz. The Czech National Bank imposed the fine amounting to five millions CZK for behavior of the real estate agency that it repeatedly made its clients sure that brokerage contract is not exclusive, though it was and the breach of exclusivity was sanctioned with 6 % from price of real estate, at least with 19,500 CZK. More at www.coi.cz. Only such amount of fines and regular controls can discourage entrepreneurs from doing it.

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