

Study on Enforcement of Authorities' Powers and National Procedural Rules in the Application of Regulation 2006/2004/EC on Consumer Protection Cooperation

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EXECUTIVE SUMMARY

Regulation 2006/2004/EC¹ (hereinafter "the CPC Regulation") provides the competent national authorities for consumer protection with an instrument to effectively tackle intra-Community infringements through a mutual assistance mechanism.

The volume of cross-borders transactions in the Single Market has increased together with the possibility of cross-border infringements where the trader is located in a jurisdiction different from the consumers. Consumer confidence in cross-border shopping depends, in large part, on effective cross-border enforcement.

Each Member State developed an enforcement system adapted to its own laws and institutions to tackle purely domestic infringements. Effective cross-border enforcement however requires the adaption of national systems. The CPC Regulation was among others introduced to ensure that there is no discrimination between national and intra-Community transactions. The CPC Regulation provides for cooperation between enforcement authorities dealing with intra-Community infringements and thereby contributes to improving the quality and consistency of consumer protection laws' enforcement and to monitoring the Single Market performance².

To achieve these objectives, the CPC Regulation established a network of public enforcement authorities throughout the EU, vested with minimum common investigation and enforcement powers to prevent and deter sellers or suppliers from committing intra-Community infringements.

The Scope of the Study

The objective of this Study is to analyse complex legal issues arising in the application of the CPC Regulation and to examine in particular how the Member States have implemented the minimum enforcement and investigative powers of the national authorities competent for the enforcement of consumer protection laws. It also examines the national procedural rules applicable to the proceedings initiated and/or managed by these authorities in a domestic and in the cross-border context.

The Study comprises two themes:

Theme 1 includes a comprehensive and accurate overview of national legislations, which constitute the basis of mandated powers under CPC Regulation in ten selected Member States. These powers refer to investigations and enforcement measures necessary to remove intra-Community infringements of consumer protection rules laid down in one of the EU legislative acts taken into consideration under Theme 1. The Member States selected are: Belgium; the Czech Republic; France; Germany; Italy; Latvia; Poland; Spain; Slovakia; and the United Kingdom.

The theme covers only a selected number of legislative acts covered by the CPC Regulation. On the basis of the Task Specifications and of the work plan proposed to the contracting authority, the European Directives selected under this theme are:

- Directive 2005/29/EC on unfair commercial practices;
- Directive 2000/31/EC on electronic commerce:
- Directive 97/7/EC on distance contracts;

¹ Regulation (EC) No 2006/2004 of the European Parliament and of the council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ L 364, 9.12.2004.

² Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws ("the regulation on consumer protection cooperation"), 2003/0162 (COD).

Directive 2006/114/EC on comparative and misleading advertising only with reference to the provisions listed in the Annex to CPC Regulation (i.e. provisions applicable to comparative advertising, which are also relevant in business to consumer relations); Article 1, Article 2(c), and Articles 4 to 8.

These legal instruments are the most frequently used instruments in the CPC Regulation context.

Theme 2 requires identifying and mapping out domestic procedural rules that may apply in proceedings initiated on the basis of the CPC mutual assistance mechanism. Differences between these national procedural rules may cause problems for the mutual mechanisms of the CPC Regulation, either because of the discrepancies between the rules as such or because of the way in which they are applied in a given national jurisdiction. In the study, appropriate sector specificities must be taken into account.

This theme covers the analysis of procedural rules in seven selected Member States, a representative sample of different national public enforcement systems: Belgium, the Czech Republic, France, Germany, Italy, Latvia, the United Kingdom and it covers five European Directives:

- Directive 2005/29/EC on unfair commercial practices:
- Directive 2000/31/EC on electronic commerce;
- Directive 97/7/EC on distance contracts;
- Directive 90/314/EEC on travel, package holidays and package tours:
- Directive 2002/65/EC on distance marketing of financial services.

Theme 1: State of play of minimum powers of competent enforcement authorities

Article 4(6) of the CPC Regulation establishes certain minimum investigative and enforcement powers of the competent authorities in relation to their obligations under the CPC Regulation.

The examined Member States introduced these powers following the entry into force of the CPC Regulation or extended the existing national enforcement powers in consumer protection to intra-Community infringements. Moreover, among the examined Member States, recent Belgian and French reforms have made new powers available to the competent national authorities.

All the examined Member States provides powers to require and obtain information from the trader, the possibility to carry out inspections, to require the removal of the infringement and/or adopt an order to cease the unfair commercial practice and impose fines for non-compliance with the order.

In general, the fact that there are no differences between domestic enforcement powers and those applied to intra-Community infringements has emerged. The only exception is Germany, where the enforcement powers provided by the CPC Regulation have been introduced for the competent national administrative authority, BVL, while domestic infringements are dealt with by consumer associations within the context of private enforcement.

Some loopholes have emerged concerning requests to suspend infringements and the undertakings. Some of the examined Member States, like Italy, interpreted the provision as *moral suasion*³ or informal contacts with the infringer.

³ The Italian Competition Authority has "codified" the definition of moral suasion in Article 27(2) of the Regulation as implementation of Article 4(6)(d) and an instrument to reduce the need for a formal procedure and reduce the administrative costs. The moral suasion related to the notion of better regulation "which involves a predisposition to apply, informal, low intervention control styles rather than old —fashioned command methods". For the completeness of the discussion, reference must be made to the fact that, according to some academics, informal as well as formal negotiations, bargaining discussions between the regulator and the regulated "may antagonise several constitutional values, including transparency, accountability, process and participation as well as several values associated with formal conceptions of the rule of law". K. Yeung, Better Regulation, Administrative Sanctions and constitutional values, Legal Studies (2013).

With regard to undertakings, competent national authorities in the Czech Republic and Slovakia are not allowed to accept or propose undertakings, while Belgium and France gives to the authorities, beside the undertakings, an additional instrument to settle the infringement against payment of an administrative fine.

We consider that the European Commission and the Member States should promote the use of administrative settlements and undertakings, which should go beyond *moral suasion*. Undertakings and settlements, in general, restore consumer protection fast, promote voluntary compliance and reduce the enforcement and litigation costs. A uniform approach to such proceedings in the CPC context would be highly advisable r to specifically prevent forum shopping. We, therefore, recommend that guidance with undertakings and settlements be developed in the CPC context, allowing the Member States to implement this provision of the CPC Regulation more effectively and efficiently.

Different approaches have emerged also with respect to administrative fines. Most Member States provide the possibility, for the competent national authority, to impose administrative fines, both as penalties for the infringement, as well as for non-compliance with the cease and desist order. In the United Kingdom, only the courts may impose sanctions for non-compliance with enforcement orders in separate proceedings.

Though, in principle, this approach reflects national constitutional division of powers, where the role of formally determining whether a violation of the law has occurred lies with the courts and the role of the administrative officials in law enforcement is, in general, confined to investigating and collating evidence concerning suspected legal violations and, where appropriate, instituting legal proceedings against the suspected violation for judicial determination and the imposition of a sanctions. There is much debate on the effectiveness of the enforcement by an independent public authority, and the possibility to impose sanctions is one of the elements that characterises an independent enforcement and supervision authority. Recent national legislative reforms, such as in Belgium and France, have taken the route of giving to the competent national authority the possibility to impose administrative fines without applying to the court, having considered it as a more effective way to enforce the adopted decision.

Given great variations among Member States as regards administrative sanctions, which may lead to forum shopping and inefficiencies in consumer protection law enforcement, we recommend that the Commission and Member States consider a uniform approach to administrative sanctions, including possibly a clarification of Article 4(6)(g) of the CPC Regulation.

1. National Public Enforcement Models

In terms of procedural enforcement models, public enforcement may take place within the framework of criminal and/or administrative regulations with different institutional implications: the former is administered primarily by courts; the latter primarily managed by government agencies and entities with a varying degree of involvement of private actors. Competent consumer authorities may also resort to civil law actions.

Regarding the sample analysed, in some cases the competent national authority is also the body in charge of competition rules and enforces consumer protection legislation under a set of procedural rules that differ from competition rules.

The advantage is that these authorities have broad experience in carrying out inspections and detecting infringements and act within a procedural (administrative law) framework that they control from start to end.

In some Member States and for some areas, procedural rules regulating the intervention of consumer enforcement authorities are more akin to those applied in criminal proceedings while, in others, they are strict administrative proceedings or action may be sought in civil proceedings. The nature of the proceedings determines the authority's investigative powers, the type of admissible evidence as well as the standard of proof (weight of evidence needed to prove the case), procedural safeguards and the rights of the (possible) infringer, timeliness/legal deadlines and statute of limitations, and the powers for execution and enforcement of the decisions.

The national reports also consider consumer redress mechanisms/entities, which act as private enforcement alongside public enforcement, to the extent that they are relevant to shed light on procedural law having a bearing on public enforcement in the CPC framework.

The national procedural rules were analysed based on the following three sub-categories: cease-and-desist orders, "self-managed" administrative proceedings, criminal law actions and "other" civil law actions.

➤ Theme 2: Procedural rules and their impact on the CPC mechanism

1. National Procedural Rules

Three different procedural systems are recognized in the national procedural rules applicable within the public enforcement context in the examined Member States:

- Administrative proceedings: the competent national authority starts and conducts the investigation, declares in a decision that an infringement was committed and imposes sanctions;
- *Civil proceedings:* the competent national authority starts and conducts the investigation; based on the investigation, it requests a civil court to issue an injunction or a cease and desist order.
- Criminal proceedings: the competent national authority starts and conducts the investigation and, where the infringement constitutes a strict liability offence, or it is particularly serious or where the trader refuses to comply with a court decision, it refers the case to the prosecutor/investigating judge for action under criminal law. Criminal sanctions may include imprisonment, ban of activities for a specified period of time or financial sanctions.

In these three different kinds of proceedings, we identified some common procedural elements that could also constitute hurdles to the CPC Regulation's smooth performance. Moreover, we examined in depth the different procedural rules applicable to cease and desist orders, which is the main tool to obtain the cessation of the infringement, both at domestic and intra-Community levels.

Cease and desist orders are modelled on injunction orders from the Injunction Directive, and are usually obtained in civil court proceedings except in the Czech Republic, Italy, and Latvia, where they are issued in administrative proceedings. In the latter case, cease and desist orders are issued by the authority in the form of an order to cease or remove the unfair act or omission. France allows both: the competent national authority may either issue an administrative order or refer the case to a civil court to obtain a judicial cease and desist order.

Among the examined Member States, Germany and the United Kingdom implement the possibility provided by Article 8(3) of the CPC Regulation and has instructed third parties to obtain the cessation of the infringement.

In general, cease and desist orders may be used against all violations of consumer's protection legislation, including criminal offences.

Administrative proceedings are characterised by extensive autonomy of the competent national authority, whose work may be challenged before the Administrative Court in a judiciary review. Some safeguards are provided for the defendant, in particular

- Right of defence during the procedure;
- Access to the case file during the procedure;
- Protection of business secrets and confidential information;
- Legal and professional privilege protection.

In Belgium, France and the United Kingdom, criminal proceedings are used to sanction violations of consumer legislation. In these Member States, fair commercial practices are traditionally enforced through criminal sanctions.

Criminal offences under consumer protection legislation are "strict liability offences" which do not require proof of *mens rea* for one or more aspects of the offence. The primary sanction is a fine rather than imprisonment.

Civil and criminal procedural rules are characterised by rigorous procedural safeguards laid down in legislation and a higher burden/standard of proof that may render discovering an infringement difficult.

2. Application of National Procedural Rules in cross-border (intra-Community) cases

National procedural rules applied to cross-border infringements may result in procedural hurdles, which hamper the smooth performance of cross-border cooperation. In fact, under the CPC Regulation, the competent national authority where the affected consumers are located may ask for assistance from the competent national authority where the trader or supplier resides, where the act or omission took place, or where evidence was found and vice versa. Each authority will apply its national procedural rules to the cooperation.

As preliminary issues, we must point out that difficulties with cooperation arise from inconsistent interpretation of the provisions of the CPC Regulation.

The main issues arising from the application of national procedural rules to cross-border cases are:

- Allocation of competence among competent national authorities;
- Burden/standard of proof;
- Linguistic barriers;
- Statute of limitations, where present;
- Exchange of information;
- Applicable law;
- Unilateral and extraterritorial action of competent national authorities.

Allocation of competence among competent national authorities

Allocation of competence under the CPC Regulation refers to the identification of the competent national authority/authorities. Since the CPC Regulation provides for mutual cooperation without clarifying which competent national authority should take the lead in tackling an intra-Community infringement, we elaborated some options using examples taken from the Commission Notice on Network of Competition Authorities⁴. In general, we believe that the competent national authority of the place where the infringer resides is usually more successful to obtain infringement cessation. In some cases, if the place where the trader resides differs from the place where the act or omission took place or where evidence exists, a coordinated action of various authorities is needed.

Burden/Standard of Proof

One of the most discussed issues is the standard of proof required to trigger the procedure in the requested Member State. Under the CPC Regulation, sufficient information must be provided. However, the definition is not unanimously recognised as different enforcement proceedings (administrative, civil and criminal), which carry different burdens and standards of proof, are used. When civil and criminal proceedings are used as enforcement, the burden/standard of proof is particularly high and may be difficult to meet due to the fact that most infringement proceedings are initiated with consumer complaints, and especially evidence may not be available when infringements are committed through electronic means.

In our opinion, inconsistencies on the standard of proof may be overcome by consulting the extensive jurisprudence of EU Courts, which have clarified that the authority needs to only gather sufficiently complete information to enable it to meet the relevant standard of proof. Moreover, some Member States have directed the burden of proof to the competent national authorities. The results of their investigations are considered legitimate until the contrary is proven (rebuttable presumption of correctness). A similar rule (rebuttable presumption of correctness of the applicant authority's investigation results), introduced at the EU level, may help to overcome the procedural hurdles linked to the burden/standard of proof.

Linguistic Barriers

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⁴ Refer to Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27 April 2004.

Linguistic barriers appear to be an obstacle especially where cease and desist orders are issued in civil proceedings and the civil court asks for translations of the documents concerned. This is burdensome and costly for the involved authorities. We suggest that clear rules be introduced to manage translations of documents linked to CPC mutual assistance requests. Some clarifications may be found in the European and international rules on the taking of evidence abroad, which include indications on the taking of evidence for judicial proceedings and on the allocation of the translation costs when the translations of evidence are necessary.

Statute of Limitations

The statute of limitations may prevent actions, especially where civil proceedings are required. There is a divergence in the length and effects of the statute of limitations with the Member States examined. This may cause difficulties for the CPC mutual assistance mechanism. The CPC Regulation should contain rules coordinating this aspect of the proceedings. For example, it might require that a mutual assistance request interrupt such a limitation in the Member States concerned. If the limitation expires and no further action is possible in the requested Member State, the Commission should be informed and alternative tools and measures (such as an extraterritorial action from the requesting Member State) should be available. Also, the Commission should consider whether it would be useful to set in the CPC Regulation a minimum length for the statute of limitations (i.e. a period during which all authorities should be able to pursue the infringement).

Exchange of Information

Access to files constitutes one of the relevant procedural issues, especially where an authority is requested to investigate on behalf of another authority to obtain evidence. Access to files may be twofold: access granted to the parties of the investigation (such as the case of Italy's AGCM's Regulation A which disciplines access to files by parties involved in the investigation) and the exchange of information between authorities within the CPC Regulation.

A key element of the CPC Regulation's performance is the power of the competent authorities to exchange and use information (including documents, statements and digital information) obtained through complaints or investigations. Rules on exchange of documents among competent national authorities already exist in the CPC Regulation. Some clarification may be needed concerning the need to give special protection to certain information that may lead to criminal sanctions.

Applicable Law

From the information collected from the survey and in analysing the national decisions, issues related to the applicable law have arisen. *Strictu sensu*, the question of applicable law (both jurisdiction and substantive law) is prominent in court proceedings. However, we have noticed some inconsistencies also with administrative decisions, while some authorities assess intra-Community infringements against their national law that implemented the EU Directives, others refer to the legislation of the requesting Member State or, in a neutral way, to the CPC Regulation and EU Directives.

The European Court of Justice has treated the issue of applicable law. The Court has repeatedly clarified that "in applying national law, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the Unfair Commercial Practices Directive, in order to achieve the result pursued by that directive and thereby comply with the third paragraph of Article 288 TFEU"⁵.

The Court assessment should be valid also for the national public authorities. When required to take an action against a trader who resides in its territory, for unfair commercial practice that affects consumers in another Member State or in various Member States, the authority should assess conduct in a way that pursues the purpose of the directives and will provide protection to consumers abroad.

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⁵ Case C-106/89 Marleasing [1990] ECR I-4135, § 8; Joined Cases C-397/01 to C-403/01 Pfeiffer and Others [2004] ECR I-8835, § 113; and Case C-69/10 Samba Diouf [2011] ECR I-0000, § 60.

This would help remove confusion regarding the applicable law. The authority should adopt a decision following its national procedural rules (e.g. statute of limitations, procedural safeguards), but the assessment of the trader's practices should be as close as possible to the European court's interpretation of the relevant Directives and practices.

Unilateral and Extraterritorial Action of Competent National Authorities

The performance of the CPC Regulation may be hampered by the adoption, by a national authority, of a unilateral decision against a trader resident abroad to protect its national consumers. This may be the consequence of the requested authority's refusal to tackle the infringements or the authority's direct decision not to rely on the CPC Regulation or on the Injunction Directive.

The CPC Regulation does not deal with consequences of the refusal under Article 15 of the CPC Regulation nor does it to impose that, if the requested authority does not agree with the applicant authority, the former should for instance proceed according to the Injunction Directive or with any other tools. Moreover, the list of grounds for refusal of mutual assistance does not seem to adequately cover the range of situations which authorities could legitimately invoke and may lead to different interpretations by the competent national authorities.

As a result of the lack of guidelines, it seems that some Member States have taken the matter into "their own hands" and resorted to a sort of "extraterritorial enforcement".

Direct enforcement by an authority against a trader abroad, while admissible, should be discussed within the network of authorities in order to prevent minimizing the conflict between competent national authorities.

Moreover, the enforcement of an unilateral decision from the competent national authority, both administrative and judicial, will not be possible outside the national territory, as clarified by the European Court of Justice, which may render the proceedings useless in case the trader, against whom an order is issued, is resident abroad.

3. Recommendations and Conclusions

From the results of the Study, we have drawn the following conclusions and recommendations.

The Scope of the CPC Regulation

The first issue, which is beyond the two themes, is the scope of the CPC Regulation. As a matter of fact, the CPC Regulation constitutes, at present, one of the possible instruments available to the competent national authorities for tackling intra-Community infringements.

In order to enhance the consumer protection at the European level, increasing the integration of the Single Market, the CPC Regulation should become the primary instrument to tackle intra-Community infringements. Direct or unilateral actions by a competent national authority should become the exception to the CPC Regulation. This would grant consumers the same level of protection in all the Member States, knowing that another competent authority in another Member State will protect their interests in the same way that their domestic authority would. We believe that this would increase the confidence of the consumers towards a single retail market.

Theme 1: State of play of minimum powers of competent enforcement authorities

Some difficulties in the proper performance of the CPC Regulation arise from the fact that competent national authorities are organized in various ways and operate under different legal systems. The examination of the minimum enforcement powers in the ten selected Member States has detected few loopholes, mainly in the field of undertakings. Minimum enforcement powers have been implemented or they already existed in Member States. The competent national authorities are provided with different types of enforcement powers and tools, based on the jurisdiction's legal system. Belgium, France and Italy have reviewed their national legislation during the preparation of the Study and they have increased the

enforcement powers of the competent national authorities. The United Kingdom has undergone extensive reform of the competent national authority.

We envisage more convergence in the application of these powers, mainly through interpretative notices from the European Commission.

• Theme 2: Procedural Rules and their impact on the CPC mechanism

Under Theme 2, more shortcomings were identified in the application of domestic procedural rules for cross-border infringements. The Study emphasised that, with the exception of the German system, there are no different rules for domestic and intra-Community enforcement, and the national rules are applied to cross-border enforcement. Clearly, different national rules have an impact on the effectiveness of the enforcement in case of intra-Community infringements, creating hurdles and gaps where unfair commercial practices may remain unpunished. While some problems may be tackled only with modifications of the CPC Regulation, others may be overcome with the use of soft laws (see the above-mentioned issues in §2 under theme 2).

As a final remark and possible initiative, we envisage a stronger cooperation between competent national authorities and the European Commission, possibly through the strengthening of the CPC Network on the model of the European Competition network, in order to enhance the links between all involved authorities with the aim of effectively and efficiently applying the CPC Regulation in their respective jurisdiction. As a possible initiative, we suggest considering a supervisory cooperation on the model of the Baltic committee among competent national authorities, with the purpose of sharing information and common practices and promoting the supervision of the market to prevent possible market shortcomings.

INTRODUCTION

1.1 SCOPE OF THE STUDY

The objective of this Study is to analyse complex legal issues arising in the application of CPC Regulation Cooperation and to specifically examine how Member States have implemented the minimum enforcement and investigative powers of the national authorities competent for the enforcement of consumer protection laws and the national procedural rules applicable to the proceedings initiated and/or managed by these authorities in a domestic and cross-border context (i.e. when dealing with intra-Community infringements as defined by the CPC Regulation).

The objective of CPC Regulation is to lay down the conditions under which competent authorities in the Member States designated with the responsibility for enforcing the laws protecting consumers' interests have to cooperate with each other and with the Commission to ensure compliance with those laws and the smooth performance of the internal markets, as well as to enhance the protection of consumers' economic interests.

The Study comprises two themes:

Theme 1 includes a comprehensive and accurate overview of national legislations that constitute the basis of mandated powers under CPC Regulation in 10 selected Member States. These powers refer to investigations and enforcement measures necessary to remove intra-Community infringements of consumer protection rules laid down in one of the EU legislative acts taken into consideration under Theme 1. The Member States selected are: Belgium, Czech Republic, France, Germany, Italy, Latvia, Poland, Spain, Slovakia, and the United Kingdom.

The theme covers only a selected number of legislative acts covered by the CPC Regulation. On the basis of the Task Specifications and of the Work plan proposed to the contracting authority, the European Directives selected under this theme are:

- Directive 2005/29/EC on unfair commercial practices;
- Directive 2000/31/EC on electronic commerce;
- Directive 97/7/EC on distance contracts;
- Directive 2006/114/EC on comparative and misleading advertising only with reference to the provisions listed in the Annex to CPC Regulation (i.e. provisions applicable on comparative advertising, which are also relevant in business to consumer relations); Article 1, Article 2(c), and Articles 4 to 8.
- Theme 2 requires identifying and mapping out domestic procedural rules that may apply in proceedings initiated on the basis of CPC referrals. Differences between these national procedural rules may in fact be problematic on the operation of the mutual mechanisms of CPC Regulation, either because of the rules as such or the way they are applied in a national jurisdiction. In the Study, appropriate sector specificities must be taken into account.

This theme provides for analysing the procedural rules in seven selected Member States as a representative sample of different national public enforcement systems: Belgium, Czech Republic, France, Germany, Italy, Latvia, and the United Kingdom covering five European Directives:

- Directive 2005/29/EC on unfair commercial practices;
- Directive 2000/31/EC on electronic commerce:
- Directive 97/7/EC on distance contracts:
- Directive 90/314/EEC on travel, package holidays and package tours;
- Directive 2002/65/EC on distance marketing of financial services.

1.2 METHODOLOGY

Introduction

Task Specifications require, for Deliverable 1 under Theme 1, identifying the enforcement powers available to the competent national authorities on the basis of their legislations and regulations and comparing these with the enforcement powers provided by Article 4(6) of CPC Regulation.

For Deliverable 2 under Theme 1, Task Specification required analysing the shortcomings found when looking for a valid justification based on how the national system is set up providing the details of the national situation in question.

In addition, the Task Specifications require analysing the national procedural rules applicable in seven selected Member States for enforcing consumers' rights. In order to cover Deliverable 3, seven national reports and a comparative grid were prepared according the description below.

For Deliverable 4, Task Specifications require comparing the rule applied in cross-border context to those applied in domestic context. Concerning Deliverable 4, a separate chapter was prepared comparing the application of the domestic procedural rules to the cross-border application.

For seven Member States considered as case studies, two levels of application of the procedural rules are analysed:

- National procedural rules applicable to domestic infringements;
- National procedural rules applicable to cross-border infringements.

Deliverable 5 under Theme 2 requires analysing the impact of the CPC mechanism in the selected case-studies, identifying the types of difficulties arising from applying national procedural rules to cases received though the CPC system, describing the nature of the problems identified, analysing how the legal requirements or practices of the Member State examined contribute to them, identifying their scale, and identifying who is affected and how the problem in question may develop. Moreover, the Task Specifications require analysing if the difficulties are caused by legal prescriptions discriminating between domestic or non-domestic enforcement or to national procedural rules or practices. Finally, Deliverable 5 requires providing an assessment of whether a minimum coordination of certain procedural aspects at the EU level is advisable for the purpose of encouraging a smoother performance of mutual assistance mechanisms under the CPC regulation.

Forms of Enforcement

The Study focuses on national enforcement powers and procedural rules in the application of CPC Regulation. The intervention of the competent national authorities is considered *public enforcement* as opposed to *private enforcement*, i.e. a legal action brought by one private party against another party before a national court⁶ or before alternative dispute resolution bodies, in other words as opposed to enforcement dealing with consumers' individual interests (even though claims may be brought through grouped actions, such as in the case of collective redress actions).

Some authors consider that this division is obsolete due to the fact that the European conventional distinction between public and private enforcement "while rooted in long lasting tradition, does not capture the current state of affairs since judicial enforcement is sought by both the public and private claimants and administrative enforcement is strongly affected, de jure or de facto, by the role of private organisations". Accordingly, they only make the distinction between administrative and judicial enforcement⁷.

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⁶ Green Paper, Damages actions for breach of EC antitrust rules, COM (2005) 672final, p. 3.

⁷ F. CAFAGGI, H.W MICKLITZ, New frontiers on consumer protection – The Interplay between private and public enforcement, Intersentia 2009, p.1 and p.407.

However, since the Study focuses on the cooperation between competent national authorities as defined by Article 3(c) of the CPC Regulation, the distinction between public and private enforcement is relevant in that the subject matter relates to the intervention of the competent national authorities to remove infringements on consumer legislation, which affect the collective interest of consumers. Public intervention in protecting consumers' rights responds to the requirement, clarified by Directive 2005/29/EC "to ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this directive in the interest of consumers". In this context, enforcement through the action of public agencies responds to public interest imperatives.

The scope of public intervention is to remove the infringement and ensure that the perpetrator complies with the applicable legislation. Proceeds from any sanction that may be imposed are an income of a state budget and, as such, are not restored to the consumer. The purpose of any such sanction is thus not redress but a punishment imposed for an offence committed by the trader.

Consumers seeking redress have to introduce a private action, either individually or through collective actions introduced by consumer associations. In some Member States such private redress-seeking claims may also be made in a context of public enforcement, where the consumer/consumer association may have standing as a civil party or as a third party, which enables it to rely on the evidence furnished for the public enforcement action. These actions however do not constitute public enforcement.

In terms of enforcers' approach, public enforcement may be *active*, where the enforcement primarily relies on the initiative of the public authority (*ex officio* procedures) and its monitoring activity, and/or *reactive*, where the public authority starts investigation on the basis of consumers' complaints.

In terms of procedural enforcement models, public enforcement may take place in the framework of criminal and/or administrative regulation with different institutional implications: the former is administered primarily by courts; the latter primarily managed by governmental agencies and entities with an increasing involvement of private actors. Competent consumer authorities may also resort to civil law actions.

A possible classification of procedural schemes followed in the Member States for public enforcement may include the following forms:

- Administrative proceedings: the competent national authority starts and conducts the investigation, declares in a decision that an infringement was committed and imposes fines;
- Civil proceedings: the competent national authority starts and conducts the investigation; based on the investigation it requests a civil court to issue an injunction or a "cease and desist" order.
- Criminal proceedings: the competent national authority starts and conducts the investigation and, where the infringement constitutes a strict liability offence, or it is particularly serious or where the trader refuses to comply with a court decision, refers the case to the prosecutor/investigating judge for action under criminal law. Criminal sanctions may include imprisonment, ban of activities for a specified period of time or financial sanctions.

Task Specifications require, for Deliverable 1 under Theme 1, identifying the enforcement powers available to the competent national authorities on the basis of their legislation and regulations and comparing them with the enforcement powers provided by Article 4(6) of CPC Regulation.

Under Theme 2, according to the Task Specification, the two Deliverables covered by the Interim Report require providing:

- Deliverable 3: A typology of national procedural rules that frame the intervention of the competent authorities in relation to proceedings for the enforcement of consumer legislation covered by the CPC Regulation, specifically including those rules that establish procedural standards, formal requirements or other conditions to be met.
- Deliverable 4: An overview of their application in a purely domestic context and a comparison of the rules applied in a cross-border context and those in national context.

2.1 DELIVERABLE 1

In order to fulfil Deliverable 1, for each of the legislative acts covered by the Study, a synthetic table has been prepared comparing the powers introduced by the CPC Regulation with those existing in the national law and conferred to the relevant competent authority. In Member States where one single authority is competent for all the relevant acts, the tables have been consolidated into one single grid. The same has been done for the Member States where different authorities are competent for enforcing the consumer protection legislation, but they all apply the same set of rules.

The introduction to the table includes a short description of the enforcement powers in the Member States table indicating what kind of authority (public authority and/or private bodies) is entrusted with enforcement powers outlining the legal framework of the enforcement powers for each analysed Member State.

2.2 DELIVERABLE 2

On the basis of the tables prepared for Deliverable 1, an assessment will be made for each examined Member State on the enforcement powers. The assessment evaluates if the implementing measures have conferred effective powers to the authorities and, in case of lack of implementation, which are the powers that are missing.

2.3 DELIVERABLE 3

In order to fulfil the task under Deliverable 3, the national report will analyse the national proceedings and the conditions for exercising the different actions provided by national legislation for each Member State.

National reports describe the procedural rules of the Member States relevant to the exercise of CPC authorities' powers. When a national authority is requested by another Member State's public authority to carry out an investigation or take enforcement measures in the framework of a CPC referral, it does that on the basis of its national procedural rules.

Seven Member States were selected as case studies based on geographical balance and to cover the range of existing public enforcement systems, including criminal proceedings.

General Remarks

Regarding the sample of countries analysed, in some cases the competent national authority for consumers' protection is also the responsible body in charge of competition rules and enforces consumer protection legislation under a set of procedural rules that differ from competition rules.

The advantage is that these authorities have broad experience in carrying out inspections and detecting infringements and act within a procedural (administrative law) framework over which they have control from start to end.

In some Member States and for some areas, procedural rules framing the intervention of consumer enforcement authorities are more akin to those applying in criminal proceedings, while in others, they are strict administrative proceedings or action may be sought in civil proceedings. The nature of the proceedings determines the investigative powers of the authority, the type of admissible evidence as well as the standard of proof (weight of evidence needed to prove the case), procedural safeguards and the rights of the (potential) infringer, timeliness/legal deadlines and statute of limitations, and the powers for execution and enforcement of respective decisions.

The national reports will also consider aspects related to consumer redress mechanisms/entities, which act as private enforcement alongside public enforcement, to the extent that they are relevant to shed light on procedural aspects having a bearing on public enforcement in the CPC framework.

The national procedural rules will be analysed based on the following three sub-categories: cease-and-desist orders, "self-managed" administrative proceedings, criminal law actions and "other" civil law actions.

Cease and Desist Orders

Cease and desist (also defined in some jurisdictions as "injunction" or "enforcement" orders) is a formal action against a trader to prohibit any continuing or further infringement. In some Member States these orders are obtained in civil proceedings while in others they are part of administrative proceedings.

In spite of some differences, cease and desist orders are common in the majority of legal systems. They also constitute the primary form of public enforcement. Where other forms of public enforcement exist, they are generally subordinated to the preventive use of a "cease and desist" order. Therefore, we propose analysing the procedural rules for the "cease and desist" order separately for each Member State.

The analysis of the national procedural rules applicable to cease-and-desist orders will cover:

- Competent authority (to request and to issue the order);
- Infringements that may be addressed and that are addressed through cease and desist orders:
- Competence ratione materiae and competence ratione loci;
- Burden of proof;
- Procedural safeguards:
- Time frame/legal deadlines:
- Appeal procedure and conditions;
- Sanctions for non-compliance;
- Follow up and monitoring of compliance.

> Self-managed Administrative Proceedings

Self-managed administrative proceedings occur when the authority autonomously initiates an investigation against a trader for infringement of consumer protection legislation and where such authority directly exercises powers to stop the infringements found, including the possibility to obtain undertakings and impose penalties. Decisions by the authorities may be challenged in courts (administrative justice) and thus be subject to ex-post judicial review. Where consumer protection enforcement is carried out through administrative proceedings, the public authority has strong investigative and executive powers, considerable independence and a margin of valuation in adopting decisions.

While the description of the powers entrusted to the competent national authorities is included in Deliverable 1, national reports may further analyse some specific powers entrusted to the competent national authorities during the investigation and the application of procedural rules in the proceedings managed by the authorities themselves.

The analysis of the self-managed administrative proceedings in the national report will cover:

- Competent authority,
- Competence ratione loci, personae etc.;
- Investigative powers, including evidence requirements and standard of proof;
- Control over the investigation;
- Procedural safeguards;
- Burden of proof and standard of proof:
- Opening and closing of the investigation (types of decisions that the authority may adopt);
- Opening and closing of an infringement procedure (types of decisions that the authority may adopt);
- Undertakings, commitments, transaction and settlement;
- Decisions;
- Administrative fines;
- Statute of limitations:
- Follow up and monitoring of compliance;
- Appeal procedure and conditions (including its legal effect on the administrative decision).

Criminal Proceedings

The infringements of consumer protection legislation may, in specific cases listed in the legislation, be treated as offences under criminal law. To ensure a high level of deterrence, some Member States included in the case studies have established criminal proceedings to enforce consumer protection rules, also known as the "criminalisation" of consumer protection. The chosen legislative systems using criminal proceedings to enforce legislation on consumer protection are characterised by including violations of the consumer protection legislation among the "strict-liability offences". The feature of strict-liability offences is the absence of mens rea: the prosecution is not required to prove the defendant intended the consequences of his actions or even foresaw them. In some cases, regulated by the legislation, the prosecution may be required to show that the defendant was "negligent".

Where enforcement of consumer protection laws is ensured thorough criminal proceedings, the applicable national law includes substantive rules defining the offence (criminal rules) and procedural rules applicable to the proceedings against the infringer (criminal procedural rules) as well as sanctions (criminal sanctions). These rules and procedures abide by a set of stricter principles and present some distinctive features.

With regard to criminal proceedings, the national reports will examine:

- Violations which constitute criminal offences;
- The competence ratione materiae and the competence ratione loci;
- Burden/standard of proof and related evidence requirements:
- Standing of the competent national authorities under the CPC Regulation in criminal proceedings (e.g. amicus curiae, third party etc.);
- Procedural safeguards;
- Court decision;
- Sanctions;
- Appeal:
- Civil action linked to the criminal action and intervention of third party;
- Statute of limitations.

Civil Proceedings other than those relating to Cease and Desist Orders

For the purposes of this study, civil proceedings are understood as proceedings taken by an administrative agency/authority in a civil court against a trader. In general, they relate to the public authority's request to obtain a cease and desist order (see above), but there may be other cases where the public authority takes legal action against a trader before a civil law court.

The national report will therefore cover these other cases of civil proceedings where they are used by authorities in the Member States concerned to enforce some of the legislation included in the study's sample.

Case Law

National reports will include examples of the application of different proceedings within the domestic context. Case law helps to clarify the conditions and the application of the rules in a domestic context. For each national report we selected some examples of the most relevant case law to illustrate some problematic aspects arising in the application of procedural rules in the domestic context, which also apply to the enforcement of consumer laws by competent authorities in the CPC Regulation context, including, where appropriate, cases that have led to legislative changes.

Comparative Grid

To facilitate comparing national procedural rules in the selected Member States, a comparative grid is proposed. This grid should cover the above legal instruments: cease and desist orders, self-managed administrative proceedings and criminal proceedings.

This grid has some limits in terms of comparability due to the fact that there are great differences between some of the selected Member States concerning procedural frameworks used for public enforcement: some rely solely on administrative proceedings, others on a mix of administrative and civil proceedings, while others rely on criminal proceedings. Consequently, the procedural rules and safeguards vary greatly across the case studies.

2.4 DELIVERABLE 4

Deliverable 4 requires a comparison of the procedural rules applied in a domestic context and in a cross-border context. Publicly accessible information on cross-border application is limited since the reports from the competent national authorities in the CPC framework do not identify in detail the national procedural aspects of cross-border cases.

Under the CPC Regulation, the investigative and enforcement powers provided by Article 4(6) shall be exercised "in conformity with national law". In the context of cross-border cooperation, some difficulties may arise when the Member State requested to investigate or pursue the infringer applies national procedural rules that are different from those of the requesting Member State.

The external evaluation of the CPC Regulation, published in December 2012, identified some problems that could arise from this. It highlighted, for example, the differences with the level of evidence that the requested authority may or may not consider sufficient, according to its national procedural rules, for taking action following a mutual assistance request. Other problems mentioned were those of national rules that may prevent actions being taken when the infringement occurs outside the authority's territory (e.g. lack of territorial or personal jurisdiction) or (in common law countries) when the lack of precedent prevents the case from progressing in judicial proceedings.

In a complex infringement case where various Member States are involved, questions may arise concerning which authority may be competent. However, the external evaluation report did not find actual examples of such cases.

> Transnational (cross-border) Public Enforcement

When comparing and assessing procedural aspects of domestic and cross-border public enforcement, the study focuses on situations in which a competent enforcement authority acts at the request of its partners in other Member States within the framework of CPC cooperation mechanisms. Transnational public enforcement of consumer law may also be facilitated through injunction orders in accordance with Directive 2009/22/EC ("the Injunction Directive"): competent national authorities that are qualified bodies under Article 3 of the Injunction Directive may seek injunction orders before the court of another Member Sate against a trader in a transnational consumer infringement case.

Concerning cross-border enforcement, the administrative cooperation avenue provided by the CPC Regulation offers an alternative to that made available under the Injunction Directive and, as emphasised in the Commission's report on the application of the Injunction Directive (see COM(2012)635), may partially explain a more limited recourse by public authorities to the injunction instrument for cross-border infringements.

The scope of the Study is not to analyse the use of the cross-border injunction order introduced by Directive 2009/22/EC, but only the cooperation under the CPC Regulation and the legal actions, such as injunction orders, that a competent national authority may take at the request of another competent national authority. Direct actions taken by a competent national authority before another Member State's court are not discussed here. However, the study may consider whether there are cases where procedural difficulties may have caused authorities to resort to this type of action in lieu of the CPC mutual assistance tool (see also proposed questionnaire further below).

CPC Cross-border Enforcement Cooperation among Competent National Authorities

The CPC Regulation aims at facilitating cross-border enforcement though cooperation among competent national authorities for the consumer protection legislation.

Transnational infringements involve the question of the "extraterritoriality" of consumer protection.

According to Article 3(b) of the CPC Regulation, 'intra-Community infringement' means any act or omission contrary to the laws that protect consumers' interests, as defined in (a), that harms, or is likely to harm, the collective interests of consumers residing in a Member State or Member States other than the Member State where the act or omission originated or took place; or where the responsible seller or supplier is established; or where evidence or assets pertaining to the act or omission are to be found.

Article 3(b) of the CPC Regulation focuses on the difference between the place of act/omission and that of the establishment of the infringer and the place of impact over consumers' interests.

A first case covered by the Regulation is where a trader acts in Member State A and causes consumer harm in Member State B.

Other additional situations covered are:

- Member State A is the place of establishment of the trader causing harm in Member State B. This
 may include situations where the trader acted in a country other than that of the place of its
 establishment (State C);
- 2. Member State A is the place where evidence or assets are found while harm occurs in Member State B (regardless of where the trader acted, Member State A or C).

These three scenarios of infra-Community infringements emerging from Article 3(b) of the CPC Regulation "trigger[s] the exercise of the enforcement powers by a watchdog against a trader".

In a bilateral scenario, the scheme of the CPC Regulation offers, for transnational enforcement, the route of an enforcement action by a competent national authority (requested authority) against a trader located within its jurisdiction at the request of another Member State's competent authority in the interest of protecting consumers based outside the requested authority's territory.

When the infringer is a company with offices in various Member States, or where the act is committed using electronic commerce and the effects take place in various Member States, more than one competent authority may be involved. However, in "multijurisdictional infringements", defining the authority competent for the investigation and enforcement measures may be more complicated and even cooperation between the authorities may be rendered difficult by the need to apply different procedural rules.

Under Article 9 of the CPC Regulation, competent authorities shall coordinate their market surveillance and enforcement activities and, when the consumers affected are in two or more Member States, "the competent authorities concerned shall coordinate their enforcement actions and requests for mutual assistance via the single liaison office. In particular, they shall seek to conduct simultaneous investigations and enforcement measures".

In this case, difficulties may arise in providing enough evidence or in finding the legal basis to persuade a competent national authority to act on its territory against a trader when the consumers affected are in another Member State, or to seek evidence in its territory when neither the trader nor the affected consumers are in its territory. Moreover, when the requested authority decides to act, it may seek undertakings or settlement with the trader on behalf of another competent authority and impose sanctions according to its national rules. Issues may also arise on the extraterritorial enforcement of the decision and the extension of the scope of protection to consumers based outside the State of the enforcer.

According to the competent national authorities' reports sent to the Commission between 2009 and 2011, many authorities have signed bilateral cooperation agreements to deal with transnational cooperation. However, these documents are not published and information about them needs to be sought from the authorities. The reports indicate that the authorities receive various requests for information from other

⁸ G. BETLEM, *Public and Private Transnational Enforcement of EU Consumer Law*, European Business Law Review 2007, v.18 No4, p.688.

competent national authorities on the national legislation and rules applicable, and in some cases they are requested to investigate or open proceedings over infringements.

Due to lack of information on actual examples of cooperation in the public databases, to obtain practical information about the cooperation between authorities and on the bilateral agreements to promote cooperation in the multijurisdictional infringements, we sent a set of short questions to the competent national authorities in the seven Member States selected as case studies.

The replies to the questionnaires from the selected Member States helped us identify the problems and the possible areas for study on ways to address the needs for cooperation in transnational enforcement under possible situations of cross-border infringements covered by Article 3(b) of the Regulation (see the above examples of hypothetical cross-border cases).

Questionnaire

We sent to the competent national authorities the following questions:

- According to the 2009 and 2011 Reports on the CPC Regulation, you received mutual assistance requests from another competent national authority under the CPC Regulation concerning breaches of one of these legislations: Directive 2005/29/EC on unfair commercial practices; Directive 2000/31/EC on electronic commerce; Directive 97/7/EC on distance contracts; Directive 90/314/EEC on travel, package holidays and package tours; and Directive 2002/65/EC on distance marketing of financial services. Could you briefly describe in an important or recurring case the decisive elements of the infringement that caused your authority to seek assistance through the CPC mechanisms (having regard to the definition of Article 3 (b) of the CPC Regulation)?
- In such a case, which powers under Article 4(6) of the CPC Regulation did you use?
- Which national proceedings did you apply? What national procedural requirements and conditions did you have to meet in this context? Would the same procedural rules apply for your domestic infringement cases? If not, please explain the difference. If yes, are there other aspects that you would need to consider when dealing with a CPC case as opposed to a purely domestic case? If yes, please explain.
- If you refused/could not proceed against a trader, what were the reasons and the legal basis for not proceeding? If following an enforcement request you could not proceed against a trader, what were the legal and other difficulties/barriers preventing you from accepting and acting on the request?
- Do you have any experience with multijurisdictional infringements that involved several (more than two) competent national authorities at the same time? If yes, what were the difficulties (legal and practical) in dealing with these kinds of infringements?
- What were the main obstacles to fruitful cooperation among authorities (lack of evidence, time limit/legal deadlines for the action, etc.)?
- Did you seek an injunction order before a court in another Member State as an alternative to addressing the problem through a CPC enforcement request to that Member State? If yes, did you choose this tool because of specific difficulties in the CPC cooperation mechanism? Please provide details.
- Do you have bilateral cooperation agreements with other national authorities competent in consumer protection in your country or in other Member States? If yes, which are the aspects covered by the agreements? Are they useful to improve and remove procedural obstacles to cooperation between competent national authorities?

2.5 DELIVERABLE 5

The methodology for Deliverable 5 requires identifying the problems arising in the cross-border enforcement, notably from national requirements, inconsistent interpretation of the rules and from the authorities practice. The Deliverable provides some suggestions and recommendations to improve the smooth performance of the CPC Regulation. For this Deliverable, the methodology was based on the results of desk researches carried out for Deliverable 4 and on the replies to the questionnaires circulated among the competent national authorities.

CHAPTER 1 – THEME 1

Under Theme 1 the Study covers Deliverables 1 and 2, which require identifying, in the examined Member States, the powers listed under Article 4(6) of the CPC Regulation.

Chapter 1.3 provides comparative tables between the powers listed in Article 4(6) of the CPC Regulation and those provided by the national legislation. The tables list all the enforcement powers available to the competent national authorities.

With regard to the enforcement powers of the competent national authorities, a procedural diversity among Member States emerged. On the basis of the principles of procedural autonomy and institutional neutrality, the Member States were given considerable leeway in adapting the CPC Regulation to their own legal systems. When applying the CPC Regulation, the Member States implement their national procedural rules and impose remedies and sanctions that are available in their respective legal systems. Some issues were raised whether consistent enforcement policies and the effective performance of the CPC network requires a certain degree of harmonization of procedures, resources, experience and independence of the competent national authorities.

Under Article 4 of the CPC Regulation, "Each Member State shall designate the competent authorities". Competent authorities are defined in Article 2(c) as "any public authority established either at national, regional or local level with specific responsibilities to enforce the laws that protect consumers' interests".

Under these Articles, each Member State had a clear obligation to designate a public authority responsible for the application of the CPC Regulation; however, the details were left to the Member States themselves. These authorities could be administrative or judicial. The diversity of institutional design among competent authorities across the EU is based on country-specific institutional traditions and legacies. The CPC Regulation provides that all the Member States must ensure that competent authorities have a set of minimum powers in order to be able to effectively carry out their enforcement tasks and discharge the Regulation's mutual assistance obligations. The exercise of these powers takes place in accordance with the national procedural rules.

1.1 MINIMUM POWERS IN SELECTED COUNTRIES

1.1.1 Belgium

With regard to the examined Directive, the DGCM is the competent authority for the investigations and the enforcement. There is a single set of investigative and enforcement powers, but sanctions may vary depending on whether the infringement is a criminal offence or not. The reform has entrusted the Financial Service Authority (FSMA) with the enforcement of consumer protection in the field of the financial services. The enforcement powers are common to all authorities and are provided by the new Code of Business Law.

The Code entrusts the DGCM inspectors with extensive powers. The Minister appoints the inspectors and there are no particular gaps to report with regard to their powers. Under the law, inspectors are competent to search for the information related to the infringement. The inspectors may require the investigated subject to provide information and to produce a copy of the relevant documents. The new powers added by the Code give to the inspector the possibility to take digital copies and photographs of the investigated places and goods. The inspectors can carry out inspections on site at business premises during working hours and, pursuant to a judicial warrant, at private dwellings. If the investigations reveal that an infringement to the Code was committed, the appointed inspectors may issue warnings to the infringer, urging him to stop the forbidden act.

The inspectors appointed by the Minister can issue a warning to comply with the legislation and in case of non-compliance, a fine may be imposed or the case referred to Court for a cease and desist order or criminal proceedings. The inspectors may also propose a settlement to the infringing party in order to avoid the criminal proceedings. If the infringer pays the fine on time, criminal proceedings based on the same facts can no longer be brought forward.

The cessation or prohibition of the act under Article 4(6)(f) of the CPC Regulation requires starting a civil action before the President of the Commercial Court. The criminal court may impose payments to the public purse only when the infringement constitutes a criminal offence.

The Belgian system provides for centralised investigative powers while the enforcement action may be carried out by the administrative authority, by referral to civil court or criminal court depending on the nature of the offence and the willingness of the infringer to cooperate (at the first stage, the DGCM may resolve the infringement by obtaining an undertaking or reaching a settlement).

The investigative and enforcement powers mandated by Article 4(6) of the CPC Regulation do exist in Belgium.

1.1.2 Czech Republic

The main investigative powers in the Czech Republic are provided by Section 4 of Act No 64/1986 on the CTIA and by the Administrative procedural code. Other powers stem from Section 11 of Act No 552/1991 on State Inspection. The latter two are general acts that apply to all enforcement authorities. The legislator has not introduced specific rules and powers in order to implement the CPC Regulation, only modifying some national rules in order to "accommodate" the cooperation under the CPC Regulation within the national framework, requesting to the competent authorities to cooperate under the CPC Regulation.

Minimum enforcement powers are available to all the competent enforcers. Inspectors are authorised to request the necessary documents, information and written or oral statements. During the investigations, inspectors are authorized to enter business premises. The authority may issue order(s) during the inspections on site, or subsequently obtain the cessation of the infringement. The authorities may impose administrative fines according to the specific legislation regulating the powers of the competent authorities.

The national legislation does not explicitly provide for the possibility to accept undertakings according to Article 4(6)(e) of the CPC Regulation. Except for the lack of undertakings, which constitutes a gap, the other minimum enforcing powers provided by Article 4(6) are covered by the Czech legislation.

An efficiency issue may be triggered by the fact that the enforcement is fragmented among various competent authorities, according to the nature of the unfair commercial practice, which may give rise to some issues when an unfair practice falls within the scope of various legislative acts. It may be difficult to identify the competent authority in charge of tackling the infringement.

1.1.3 France

Article L 141-1 of the Consumer Code provides the main investigative and enforcement powers. This provision refers to the investigative powers of the DGCCRF for the antitrust investigations, which are regulated by Articles from L 450-1 to L 450 -8 of the Code of Commerce. In this context, the competent national authority, which is responsible for the enforcement of all the examined Directives, has an extensive range of investigative powers, including inspections under judicial warrant. The DGCCRF may adopt administrative injunctions to obtain the cessation of illicit conduct or ask the civil court to issue a "cease and desist" order.

Pursuant to the 2014 legislative reform, the DGCCRF has also powers to impose administrative fines upon the infringer.

We have not found any particular shortcomings in the national legislation with regard to the implementation of the minimum enforcement powers provided by Article 4(6) of the CPC Regulation.

1.1.4 Germany

The BVL is the competent enforcement authority under the CPC Regulation. It is responsible for the enforcement of the examined Directives in a cross-border context (for intra-Community infringements only). Its powers were established when the CPC Regulation was implemented; they include all the minimum powers provided by Article 4(6) of the CPC Regulation. The BVL may obtain documents from the trader; it can carry out inspections on-site, oblige the responsible seller or supplier to desist from an existing intra-Community infringement, obtain and accept undertakings and make them public to prevent future infringements across EU borders. Publication is not required if the trader voluntarily makes a public announcement of infringement termination. The BVL can also impose administrative sanctions.

There are no shortcomings in the German system with regard to enforcement powers. The BVL is however solely competent for cross-border cooperation according to the CPC Regulation and for investigations of cross-border infringements. This may raise issue where it is unclear whether the infringement has cross-border elements.

1.1.5 Italy

In Italy the national authority that is mainly competent for investigations and enforcement of consumer protection is the competition authority (AGCM); a recent legislative modification enlarged the powers of the authorities to tackle unfair commercial practices.

In fact, the public enforcement duties have shifted from the Minister of the Economic Development that originally was in charge of many of the legislative acts under Annex of the CPC Regulation, towards the AGCM.

From June 2014, the AGCM is the only competent authority but, for infringements that relate to specific sectors, such as telecommunications, it must obtain the opinion of the sectorial authority. This should help to smooth the process and remove obstacles, such as the identification of the competent authority to tackle the infringement, without hampering the "special or technical nature" of some legislation that is dealt with by a specialized authority.

The AGCM has extensive investigative powers, notably it can have access to documents and information, inspect business premises, obtain copy of the documents and require oral and written explanations. The AGCM may obtain undertakings (a form is attached to the AGCM Regulation for the trader to submit undertakings which are consistent with the AGCM's request) and publish them, adopt decisions, and it may impose administrative fines, both for the infringement itself and/or for the non-respect of the authority's decision. Article 4(d) of the CPC Regulation is implemented through Article 4(5) of the AGCM Regulation that introduce the *moral suasion* as specific power of the AGCM to obtain the removal of the unfair practice before starting of the proceedings. We did not find shortcomings with regard to the implementation of the minimum enforcement powers in Italy.

1.1.6 Latvia

The CPRC is the authority competent for enforcing consumer protection and the CPC Regulation. The Consumer Rights Protection Law (CRPL) provides the competent authority, the Consumer Rights Protection Centre (CRPC), an extensive range of enforcement powers. The Latvian legislation entrusted a single public competent authority with the powers to enforce the various legislation on consumer protection. The enforcement powers of the CRPC are the result of the powers provided by CRPL and the by-laws of the CPRC.

CRRC can request and obtain from the trader all the necessary information and evidence needed to evaluate the compliance with the law, carry out on-site inspections, propose to the trader to offer an undertaking in writing to remove the act or remedy to the omission and adopt a decision imposing on the trader to stop the infringement and to publish it. The authority may also impose administrative fines.

The Latvian CRPL covers the minimum powers under Article 4(6) of CPC Regulation. No particular shortcomings are found in the domestic rules for public enforcement.

1.1.7 **Poland**

The Competition and Consumer Protection Office (CCPA) is the national authority competent for public enforcement under the CPC Regulation. With regard to the enforcement powers, the CCPA may require information and documents from the trader, carry out on-site inspections, require the production of documents and data and obtain copies and extracts, require to the inspected person to provide oral explanations on the subject of the inspection. During inspections the President of the CCPA may also order the seizure of files, books, documents and data for the purpose of the inspection, for no more than 7 days. The President of the CCPA is authorized to obtain commitments from the trader to terminate the infringement. It is authorized to issue a decision to impose to the trader the respect of the commitment only if the infringement has been ascertained during the investigation and the trader has proposed an undertaking to refrain from certain acts or omission. The President of the CCPA can issue a decision imposing to the trader the cessation of the infringement as well as administrative fines in case of non-compliance with the authority's decision.

We did not identify any particular shortcomings with regard to the enforcement powers of the CCPA, since the minimum powers provided by Article 4(6) of the CPC Regulation are implemented.

1.1.8 Slovakia

The Slovak Trade Inspection (STI) is the competent authority for the public enforcement of consumer protection and for the Directives under consideration. Section 4 of Act No 128/2002 on State control of the Internal market, provides the minimum powers for the STI when conducting investigations and inspections. The STI may request the necessary information and documents from the inspected persons, access to business premises and facilities, issue orders to terminate the infringements. The Slovak Trade Inspectorate may impose administrative fines by way of administrative order.

There are no legal provisions concerning the possibility for the administrative authority to accept and enforce voluntary undertakings. As in the case of the Czech Republic, this may constitute a possible shortcoming, which is not in line with Article 4 of the CPC Regulation.

The absence of the undertakings is examined below in the assessment.

1.1.9 **Spain**

The public enforcement of consumer protection in Spain is complex. The organization of consumer protection functions at three different levels: the State General Administration, the autonomous communities and the municipal bodies, each of which has its own services for consumers.

As of April 2014, the Agencia Española de Consumo, Seguridad Alimentaria y Nutrición (AECOSAN) replaced the "Instituto Nacional del Consumo" (INC) as the body that promotes and guarantees consumers' rights. Parallel to and within the framework of the competences granted to the autonomous communities, each autonomous community has its own regulation to protect consumers and it is authorised to sanction traders that violate these regulations. Similar to national legislation and authorities, autonomous communities also have passed general laws to protect consumers and users, and created regional administrative structures for consumer protection.

Each autonomous community is responsible enforcing consumer legislation and market control in its respective territory. This is usually entrusted to a specific department within the regional administration. Coordination among such regional departments and central government is assured through a standing coordination committee. The administrative bodies inspect and impose fines on manufacturers that fail to comply with the regulation on consumer protection.

AECOSAN is responsible for consumer protection at a national level, and under Article 4.5 of its By-laws, enacted by Royal Decree 19/2004, the agency is in charge of all the functions related to protecting consumer health and security. One of AECOSAN's tasks is to furnish the technical support to the consumption inspection services of other public administrations, as well as to develop tasks to promote smooth performance of the market for the protection of the consumers, through the General Subdivision of Coordination, Quality and Cooperation in Consumer Affairs. It acts as coordinator of the administration involved in consumer protection and it may establish common criteria in consumer protection after consulting with the autonomous communities.

Since the legislative framework is quite complex, the enforcement powers are included in various legislative acts. However, the powers of the competent authorities, both national and local, are based on Article 51 of the Constitution and in the Royal Legislative Decree 1/2007, which provides the general principles and powers of the competent authorities.

The investigative powers laid down in Article 4(6) of the CPC Regulation are in the general provisions of the administrative and civil procedural codes. Article 39.1 of Law 30/1992 on the administrative regime and procedure provides the powers indicated in Article 4(6)(a)(b)(c).

Some powers, such as the power to obtain information or documents from the infringer, are not explicitly provided in the law but can be inferred from the fact that the law imposes fines for refusing to submit information or obstructing supervision or inspection. General inspection powers are laid down by Royal Decree No 1945/1983, under which competent authorities in the field of consumer protection can have direct access to information of the undertaking that they are inspecting.

With regard to Article 4(6)(d) of CPC Regulation, national law does not expressly provide for the possibility of requesting the seller or supplier, in writing, to cease the intra-Community infringement. However, based on general provisions of administrative law, it could be interpreted that the public administration may notify the infringer in writing to remove the infringement.

Cessation of the infringement could be obtained with a judicial cease and desist order obtained before a civil court. An administrative fine can be imposed for failure to comply with the order. Article 53 of Royal Legislative Decree No 1/2007, which is the most relevant legislation on consumer protection, as amended by Law 3/2014, authorises AECOSAN (ex ICN) and other correspondent bodies of the autonomous communities to request cease and desist orders before a civil court. It is worthwhile mentioning that under the amendment to Article 53 introduced by Law No 3/2014, any action for a cease and desist order may be cumulated with actions requesting damages. This is a new approach, which was not found in the other analysed legislation and which may provide some input concerning interaction between public and private enforcement.

The Spanish system covers all minimum powers introduced by Article 4(6) of the CPC Regulation. In our opinion, the main problems may arise from the fact that supervision is divided among many competent authorities causing potential difficulties with identifying the authority in charge of tackling the infringement.

The system is highly decentralized. Consequently, the first range of issues may arise from identifying the local competent authority to tackle the infringement. Article 47 of Royal Legislative Decree No 1/2007 provides rules of competence: the first competent local authority is that of the place where the act or omission was committed regardless of the nationality of the infringer.

According to the legislator, each independent local authority is competent to tackle infringements within its territory. In case of multiple competent authorities, the local authority of the place where the company is situated or has its head office should have jurisdiction, and the other authorities should relinquish their competence in favour of the first. This is not a codified rule but a practice between authorities suggested by

the Explanatory Memorandum to the Royal Legislative Decree in order to simplify implementing enforcement powers. The local authority of the place where the company is situated may carry out inspections and impose sanctions. However, since this is contrary to the principle of territoriality as recognised by the Spanish consumer law, only an agreement between the authorities may redistribute the competence. At present, no additional rules, besides the general guidelines to the Explanatory Memorandum, were found on the allocation of competence. However, the coordination power granted AECOSAN under Royal Decree No 19/2014 should, at least, be directed at clarifying the allocation between the local and the national authority.

Under Article 46, § 2 of Royal Legislative Decree No 1/2007, double sanctions from different authorities for the same infringement against the same protected public interests cannot be issued. This should prevent the risk of concurrent actions. In case the same action for the same act or omission is filed before different courts, the actions should be combined, or if a decision was already issued, the court should reject the following action.

Under Article 47, § 3, of Royal Legislative Decree No 1/2007, the authorities are also competent for enforcing consumer protection pursuant to sectorial legislation when the infringement is classified as a consumer offence. In this context, legislation introduces a horizontal clause authorising the authority to tackle the infringement even when the offence is not expressly regulated by consumer protection legislation.

1.1.10The United Kingdom

The United Kingdom has implemented the enforcement powers provided by Article 4(6) of the CPC Regulation through Part 8 of the 2002 Enterprise Act, as amended by 2006 Statutory Instruments. These powers are available to the new competent national authority, the Competition and Markets Authority (CMA).

This legislative act authorises all the enforcers cited in the legislation, both at national and local levels as well as CPC enforcers, to obtain information and documents from subjects under investigation and to carry out on-site inspections (also under a judicial warrant if required, including inspections at the private dwelling). "Cease and desist" orders are obtained in judicial proceedings, prior to which the enforcers must try to negotiate undertakings with the infringer.

With regard to Article 4(6)(d) of the CPC Regulation, we have not identified any provision regarding the written request to the seller or supplier to terminate the intra-Community infringement. However, the enforcer has the obligation, under Part 8, to contact the infringer at least 14 days before requesting a "cease and desist" order. According to the *OFT Investigating, Consulting and Enforcing Guidelines,* before the enforcer submits its applications to the Court, he must provide evidence of the consultation and a clear audit trail for the Court to see. In this context, the undertakings are requested in writing.

With regard to undertakings, Part 8 of the 2002 Enterprise Act provides for voluntary (administrative) undertakings, which are negotiated between the enforcer and the infringer as a mandatory step before a "cease and desist" order is sought. The same provision foresees judicial undertakings, which are proposed during the proceedings for a "cease and desist" order to avoid the Court's injunction.

The "cease and desist" order is a judicial decision.

No particular shortcomings have been found with regard to the implementation of Article 4(6) of the CPC Regulation in the United Kingdom.

Under the current regime, the competent authorities may not impose administrative fines. Since under the UK legislation the violation of consumer protection is a strict liability offence, the courts may impose criminal sanctions in criminal proceedings. However, the 2014 CMA's Guidance¹⁰ provides, at point 6.54 that, in

⁹ Análisis de las modificaciones introducidas por la Ley 44/2006, de Mejora de la Protección de los Consumidores y Usuarios, a la Ley General de Consumidores y Usuarios incluidas en el texto refundido de la Ley General para la Defensa de Consumidores y Usuarios aprobado por Real Decreto legislativo 1/2007, http://consumo-inc.gob.es/informes/informes/AnalisisTextoRefundido.pdf

¹⁰ Consumer protection: guidance on the CMA's approach to use of its consumer powers, https://www.gov.uk/government/uploads/system/uploads/system/uploads/system/uploads/attachment_data/file/288624/CMA7_Consumer_Protection_guidance.pdf

relation to Community infringements, "the CMA has the power itself (or more likely by applying to the Courts) to require the losing defendant to make payments into the public purse in the event of failure to comply with the decision".

Based on the new provisions the new authority, which took the OFT's place from 1 April 2014, should be able to impose sanctions without applying to the Court. As a general rule, however, it does not seem that the former OFT has applied the 2008 RESA ACT, until now, which authorises the supervisory authority to impose sanctions on the infringers¹¹. The 2008 RESA included both the OFT (now CMA) and the relevant consumer protection legislation on unfair practices among the regulators and the enactments for the purpose of imposing sanctions.

In the United Kingdom, major problems have arisen from the "fragmentation" of competence among the OFT/CMA and the TSS. According to the 2011 House of Commons Report¹², the enforcement system for dealing with trader malpractices that occur at regional and national level is inadequate "and instance of abuse fall through cracks between enforcement bodies". When cases of malpractices occur across the jurisdiction of several local authorities, the cases can be too large for LTSS but not sufficiently important to be taken on by the former OFT/CMA, which focused on protecting consumers from problems caused by new and emerging markets, or from the lack of effective competition. The arrangements for addressing consumer problems that occur regionally or nationally are inadequate. "Regional and national cases may be tackled by TSS, department funded regional enforcement projects or the OFT but no organisation has the overall responsibility for ensuring they are adequately resolved". According to the report, only two of 15 cases referred to the OFT from TSS have resulted in direct enforcement action being taken by the OFT.

After the reform, the CMA will seek to target consumer enforcement action where it can secure wide-ranging changes to markets and tackle significant consumer detriment, particularly in emerging trends. Under the new arrangements in the consumer landscape, most "single trader national cases", which involve a single national company, are likely to be taken by TSS under the new national leadership structure led by the NTSB in England and Wales, and CoSLA in Scotland. According to CMA's Guidance, it is expected that TSS will take an increased number of national cases, including those that would have previously been taken by the OFT prior to the landscape reforms. The detailed structure of the new system is described in Chapter 2.1.7.

Wide enforcement powers are available to the delegated third party, PhonepayPlus, which is in charge of the enforcement of unfair commercial practices for premium rate (or phone-paid) services in the United Kingdom. It is under the supervision of the Ofcom, the national supervisor for telecommunication, and it is a self-regulated body with its own self-managed proceedings and enforcing powers, including the possibility to impose fines.

1.2 GENERAL OBSERVATIONS

Single Authority vs. Multiple Authorities.

From the analysed Member States, we can identify two models of enforcement at domestic levels: a single authority in charge of consumer protection and the multiple supervisor model where a central authority has the role of coordinator or is in charge of the high impact cases only, and the enforcement is carried out by local public bodies. The latter is the model in Spain and in the United Kingdom.

The Spanish fragmented enforcement system is the result of the need to respect the constitutional autonomies of the regions, while in the United Kingdom its roots are founded in history when cities got charters and had local markets to be monitored.

¹¹ Regulatory Enforcement and Sanctions Act 2008 (RESA) formally came into force on the 06 April 2010 RESA established a framework for a civil sanctions scheme, providing statutory endorsement for a number of specific remedies and penalties, along with provisions for appeal. The scheme is available to many potential regulators, including national bodies and local authorities. Any specific scheme is to be implemented by statutory instrument.

¹² House of Commons - Committee of Public Accounts, *Protecting Consumers – the system for enforcing consumer law*, Fifty-fourth Report of Session 2010–12, http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpubacc/1468/1468.pdf

The different models all have their positive and negative outcomes. The difficulties of dealing with the mechanism of multiple enforcers have been clarified in the report of the House of Commons and in the Explanatory Memorandum of the Spanish Royal Decree.

In the United Kingdom, the TSS, prior to the reform, successfully worked against local fraud. However, most fraudulent acts are now committed on regional and national fronts. The referral mechanism between the TSS and the OFT, however, was quite complex. Since 2005, proposals to create a "joint enforcement model" under which, essentially, the national body and TSS make joint decisions on which cases to pursue and by who 13 were made.

During the discussion of the reform, arguments were raised about the possible transfer of some competence towards consumer organisations, such as Consumer Focus and Citizens Advice. However, some resistance emerged from the consumer organisations themselves, which focus on advocacy and prevention.

The Spanish system has tried to allocate competences to the regional authorities, with rules of competence and clarifications about the circumstances in which the statutory competence of an authority may be surrendered in favour of another authority.

On the other side, local authorities have a better overview of the market and of the businesses to be controlled rather than the national authorities, which are at a disadvantage compared to decentralized authorities concerning the businesses they must control ¹⁴.

Public vs. Private Enforcement Bodies

Traditionally, the national approaches to enforcement diverge: some jurisdictions rely on enforcement by private consumer organisations, while others emphasize the role of public authorities, or the criminal justice system. Nordic countries rely on powers of the Ombudsmen and the use of soft law.

Among the examined Member States, Germany stands out for having entrusted enforcement of domestic consumer protection to national consumer organisations. Germany follows a model where private, consumer and trader organisations play a major role in enforcing consumer law. This Member State seemed "quite reluctant to grant public authorities a prominent role, rebalancing sharing of responsibilities between public and private enforcement". The intra-Community enforcement is the competence of a public body: the BVL. In some circumstances, the BVL may decide to entrust the request for enforcement to a private consumer organisation (a possibility which in practice the BVL has made wide use of under the CPC Regulation, in accordance with Article 8.3, as discussed further under Theme 2).

In the United Kingdom, enforcement in the sector of premium rate services has been entrusted to an independent body, PhonepayPlus, with extensive enforcement powers and self-managed proceedings. Two independent bodies, the Tribunal and the Independent Appellate Body (IAB), which are both administrative bodies, are in charge deciding against the service provider and, under certain conditions, of the appeal. Three separate administrative bodies ensure that power is not concentrated in a single body and ensure accountability.

In general, the enforcers' choice and, eventually, the form of enforcement implemented are affected by the differences between divisible and indivisible remedies (damages and injunctions). When the remedy is damages and compensation is the primary goal, private enforcement is often the dominant strategy¹⁶. Deterrence is mainly associated with public enforcement.

¹³ "We have fairly strong views that the best model is the joint enforcement model under which, essentially, the national body and trading standards come together and make very careful decisions about which cases to pursue and which cases not to pursue, how they are pursued, by which body, and how the joint resources of trading standards and the national body can be used most effectively". P. Collins, Chairman of the OFT, Report by the Comptroller and Auditor General, Committee of Public Accounts, 5 September 2011.

¹⁴ K. CSERES, Comparing Laws in the Enforcement of EU and national Competition Laws, European Journal of Legal Studies, 3/2010, p. 37, footnote 99.

¹⁵ F. CAFAGGI, *The Great Transformation. Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective*, Loyola Consumer Law Review, 21/2009, p. 506.

There has been a lot of discussion about public vs. private enforcement: it has been argued that public enforcement "is superior to private enforcement and that having a public authority retaining control ensures a balanced and responsive enforcement process whereas private collective enforcement raises not only issues of accountability, legitimacy, and transparency, but may also bring about frivolous and disproportionate enforcement activity and cause over deterrence"¹⁷.

Admittedly, however, public authorities also have their limitations. "Public authorities may lack information that private enforcers do have. Moreover, much like private consumer organisations, they too have limited resources, need to prioritise and therefore cannot enforce all rules with equal vigour. Furthermore, public authorities may or may not maximize enforcement efforts."

18.

The discussion on what model of enforcement is better is beyond the scope of the Study and of Theme 1, which is focused on the state of play of minimum powers of competent enforcement powers and the shortcomings arising from applicable procedural rules in different enforcement systems. However, when the enforcement is fragmented among various authorities, some problems may arise from the use of the private law and thus private enforcement for the enforcement of consumer protection especially under CPC Regulation.

Under the German mixed approach, the effect of entrusting consumer organisations with enforcement leads to the application of private law instead of public law with limited investigative powers of the consumer organisations. The minimum enforcement powers reported in Capter 1.3 refer to the BVL and are not applicable to private organisations. In case of intra-Community infringements, as described in Chapter 2.1.4.2, the BVL is in charge of the investigation and it may decide, subject to agreement of the requesting authority, to transfer the file to a consumer organisation for judicial enforcement. Application before the Court may be burdensome in intra-Community infringements since civil procedure rules require the translation of the evidence as well as the full burden of proof for the consumer organisation as reported in detail in the following chapters. The Court may not accept unsubstantiated allegations and the increased costs of providing sufficient evidence to convince a Court may be a barrier to enforcement in some circumstances.

The new Spanish regime has introduced an interesting relationship between the public enforcement, through a cease and desist order requested by the authority, and the private enforcement, specifically the request for damages. The new Article 53 of the Royal Legislative Decree 1/2007, as amended by the Law 3/2014, provides that to any cease and desist action, also requested by the authority, an action for restitution or for damages may be joined by consumers.

Detected shortcomings with regard to minimum enforcement powers under Article 4(6)

Generally, all the examined Member States have implemented to a large extent the minimum enforcement powers provided by Article 4(6) of the CPC Regulation. Most Member States have reviewed their own legislation in order to take into account the provisions of the CPC Regulation; only Spain does not mention the CPC Regulation, at least with regard to the enforcement powers.

Belgian, French, and UK legislations provide for one single act, which brings more clarity concerning the applicable rules to use. In Italy, legislation on consumer protection is set out in the Consumer Code; however the authority under its self-regulatory powers lays down the procedural rules.

In the Czech Republic and Spain, the enforcement powers are included in various different acts, some of which specifically focus on consumer protection, while others lay down general powers for the public authorities. These legislative systems do not raise particular concerns on the very existence of the powers;

¹⁶ F. CAFAGGI, The Great Transformation: Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective, id. above, p. 510.

¹⁷ W. H. VAN BOOM, M. LOOS, Effective enforcement of consumer law in Europe Private, public, and collective mechanisms, W.H. van Boom, M.B.M. Loos (eds.), Collective enforcement of consumer law in Europe. Securing compliance in Europe through private group action and public authority intervention, Groningen: Europa Law Publishing, 2007, p. 250.

¹⁸ W. H. VAN BOOM, M. LOOS, Effective enforcement of consumer law in Europe Private, public, and collective mechanisms, id. p. 251.

however, the fact that there are many different legislative acts could render identifying the relevant legislation and the competent authority difficult, thus impacting the effectiveness of the enforcement.

Below we report, under each relevant article of the CPC Regulation, the shortcomings with implementing the minimum enforcement powers in the examined Member States.

Article 4(6)(d) of the CPC Regulation

This Article mandates, among the minimum powers of the enforcers, the possibility to request in writing the cessation of the intra-Community infringement. The examined legislative systems do not expressly include such provision. Implementation has been approached in different ways: some Member States have introduced a sort of *moral suasion* while in others the warnings are a more formal proceeding. Finally, some Member States do not distinguish between Article 4(6)(d) and (e) and they only issue formal decisions with no previous warnings or prior informal contacts with the traders.

The systems which rely on the administrative proceedings (Belgium, Czech Republic, France, Germany, Italy, Latvia, Poland and Slovakia) use this power by way of the decisions and administrative injunctions that are issued by the (competent) authority, including the power to obtain the cessation of the intra-Community infringement under Article 4(6)(e). The Spanish legislation does not have any provision regarding this power.

The United Kingdom provides for a mandatory obligation to negotiate undertakings before seeking an enforcement order by the Court, but it has no explicit provision regarding this power.

We suggest that Member States could provide for a pre-decisional request to be adopted by the competent national authority to stop the infringement. A good example, in our opinion, is the *procedure d'avertissement* disciplined in Belgium by Article XV.32 of the Code of Economic Law. With respect to the previous Article 123 LPMC, the Code introduced the possibility to impose a fine within 30 days of the warning for failure to comply.

Under the Code, a warning is issued within three weeks from establishing the infringement and is sent to the infringer via registered mail. The warning must indicate: the facts and the violated legislative provisions; the term within which the infringing conduct must be stopped; notification that, if the warning is not complied with, court proceedings for a "cease and desist" order can be initiated; (the fact that) a settlement can be proposed and the Public Prosecutor be informed in time to halt the criminal action; the fact that a fine may be imposed and a publicly-made statement by the infringer to commit to ending the infringement may be ordered.

In our opinion, this would be a correct and appropriate implementation of Article 4(6)(d) which would increase transparency for all actors and make a clear distinction between a written warning or request and the administrative or judicial "cease and desist" order, which is covered by Article 4(6)(f).

Keeping a clear division between the pre-decisional request and the decision is also important from the point of view of the remedies available to the infringer. A written warning does not constitute an administrative decision and, consequently, no administrative or judicial review should be admitted.

Article 4(6)(e) of the CPC Regulation

This Article provides for the possibility of the competent national authority to (negotiate), obtain and accept undertakings from the infringer.

Enforcement undertakings, as "legally binding agreements between the regulator and business, under which the business agrees to carry out specific activities to rectify its non-compliance" are alternatives to the cease and desist order and are quicker and cost-effective mechanisms for resolving non-compliance.

¹⁹ R. MACRORY, *Regulatory Justice: Making Sanctions Effective*, Final Report, November 2006, p. 65.

Different regulatory enforcement instruments are characterised and ordered according to the level of formality and the degree of coerciveness underpinning them²⁰.

Nearly all the competent national authorities of the examined Member States can obtain or accept undertakings, except for the Czech Republic and Slovakia. In both these systems, based on administrative proceedings, the competent national authority can only issue decisions against the infringer.

The legal literature has divided the decisions of the competent national authorities or of the national courts into two categories: "prohibitory", which consist in orders to cease and desist the unlawful conduct, and "affirmative", which order businesses to change or rectify a business practice and/or a contractual term²¹. The undertakings rather belong to the latter category and, in many cases, are part of the decision issued by the competent national authority, without any proposal or negotiation with the parties.

The absence of negotiated undertakings may cause some difficulties in terms of availability of rapid and efficient means to obtain the correction of infringing practices. Indeed, undertakings, which are generally voluntarily proposed by the infringer to remove the violation, could help the administration obtain the desired result (i.e. the removal of the infringement) by means of a positive and rapid impact on the market, without the length and costs of a full administrative proceeding.

A swift termination of the case leading to quick cessation of the infringement greatly benefits the markets and restores consumers' rights quickly and effectively. Examples of this are the undertakings accepted by the OFT from 14 airlines companies in 2012, after opening an investigation into the level and/or the existence of payment card surcharges. The airlines under investigation were either charging consumers an additional fee, which was not included in the headline price, for the use of debit cards and/or they were not presenting their credit card charges in a clear and transparent manner. The OFT was concerned that these practices made it difficult for consumers to compare prices easily, damaged consumer's confidence and impeded effective competition²².

The airlines proposed and implemented undertakings which were published on the OFT website. The companies changed their commercial conduct as of the month following the acceptance of the undertakings (August 2012).

This case clearly shows that market changes can be implemented - and unfair commercial practices removed quickly thanks to undertakings, even where the number of companies involved is large. The importance of this case also lies in that it was based on cooperation with another competent national authority (Italy's AGCM) that was carrying out an investigation on the same issue, although the outcome in the Italian case was different as no undertakings were proposed, but the authority adopted a decision first, followed by a second decision against the airlines for failure to comply with the first decision. An administrative fine for the total amount of EUR 100,000 was imposed for such non-compliance issue²³.

The United Kingdom and the Italian systems are interesting because the former foresees the negotiation of undertakings as a mandatory step of the administrative proceedings (according to Section 219 of Part 8, 2002 Enterprise Act, the enforcer must contact the trader 14 days before seeking an enforcement order, so as to give the trader the opportunity to submit undertakings), whilst the latter foresees a form to be filled in, specifically for the submission of undertakings.

²⁰ The idea is well described in the Ayres and Braithwaite pyramidal scheme, which organises regulatory tools and sanctions by reference to their coercive backing, associated formalities and expenses. Informal, cooperative solutions between the regulator and regulated lie at the base of the pyramid, constituting numerous, most timely and least costly means by which regulator may secure compliance, I. AYRES, J BRAITHWAITE, *Responsive Regulation*, Oxford, 1992, p. 19.

²¹ F. CAFAGGI, *The Great Transformation. Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective*, id. p. 507-508.

 $^{{\}color{red}^{22}} \ \underline{\text{http://www.oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/card-surcharges/\#.Uyh3qqh5M4o}$

http://www.agcm.it/stampa/news/6061-trasporto-aereo-chiusi-cinque-procedimenti-di-inottemperanza-avviati-nei-confronti-di-alitalia-blue-panorama-easyjet-ryanair-e-wizzair.html

Article 4(6)(g) of the CPC Regulation

Article 4(6)(g) provides the possibility, for the competent national authorities, "to require the losing defendant to make payments into the public purse (....) in the event of failure to comply with the decision".

Administrative fines are perceived as an essential tool for the competent national authorities to address violation of legislation. They can provide an intermediate step between the formal, costly and stigmatising action for criminal prosecution and the more informal means of advice and persuasion to return to compliance²⁴. The approach of the examined Member States on the subject is varied.

Most of the examined Member States provide for the possibility to impose administrative fines for failure to comply with the adopted decision. France has recently introduced administrative fines to increase the enforcement powers of the DGCCRF. Also Belgium, with the reform, provided the possibility for the DGCM to impose fines for non-compliance with the warnings. Failure to comply with the enforcement order constitutes, according the new Article XV.85 (1), a criminal offence and will result in a criminal sanction being imposed.

The United Kingdom has a different approach. The system relies on a mix of administrative, civil and criminal proceedings which do not entrust the competent national authorities with the power to adopt a decision, but give them the possibility to choose between asking for a "cease and desist" (or enforcement) order before the Civil Court and transferring the file to the Public Prosecutor, so that criminal proceedings are initiated.

In case of judicial enforcement through a cease and desist order, fines cannot be imposed²⁵. Failure to comply with an enforcement order could be found by a Court to be in contempt of the Court, which could lead to a fine or imprisonment.

The non-imposition of administrative fines for failure to comply with an enforcement order is not an absolute provision, but derives from the competent authority's decision not to use the powers under the 2008 RESA Act. A reason for this may be found in the fact that the authority imposing the fine must publicly notify this thus creating adverse publicity. Moreover, the idea behind an enforcement order is to remove the unfair practice not to seek punishment. The most serious infringements are prosecuted before the Criminal Court, which will impose the most appropriate criminal sanction.

The absence of administrative fines cannot be considered a shortcoming in the strict sense, since it reflects the constitutional doctrine of separation of powers where the role of formally determining if a violation of the law has occurred, and the appropriate legal sanction to be imposed for the violation, lies with the Courts. The role of administrative officials in law enforcement is, in theory, confined to investigating and collating evidence concerning suspected legal violations and, where appropriate, instituting legal proceedings against the suspected infringer for judicial determination and the imposition of sanctions. The idea of an administrative authority imposing sanctions is seen as wielding extraordinary powers of enforcement and carries a significant risk of prosecutorial overarching that can results in failure to adhere to the requirements of due process²⁶.

However, recent trends move towards the possibility for national enforcers to secure compliance through the application of administrative sanctions, such as the French reform, thus implementing the dominant idea that the deterrence of the fine may reduce the risks of non-compliance with the legislation.

The United Kingdom as well seems to foresee the possibility to impose administrative fines at least for intra-Community infringements under the CPC Regulation. The new CMA Guidelines now provide the possibility

²⁴ R. MACRORY, *Making Sanctions Effective*, id.

²⁵ Civil pecuniary penalties are imposed by the Court under the authority of a statute for a breach of that legislation. They are imposed after a civil trial, according to the rules of civil procedure and evidence. The primary purpose of such a regime is to secure compliance with a statutory requirement. "Civil pecuniary penalties blur the line between the criminal and civil law. They are punitive rather than compensatory. Liability is established on the civil standard of proof – on the balance of probabilities – rather than the criminal standard of proof beyond reasonable doubt. And they are imposed through a civil trial, without the protections given to those defending a criminal charge. Yet the outcome can be very grave. In some cases it can be more severe in monetary terms than a criminal prosecution for the same conduct", New Zealand Law Commission, Civil Pecuniary Penalties, Issues Paper 3/2012, http://www.lawcom.govt.nz/sites/default/files/publications/2012/11/nzlc-ip33-civilpen-web.pdf.

²⁶ K. YEUNG, Better Regulation, Administrative Sanctions and Constitutional Value, id., p. 316

to impose fines against traders for intra-Community violations, but the regulatory instrument has not been adopted yet.

1.3 COMPARATIVE TABLES

1.3.1 BELGIUM – ENFORCEMENT POWERS UNDER ARTICLE 4(6) OF CPC REGULATION

LEGAL FRAMEWORK

The Belgium Government has adopted, in 2013, a new Code of Economic Law (hereinafter "the Code") which has consolidated and repealed some of the provision of the previous law *Loi relative aux pratiques du marché et à la protection du consommateur*). The legislation contains both the substantive and procedural provisions and it is applicable to both national and intra-community infringement. The law enforcement is handled by the Directorate General for Control and Mediation (DGCM) which is part of the Federal Public Service of Economy, SMEs; Self-Employed and Energy. The DGCM is also competent for receiving administrative complaints. The powers to obtain documents and carry out inspections are delegated to the DGCM. If an infringement is detected, the Ministry or the delegated agent may issue a warning to stop the infringement fixing a date for the cessation. In case of non respect of the warning, the matter is referred by the inspectors to the court. With this exception, the cease and desist orders and the imposition of sanctions and fines are referred to the Commercial Court. Infringements of the Belgian law on consumer protection are punishable with a series of criminal fines and, in the most serious cases, with the imprisonment.

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING PROVISION CPC REGULATION REFERENCE TO NATIONAL LAW(ARTICLE, PROVISION NATIONAL LAW (QUOTATION OR SUMMARY) Article 4(6) 6. The powers referred to in paragraph 3 shall only be exercised

PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:		
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Article XV. 2§ 1 ^{er} of the Book XV of the Code	Article XV. 2§ 1 ^{er} Without prejudice to the duties of the police officers, officials appointed by the Minister shall be competent for the investigation and establishment of the infringements referred to in the present Code. ()
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Article XV.3 of the Book XV of the Code Article XV.16 of the Book XV of the Code.	Article XV. 3 The official appointed by the Minister according the Article XV.2, may ask to a business or to any person concerned by the infringement to provide all the information they consider necessary for the accomplishment of their task. Article XV.16 The agent in charge of the inspection may require to provide evidence concerning the substantive accuracy of the factual data the business has communicated in the context of a commercial practice. The business shall provide evidence concerning the substantive accuracy of these data within a maximum period of one month. If the proof required under the first subparagraph is not provided or is deemed to be insufficient, the Minister or the official appointed for this purpose may consider the commercial practice to be contrary to the provisions of this Chapter.
(c) to carry out necessary on- site inspections;	Article XV.3	 Article XV. 3 In the context of the research and ascertainment the infringements, the appointed officials, may: enter the workshops, buildings, adjacent and enclosed courtyards, during normal opening or working hours, to which access is necessary to accomplish their tasks; [] with the exception of private dwellings; enter the inhabited premises, if they have reason to believe in the existence of an infringement, with the prior authorisation of the police magistrate; visits to inhabited premises must be carried out between 05:00 and 20:00 and must be made jointly by at least two officials. In the performance of their duties, the appointed officials may require the assistance of the local or

PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
		federal police. They may perform all the investigation, exams, controls, searching, and obtain all the necessary information.
		They may question all the relevant persons on the facts that constitute the infringement.
		They may obtain all the documents, file, books also on informatics support on request and without the need to go to search by themselves.
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Article XV.31 §1 ^{er} of Book XV of the Code.	Article XV.31 §1 Where it is found that an act constitutes an infringement of the Code, or that it may give rise to a cease and desist order in accordance with point 2 of the first subparagraph of Article 113, the official appointed by the Minister may issue a warning ordering to the offender to put an end to this act. The warning shall be served to the offender within a period of 30 days from the finding of the facts, by registered letter or by handling over a copy of the report establishing the facts. The warning shall mention: 1. the alleged facts and the legal provision(s) infringed; 2. the period to put an end to the infringement; 3. the fact that, if no compliance is given to the warning, either a proceedings for a cease and desist order will be brought, either the file will be transferred to the public prosecutor, a proposal for a settlement will be formulated or an administrative sanction will be imposed.
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking	Article XV. 31 §3 of Book XV of the Code.	Article XV.31 § 3 ()§3. Without any prejudice to other measures provided by the Code, the appointed officials may made public the undertaking of the offender to bring an end to the infringement.
(f) to require the cessation or	Art. 2 Loi concernant le règlement de	Article 2

PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)
Article 4(6)		
prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	certaines procédures dans le cadre de la loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur Article 112 Loi relative aux pratiques du marché et à la protection du consommateur du 6 avril 2010 Article 116 Loi relative aux pratiques du marché et à la protection du consommateur du 6 avril 2010	The President of the Commercial Court shall declare the existence and order the cease and desist of any act, even criminally sanctioned, which constitutes a breach to any provisions of the Act of 6 April 2010 on the Market Practices and Consumer Protection Act (now the Code). He is entitled to order an injunction to prohibit the market practices referred to under Articles 83 to 99 even in case they have not started yet but they are imminent. Article 112 The President of the Commercial Court may grant to the offender a deadline to end the infringement, where the nature of the infringement requires so. He may grant the lifting of the injunction when the infringement has been ended. Article 116 The President of the Commercial Court may authorise the publication of his decision, or the summary thereof, for a given period, both outside and inside the offender's premises and order the publication of the judgment or its summary in the press or by any other means, at the offender's expenses. However, these measures of publicity can be authorised only if they are likely to contribute to the cessation of the act or of its effects.
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Article XV.85 of Book XV of the Code	Article XV.85 The infringement that do not comply with the cease and desist order, will be punished with a fine of level 3. Article XV.70 A fine of level 3 is a penal sanction between EUR 26 to EUR 25,000. Article XV.83 (13) All the infringement that constitutes unfair commercial practices are punished with a sanction of level 2, with the exception of those in Article VI. 100(12)(14)(16)(17) and Article VI. 103(1)(2)(8). Article XV.70 Level 2 sanction is a fine between EUR 26 and EUR 10,000.

Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
		Article XV.86 The violations of the Article VI.100 Article VI. 100(12)(14)(16)(17) and Article VI. 103(1)(2)(8), which correspond to points 12,14,16,17,24,25 and 31 of Annex I of Directive 2005/29/EC, are punished with a level 6 sanction.
		Article XV.70 Level 6 sanction is a fine between EUR 500 and EUR 100,000 and imprisonment from one to five years or one of the two sanctions alternatively.

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (QUOTATION OR SUMMARY)
Art. 4 (6)		
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Article XV.118 of Book XV of the Code	Article XV.118 A sanction of level 2 is imposed for the violation of Article XII. 6 to Article XII.9 (information and transparency) and Article XII.12 (advertising) A sanction of level 3 is imposed for infringement to Article XII.13 (advertising via electronic means without prior consent of the recipient). Article XV.70 Level 2 sanction is a fine between EUR 26 and EUR 10,000. Level 3 sanction is a fine between EUR 26 and EUR 25,000.

1.3.2 CZECH REPUBLIC - ENFORCEMENT POWERS UNDER ARTICLE 4(6) OF CPC REGULATION

LEGAL FRAMEWORK

The CPC Regulation has been implemented in the Czech Regulation with Act No. 160/2007 amending certain laws in the field of consumer protection. Under this law, the necessary changes were made to several laws in order to allow the competent authorities to proceed in accordance with the CPC Regulation.

The role of the single liaison office in the Czech Republic is played by the Ministry of Industry and Trade, which is the central government authority responsible for the protection of consumer interests. In accordance with Article 4(1) of the Regulation, the Czech Republic nominated nine authorities delegated with the surveillance and enforcement of rights. These competent authorities are the Czech National Bank, the Czech Trade Inspectorate, the Czech Proof House for Firearms and Ammunition, the Council for Radio and Television Broadcasting, the State Institute for Drug Control, the State Veterinary Administration, the Czech Agriculture and Food Inspection Authority, the Civil Aviation Authority and the Office for Personal Data Protection.

The legal framework is followed by the analytical table of the enforcement powers for each of the directives covered.

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)
Article 4(6)		
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:		
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Rule 11 (b) of Act No 552/1991 on State Inspections	 While performing inspection activities, inspectors are authorized to do the following: (b) to request the inspected person to provide to inspectors the original documents as well as other records such as information stored on computer storage media, exerts, extracts, software source codes, products samples and other goods ()

	DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)	
Article 4(6)			
	Section 4 of the Act No. 64/1986 on the Czech Trade Inspectorate;	Inspectors are authorized to request the necessary documents, information and written or oral statements.	
	Section 44a of the Act No. 6/1993 on the Czech National Bank;	In the case of cross-border cooperation Czech National Bank shall exercise supervision in accordance with regulation of the European Union.	
	Section 20 of the Act No. 156/2000 on the certification of firearms, ammunition and pyrotechnic;	In the case of cross-border cooperation the authority supervises and proceeds in accordance with the relevant legislation of the EU within its competence and pursuant to the legislation.	
	Section 3 of the Act No. 146/2002 on the Agriculture and Food Inspection Authority;	Inspectors are authorized to use the measures laid down in the directly applicable regulation of the European Communities.	
	Section 82 of the Act No. 258/2000 on the protection of public health;	In the case of cross-border cooperation the Regional Health Authority is authorized to conduct public health supervision and proceed according to the directly applicable CPC Regulation.	
	Section 101 of the Act No. 378/2007 on medicinal products;	In the scope of inspection activities, the inspectors shall be entitled to conduct control of premises, reports and documents.	
	Section 49 of the Act No. 166/1999 on veterinary care	In the case of cross-border cooperation the Regional Veterinary Authority is authorized to conduct veterinary supervision and proceed according to the directly applicable regulation of EU on cooperation in the field of consumer protection.	
(b) to require the supply by any person of relevant information related	Rule 11 (d) of Act No 552/1991 on State Inspections	While performing inspection activities, inspectors are authorized to do the following: (d) to asks and request to the inspected persons to provide true and complete information about the inspected issues and the relevant facts.	

information related to the intra-Community

infringement;

Section 4 of the Act No. 64/1986 on the Inspectors are authorized to request the necessary documents, information and written or oral

(c) to carry out necessary on-

site inspections;

medicinal products;

veterinary care

Inspections

Section 49 of the Act No. 166/1999 on

Rule 11 (a) of Act No 552/1991 on State

Section 4 of the Act No. 64/1986 on the

Czech Trade Inspectorate;

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
	Czech Trade Inspectorate;	statements.
	Section 44a of the Act No. 6/1993 on the Czech National Bank,	In the case of cross-border cooperation Czech National Bank shall exercise supervision in accordance with regulation of the European Union.
	Section 20 of the Act No. 156/2000 on the certification of firearms, ammunition and pyrotechnic;	In the case of cross-border cooperation the authority supervises and proceeds in accordance with the relevant legislation of the EU within its competence pursuant to the legislation.
	Section 3 of the Act No. 146/2002 on the Agriculture and Food Inspection	Inspection is authorized to use the measures laid down in the directly applicable regulation of the European Communities.
	Authority; Section 82 of the Act No. 258/2000 on	In the case of cross-border cooperation the Regional Health Authority is authorized to conduct public health supervision and proceed according to the directly applicable regulation of EU on cooperation in the field of consumer protection.
	the protection of public health; Section 101 of the Act No. 378/2007 on	The provision refers to the provision of section 11 of the Act No. 552/1991 on the State Inspection which provides that inspectors are authorized to require controlled entities to provide truthful and

cooperation in the field of consumer protection.

complete information.

In the case of cross-border cooperation the Regional Veterinary Authority is authorized to conduct veterinary supervision and proceed according to the directly applicable regulation of EU on

a) to enter into buildings, properties, production halls and real estates, as well as into other areas

Inspectors are authorized to request the necessary documents, information and written or oral

and properties belonging to the inspected persons, provided that they are related to the inspection activities: immunity of private dwellings, properties or houses must be observed.

While performing inspection activities, inspectors are authorized to do the following:

Inspectors are authorized to enter to business premises within the inspection.

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)
Article 4(6)		
		statements which may be related to the alleged infringement. The rules allow the inspectors to enter business premises within the inspection and to take samples for analysis. They can inspect books and other documents, take away samples of goods to be further inspected, verify the identity of the persons controlled.
	Section 44a of the Act No. 6/1993 on the Czech National Bank;	In the case of cross-border cooperation Czech National Bank shall exercise supervision in accordance with regulation of the European Union.
	Section 20 of the Act No. 156/2000 on the certification of firearms, ammunition and pyrotechnic;	In the case of cross-border cooperation the authority supervises and proceeds in accordance with the relevant legislation of the EU within its competence pursuant to the legislation.
	Section 3 of the Act No. 146/2002 on the Agriculture and Food Inspection Authority;	Inspection is authorized to use the measures laid down in the directly applicable regulation of the European Communities.
	Section 82 of the Act No. 258/2000 on the protection of public health;	In the case of cross-border cooperation the Regional Health Authority is authorized to conduct public health supervision and proceed according to the directly applicable regulation of EU on cooperation in the field of consumer protection.
		The provision refers to section 11 of the Act No. 552/1991 on the State Inspection which provides that inspectors are authorized to enter to the premises and other area bearing on the subject of control.
	Section 101 of the Act No. 378/2007 on medicinal products;	In the case of cross-border cooperation the Regional Veterinary Authority is authorized to conduct veterinary supervision and proceed according to the directly applicable regulation of EU on cooperation in the field of consumer protection.
	Section 48 of the Act No. 166/1999 on	

veterinary care

Section 3 and 7c of the Act No. 64/1986

on the Czech Trade Inspectorate;

(d) to request in writing that the seller or supplier

CTIA disposes of deficiencies and propose remedial action.

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS

PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
concerned cease the intra-Community infringement;	Section 7c of the Act No. 40/1995 on the regulation of advertising; Section 44a of the Act No. 6/1993 on the Czech National Bank; Section 20 of the Act No. 156/2000 on	The competent authority may prohibit improper comparative advertising or advertising that is unfair commercial practice as an infringement under the directly applicable regulation of the EU. In the case of cross-border cooperation Czech National Bank shall exercise supervision in accordance with regulation of the European Union. In the case of cross-border cooperation the authority supervises and proceeds in accordance with the
	the certification of firearms, ammunition and pyrotechnic; Section 3 and 5 of the Act No. 146/2002 on the Agriculture and Food Inspection Authority; Section 82 and 84 of the Act No. 258/2000 on the protection of public health; Section 101 of the Act No. 378/2007 on medicinal products;	Inspection is authorized to use the measures laid down in the directly applicable regulation of the European Communities. In the case of cross-border cooperation the Regional Health Authority is authorized to conduct public health supervision and to proceed according to the directly applicable regulation of EU on cooperation in the field of consumer protection The provision refers to the provision of section 11 of the Act No. 552/1991 on the State Inspection which provides that inspectors are legitimate to require a written report on the disposing of deficiencies
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to	Section 48 of the Act No. 166/1999 on veterinary care	In the case of cross-border cooperation the Regional Veterinary Authority is authorized to conduct veterinary supervision and proceed according to the directly applicable regulation of EU on cooperation in the field of consumer protection. No provisions found

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS

PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE,	Provision national law (Quotation or Summary)
	Paragraph, Law)	
Article 4(6)		
publish the resulting undertaking		
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish	§ 67 Administrative Procedure Code (Act 413/2005 Coll.)	§67(1) The administrative authority may, by a decision 1) constitute, alter or cancel rights or duties of a person or declare, in certain case, that the person has or does not have the rights or duties or b) determines procedural issues when provided by a statute.
resulting decisions;	Section 3 and 7c of the Act No. 64/1986 on the Czech Trade Inspectorate;	CTIA disposes of deficiencies and proposes remedial action. Results of inspections are published for the purpose of prevention and to raise public awareness.
	Section 7c of the Act No. 40/1995 on the regulation of advertising;	The competent authority may prohibit improper comparative advertising or advertising that is unfair commercial practice as an infringement under the directly applicable regulation of the EU.
	Section 44a of the Act No. 6/1993 on the Czech National Bank,	In the case of cross-border cooperation Czech National Bank shall exercise supervision in accordance with regulation of the European Union.
	Section 20 of the Act No. 156/2000 on the certification of firearms, ammunition and pyrotechnic;	In the case of cross-border cooperation the authority supervises and proceeds in accordance with the relevant legislation of the EU within its competence pursuant to the legislation.
	Section 3 and 5 of the Act No. 146/2002 on the Agriculture and Food Inspection Authority;	Inspection is authorized to use the measures laid down in the directly applicable regulation of the European Communities.
	Section 82 and 84 of the Act No. 258/2000 on the protection of public health;	In the case of cross-border cooperation the Regional Health Authority is authorized to conduct public health supervision and to proceed according to the directly applicable regulation of EU on cooperation in the field of consumer protection.
	Section 101 of the Act No. 378/2007 on medicinal products;	The authority may seize the medical products concerned.
	Section 48 of the Act No. 166/1999 on	In case of cross-border cooperation the Regional Veterinary Authority is authorized to conduct

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
	veterinary care	veterinary supervision and proceed according to the directly applicable regulation of EU on cooperation in the field of consumer protection
(g) to require the losing defendant to make payments into the public purse or to	Section 9 of the Act No. 64/1986 on the Czech Trade Inspectorate;	Head of the authority may impose a fine under the applicable relevant law.
any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Section 46a of the Act No. 6/1993 on the Czech National Bank,	When an offence is committed, the authority may impose a fine up to 10 million CZK (EUR 400,000).
	Section 22a of the Act No. 156/2000 on the certification of firearms, ammunition and pyrotechnic;	When an offence is committed, the authority may impose a fine up to 5 million CZK (EUR 200,000).
	Section 92 of the Act No. 258/2000 on the protection of public health;	If the law is violated the authority may impose a fine up to 2 million CZK (EUR 80,000).
	Section 71 and 72 of the Act No. 166/1999 on veterinary care	An offense may be fined up to 50.000 CZK (EUR 2,000)

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national Law (QUOTATION OR SUMMARY)
Article 4(6)		
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall		

	DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)	
Article 4(6)			
include, at least, the right:			
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Section 10 of the Act No. 480/2004 on the protection of personal data recalling Rule 11 of Act 552/1992 on State control	Rule 11(a) (a) to enter into buildings, properties, production halls and real estates, as well as into other areas and properties belonging to the inspected person, providing that they are related to the inspection activities; immunity of personal real estate, property or houses must be observed. Rule 11(b) and (e)	
		 (b) to request and ask the inspected person to provide the inspection employee with the applicable original documents, as well as other records such as information stored on computer storage media, applicable exerts, extracts, software source codes, product samples and other goods (hereafter referred to as "essential documents" only), (e) to take away or to secure applicable documents; such seizure and transfer of documents must be documented in writing and the inspected person must receive copies of the applicable documents instead. 	
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Section 10 of the Act No. 480/2004 on the protection of personal data recalling Rule 11 of Act 552/1992 on State control	Rule 11 (c) and (d) (c) to learn about secret information, providing that the inspection employees have the proper level of authorization, issued in accordance with special legal regulation, (d) to ask and requests the inspected persons to provide true and complete information about inspected issues and relevant facts.	
(c) to carry out necessary on- site inspections;	Section 10 of the Act No. 480/2004 on the protection of personal data recalling Rule 9 of Act 552/1992 on State Control	Rule 9 Inspections are performed by the employees of the applicable inspection body (hereafter referred to as the "inspection employees") and based on written authorization, issued by the applicable inspection body.	
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Section 10 of the Act No. 480/2004 on the protection of personal data	In the case of cross-border cooperation the authority proceeds in accordance with European regulation on consumer protection cooperation.	
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra-		No provisions found	

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
Community infringement; and, where appropriate, to publish the resulting		
undertaking		
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Section 13 of the Act No. 480/2004 on the protection of personal data recalling the Code of Administrative procedure	Article 150 It is possible, in a proceeding by virtue of office or in a contentious proceeding, to impose a duty by a written order. The administrative authority may issue an order if it considers the factual findings sufficient; in this case, the issuance of the order may be the first action in the proceedings.
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Section 11 of the Act No. 480/2004 on the protection of personal data	In case of violation of the provisions of the Act N0 480/2004, the authority may impose a fine up to 10 million CZK (EUR 400,000).

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)
Article 4(6)		
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:		
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Rule 11 of Act 552/1992 on State control	Rule 11(b) and (e) (b) to request and ask the inspected person to provide the inspection employee with the applicable original documents, as well as other records such as information stored on

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
		computer storage media, applicable exerts, extracts, software source codes, product samples and other goods (hereafter referred to as "essential documents" only); (e) to take away or to secure applicable documents; such seizure and transfer of documents must be documented in writing and the inspected person must receive copies of the applicable documents instead.
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Rule 11 of Act 552/1992 on State control	Rule 11 (c) and (d) (c) to learn about secret information, providing that the inspection employees have the proper level of authorization, issued in accordance with special legal regulation; (d) to ask and requests the inspected persons to provide true and complete information about inspected issues and relevant facts.
	Rule 9 of Act 552/1992 on State Control	Rule 9 Inspections are performed by the employees of the applicable inspection body (hereafter referred to as the "inspection employees") and based on written authorization, issued by the applicable inspection body.
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Section 7c of the Act No. 40/1995 on the regulation of advertising;	The competent authority may prohibit improper comparative advertising or advertising that is unfair commercial practice as an infringement under the directly applicable regulation of the EU.
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking	No provision	No provision
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Section 7c of the Act No. 40/1995 on the regulation of advertising	The competent authority may prohibit improper comparative advertising or advertising that is unfair commercial practice as an infringement under the directly applicable regulation of the EU.

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)
Article 4(6)		
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	No provision	No provision

1.3.3 FRANCE – ENFORCEMENT POWERS UNDER ARTICLE 4(6) OF CPC REGULATION

LEGAL FRAMEWORK

In France, the *Direction générale de la concurrence, de la consommation et de la rép*ression des fraudes ("DGCCRF") is the comeptent body to enforce the consumer protection legilsation. The DGCCRF has all the powers provided by CPC Regulation. The new *Loi 17 mars 2014 relative à la consommation*, has provided new powers to DGCCRF, including the possibility for the DGCCRF to impose fines on the infringer.

The procedural rules are included in the Code de la Consommation. For the investigative powers, the Code refers to the Code of Commerce and, in particular, to the powers for the competition and antitrust investigation. DGCCRF, which is competent both for competition (now in coordination with the Competition authority) and consumer'protection, has thus extensive investigative powers.

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		

PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:	Art. L450-1, § II du Code de Commerce Modifié par Ordonnance n°2008-1161 du 13 novembre 2008 - art. 1	L450-1: Officials duly authorised by the Minister for Economic Affairs may carry out the necessary inquiries pursuant to the provisions of the present Book. Category A officials of the Ministry of Economic Affairs who are specially authorised for such purposes by the Minister of Justice on a recommendation from the Minister for Economic Affairs may receive letters rogatory from investigating judges.
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Article L450-3 du Code de Commerce Modifié par Ordonnance n°2008-1161 du 13 novembre 2008 - art. 1	L450-3 Officials referred to in art 450-1 may have access to any premises, lands or means of transport used for business purposes, request to be shown the books, invoices and any other business records and take copies of them, and gather information and receive explanations either by convening meetings or in situ. They may ask the authority by which they are employed to appoint an expert to draw up any report that may be necessary, after hearing the party concerned.
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	See above	See above
(c) to carry out necessary on-site inspections;	Art. L 450-3 du Code de Commerce Modifié par Ordonnance n°2008-1161 du 13 novembre 2008 - art. 1	L450-3: Officials referred to in art 450-1 may have access to any premises, lands or means of transport used for business purposes, request to be shown the books, invoices and any other business records and take copies of them, and gather information and receive explanations either by convening meetings or in situ. They may ask the authority by which they are employed to appoint an expert to draw up any report that may be necessary, after hearing the party concerned.
	Art. L 450-4 du Code de Commerce Modifié par Ordonnance n°2008-1161 du 13 novembre 2008 - art. 1	L450-4: Officials referred to in art 450-1 may conduct inspections at any premises and seize documents and any information only in the context of investigations requested by the European Commission, the Minister for Economic Affairs or the Competition Authority's general rapporteur on the basis of a proposal from the rapporteur or judicial authorisation given by the judge deciding on provisional detention (juge des libertés et de la detention) of the Regional Court (Tribunal de grande instance) in whose jurisdiction the premises that are going to be inspected are located. They may also, in the same circumstances, seal any

PROVISION CPC REGULATION	PEFFENCE TO NATIONAL LAW/ARTICLE	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
		commercial premises, documents and data supports for the duration of the inspection in the abovementioned premises. In case those premises are within the jurisdiction of different Courts and that simultaneous actions must be taken in front of each of them, a single order may be issued by a judge (juge des libertés et de la détention) who is competent in one of those Courts. The judge shall verify that the application for authorisation is duly grounded; the abovementioned application must contain all the elements held by the applicant which would justify an inspection. When the inspection is intended to detect the infringement of the provisions contained in Book IV of the present code, the application for authorization may contain only the evidence which gives grounds for suspecting the existence of the practices of which evidence is sought. The inspection and seizure take place under the authority and control of the judge who authorised them. The judge shall designate the chief of the service that put in charge one or more police officers to be present during the operations in order to provide assistance during the enforcement of the measures and to keep the judge informed of their progress. If operations take place outside the jurisdiction of boundaries of the Regional Court (Tribunal de grande instance) in which the judge operates, he shall issue letters of rogatory delegating such control to the presiding judge of the Regional Court (Tribunal de grande instance) in whose jurisdiction the inspections are going to be carried out. The judge may visit the premises during the inspection, and may decide to suspend or terminate it at any time. The order is served verbally and on the premises at the time of the inspection to the occupier of the premises, or his representative, who receives copy and acknowledges receipt or signs in the margins of the official record. In absence of the occupier of the premises or his representative, the order is served by registered mail sent after the inspection. Service is deemed

Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
		the occupier of the premises or his representative. If this proves impossible, the enforcement officer shall enlist the services of two witnesses who are not under his authority, or that of the administration of the Directorate General for Competition, Consumer Affairs and the Prevention of Fraud, or that of the Competition Authority. Only the investigating officials referred to in art 450-1, the occupier of the premises or his representative, as well as the law police officers and, where applicable, the agents and other persons appointed by the European Commission, may be able to access to the content of the documents and of the other items before their seizure. Officials mentioned in Article L. 450-1 may proceed during the visit to hearings of the occupier of the premises or his representative to collect the information and explanations relevant to the needs of the investigation. Inventories and sealing are carried out pursuant to Article 56 of the French Code of Criminal Procedure. The original documents of the official record and the inventory are sent to the judge who ordered the inspection. A copy of the minutes and the inventory is delivered to the occupier or his representative. A copy is also sent by registered mail to the persons involved in the case because of the items seized during the operations. The seized items and the documents are returned to the occupier of premises within six months of the date on which the Competition Authority's decision becomes definitive. The occupier of the premises is given formal notice, by registered mail, to come and collect the seized items within two months. Upon expiry of that period, and failing any steps on his part, the documents and other items are returned to him at his own expense. The inspection and the seizing are subject to appeal in front of the President of the Court of Appeal (Premier Président de la Cour d'appel') within the jurisdiction of which the judge who authorised the inspection operates, according to the rules of the Code of Criminal Pro

PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
		Code of Criminal Procedure. The seized items are maintained until a decision has become final.
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Art L 141-1 § V du Code de la consommation modifié par LOI n°2012-375 du 19 mars 2012 - art. 4 Article L 141-1-VII as modified by Art. 25 of the loi du 17 mars 2014	Art L 141-1 § V – Officials competent to establish infractions or breaches to obligations in paragraphs I, II and III may, after an adversarial procedure, order to a professional, having given him a reasonable deadline, to fulfill the abovementioned obligations, to stop any illegal conduct or to remove any illegal clause. VII Officers authorized to report violations or breaches to the provisions mentioned in I-III of Article L. 141-1 may, after an adversarial procedure, require any professional by setting a reasonable time limit to
		comply with these provisions, to stop any unlawful act or to remove any illegal clause.
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking	Article L141-2 Modifié par LOI n°2011-1862 du 13 décembre 2011 - art. 30	Article L141-2 For contraventions and those criminal offences not punished with prison sentences, referred to in Books 1st and 3rd of the present code, as well as for the infractions in art. L. 121-1, the administrative authority responsible for the matters relating to competition and consumption may, provided that criminal prosecution has not been brought, with the Public Prosecutor's consent, to reach an agreement pursuant to the procedures determined by decree issued by the "Conseil d'Etat". The act by which the Public Prosecutor agrees a compromise proposal interrupts statute of limitations of the criminal proceedings. The person responsible for the abovementioned violation may not be the subject of criminal prosecution if he has fulfilled, in the time allotted, the obligations deriving from the acceptance of the agreement.
	Article R141-3 Modifié par Décret n°2012-839 du 29 juin 2012 - art. 1	II The administrative authority referred to in paragraph I, forward the proposal of transaction to the Prosecutor of the Republic within a period of three months from the closing of the result report finding the offence. This proposal details the sum that the offender will be asked to pay to the public Treasury, the time limit for payment and, if applicable, other obligations resulting from the acceptance of the settlement. III When the Prosecutor of the Republic gave its agreement on the proposal for a settlement, the administrative authority referred to in the I shall notify the latter in duplicate to the author of the offence. This notification includes a statement specifying that if the person does not pay the sum indicated in the

PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
		proposal within the deadline or that he does not comply with other obligations prescribed to him, the Prosecutor of the Republic will decide, except if new element are provided, to start the proceedings against him. The offender has a month from the notification to reply. In case of acceptance, the offender must return to the administrative authority a signed copy of the proposal. In the event that, at the end of the period mentioned in the paragraph above, the offender has refused the proposal or did not respond, the administrative authority shall inform without delay the Prosecutor of the Republic. The Prosecutor is also informed by the administrative authority if the offender did not pay the sum indicated in the proposal, at the end of the deadline, or did not comply with the imposed obligations.
(f) to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to publish resulting decisions;	Art L 141-1 § V and VI du Code de la consommation modifié par LOI n°2012-375 du 19 mars 2012 - art. 4	L 141-1 § VI: The administrative authority tasked with matters relating to competition and consumption may request the civil courts or, where appropriate, the administrative courts, to order the removal of any illicit or unfair clause in any contract or type of contract offered or intended for consumers, imposing a fine if necessary. Having informed the Public Prosecutor thereof, it may also bring an action before the civil courts petitioning the judge to order, imposing a fine, any measure likely to put an end to the illicit conduct referred to in paragraphs I and II of the present article. The implementing regulations for such procedures are determined by decree of the Council of State.
	Article L121-4 du Code de la consommation modifié par LOI n°2012-375 du 19 mars 2012 - art. 4	Article L121-4 In the event of conviction, the Court orders publication of the judgment. It may, in addition, order the publication, at expenses of the convicted party, of one or more remedial announcements. The judgment prescribes the terms of these announcements and the terms by which they are to be issued and he gives to the convicted party a deadline for the publication. In the event of non-compliance, and without prejudice to the penalties provided for in article L. 121-7, the publication is ordered by the public prosecutor at the expense of the convicted party.
	Art. L-141-1 VIIi -2 as modified by Art. 25 of the loi du 17 mars 2014	«2 ° After notice to the Prosecutor of the Republic, ask the civil court to order, where appropriate imposing a fine, any measure likely to put an end to the breach of contractual obligations or the unlawful conduct mentioned the I-III;

PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Article - R 121 13 Code de la Consommation	Article - R 121 13 The following are punished with fines provided for 5th class contraventions: 1 Sales or offers for sale, services or service offers with prizes to consumers or buyers, as prohibited by Article L. 121-35; 2 The refusal or subordination to conditions, as prohibited by Article L. 122-1; In case of repetition, the fines provided for the recurrence of 5th class contraventions are applicable.
	Art. L-141-1 VII as modified by Art. 25 of the Loi du 17 mars 2014	(Cross- reference) Article - L 121-35 Any sale or offer for sale of goods or products or any service or supply of services offered to consumers and granting, with no additional cost, immediately or in the future, a prize consisting of products, goods or services shall be prohibited, except whether they are identical to those which are sold or delivered in case the concerning practice is unfair within the meaning of Article L. 120-1.
		Art. L 141-1 VII
		When the concerned professional has not complied with this injunction within the given time, the administrative authority responsible for competition and consumer may decide against him, under the conditions laid down in article L. 141-1-2, an administrative penalty which the amount may not exceed: 1 ° EUR 1,500 for a natural person and EUR 7,500 for a legal entity when the offence or the breach having justified the measure of injunction is sanctioned by a fine not higher than the fine foreseen for a contravention of the fifth class or than an administrative fine of EUR 3,000 for a natural person and EUR 15,000 for a legal entity; 2 ° EUR 3,000 for a natural person and EUR 15,000 for a legal entity when the offence or the breach having justified the injunction is sanctioned by an administrative fine or tort punishment with an amount exceeding EUR 3,000 for a natural person and EUR 15,000 for a legal entity. Authorized agents may implement measures of this article throughout the national territory.

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (Quotation or Summary)
Article 4(6)		
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Art L 141-1 § VI du Code de la Consommation modifié par LOI n°2012-375 du 19 mars 2012 - art. 4	L 141-1 § VI: The administrative authority tasked with matters relating to competition and consumption may request the civil courts or, where appropriate, the administrative courts, to order the deletion of any illicit or unfair clause in any contract or type of contract offered or intended for consumers, on penalty of a fine if necessary. Having informed the Public Prosecutor thereof, it may also bring an action before the civil courts petitioning the judge to order, on penalty of a fine if necessary, any measure likely to put an end to the illicit conduct referred to in paragraphs I and II of the present article. The implementing regulations for such procedures are determined by decree of the Council of State.
	Article L121-4 Code de la Consommation L 141- 1 VIII as modified by Art. 25 of the loi du 17 mars 2014	Article L121-4 In the event of conviction, the Court orders publication of the judgment. It may, in addition, order the publication, at expenses of the convicted party, of one or more remedial announcements. The judgment prescribes the terms of these announcements and the terms by which they are to be issued and he gives the convicted party a deadline for the publication. In the event of non-compliance, and without prejudice to the penalties provided for in article L. 121-7, the publication is ordered by the public prosecutor at the expense of the convicted party.
		«2 ° After notice to the Prosecutor of the Republic, ask to the civil court to order, where appropriate under penalty, any measure likely to put an end to the breach of contractual obligations or the unlawful conduct mentioned in the I-III;
		3 °Request the judicial authority, as foreseen at point 8 of section I of Article 6 of Act No. 2004-575 of 21 June 2004 on confidence in the digital economy, in case of infringement or breach of the provisions referred to in I - III of this Article, to prescribe through a summary judgment or upon request of any person mentioned at point 2 of section I of the same Article 6, or, alternatively, to any person mentioned at point 1 of section 1 of the same, as well as to providers of telephone service to the public within the meaning of the section 7 ° of Article L. 32 of the code of posts and electronic communications, all proportionate measures to prevent injury or to stop damage caused by the contents of an online public communication service.
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation,	L 141- 1 VII as modified by Art. 25 of the loi du 17 mars 2014 .	Art. L 141-1 VII When the concerned professional has not complied with this injunction within the given time, the administrative authority responsible for competition and consumer may decide against him, under the conditions laid down in article L. 141-1-2, an administrative penalty which the amount may not exceed: 1 ° EUR 1,500 for a natural person and EUR 7,500 for a legal entity when the offence or the breach

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national Law (quotation or Summary)
Article 4(6)		
in the event of failure to comply with the decision.		having justified the measure of injunction is sanctioned by a fine not higher than the fine foreseen for a contravention of the fifth class or than an administrative fine of EUR 3,000 for a natural person and EUR 15,000 for a legal entity; 2° EUR 3,000 for a natural person and EUR 15,000 for a legal entity when the offence or the breach having justified the injunction is sanctioned by an administrative fine or tort punishment with an amount exceeding EUR 3,000 for a natural person and EUR 15,000 for a legal entity. Authorized agents may implement measures of this article throughout the national territory.

DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Art L 141-1 § VI du Code de la consommation modifié par LOI n°2012-375 du 19 mars 2012 - art. 4 Art. 121-1 VII as modified by Art. 25 of the loi du 17 mars 2014 Article L121-4 du Code de la consommation Art L121-1 VIII as modified by Art. 25 of the loi du 17 mars 2014	VIII The administrative authority responsible for competition and consumer affairs can: «1 Ask to the civil court or, where appropriate, to the administrative jurisdiction to order, where appropriate under a fine, the removal of a illegal or unfair term inserted by a professional in any contract type of contract proposed or intended for the consumer, to declare that the term is deemed unwritten in all identical contracts concluded by the same professional with consumers, including contracts that are no more available, and to order him to inform at its own expenses the consumers concerned by all appropriate means;»
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation,		Art. L 141-1 VII When the concerned professional has not complied with this injunction within the given time, the administrative authority responsible for competition and consumer may decide against him, under the conditions laid down in article L. 141-1-2, an administrative penalty which the amount may not exceed: 1 ° EUR 1,500 for a natural person and EUR 7,500 for a legal entity when the offence or the breach

DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)
Article 4(6)		
in the event of failure to comply with the decision.		having justified the measure of injunction is sanctioned by a fine not higher than the fine foreseen for a contravention of the fifth class or than an administrative fine of EUR 3,000 for a natural person and €15,000 for a legal entity; 2 ° EUR 3,000 for a natural person and EUR 15,000 for a legal entity when the offence or the breach having justified the injunction is sanctioned by an administrative fine or tort punishment with an amount exceeding EUR 3,000 for a natural person and EUR15,000 for a legal entity. Authorized agents may implement measures of this article throughout the national territory.

DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Art R 121 to R 121-2 du Code de la Consommation	Art. R121 -1 foresees a fine up to EUR 1,500 if prior information provided by Article art L 121-18 and L 121-9 are not communicated in a clear and precise manner to the consumer. (EUR 3,000 in case of repeated offence) Article R121-2 foresees that legal persons may be held liable for the offense. They are liable to a fine of € 7,500 (15,000 for a subsequent offense). Art. R121-1-2 foresees a fine up to EUR 1,500 if the seller's refusal to reimburse, under the conditions laid down in Article L. 121-20-1, a good returned by the buyer when the product has a right of withdrawal. (EUR 3,000 in case of repetition) Cross reference Article L121-20-3 foresees that the supplier should indicate a deadline for the execution of the contract. If he doesn't comply with it, the consumer can obtain the reimbursement and the resolution of the contract under the conditions laid down in the second and third paragraphs of article L. 114 – 1.

DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)
Article 4(6)		
		Article L121-20-3 foresees in case of non execution of the contract because of the unavailability of the good or the service provider, the consumer must be informed of this situation and must, if necessary, be to be reimbursed without delay and at the latest within 30 days. Beyond this term, the legal interests on the sum are due.

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)
Article 4(6)		
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.		Article L213-1 Pursuant to Article L121-14, Misleading advertising shall be sanctioned with the same sanctions foreseen for deceptive commercial practices. Pursuant to Article L121-6 Deceptive commercial practices are sanctioned with 2 years imprisonment and a fine of 37,500 Euros (the fine may be increased to 50% of spending on advertising or practice constituting the offense). As additional penalties the court may orders the publication of the Comparative advertising (Following Article L. 121-8) The sanctions foreseen for misleading advertising should also be applicable to comparative advertising. Secondly, Article L. 121-15 of the Consumer Code punishes with a fine of fine of 37,500 Euros the advertiser when that advertise an unauthorized liquidation. Comparative advertising may also be sanctioned through Articles L.716-9 and L.716-12 of the Code of Intellectual Property. Pursuant to this article any person trying to sell, supply, offer for sale or lease of goods presented under an infringing mark should be sanctioned of four years imprisonment and a fine of 400,000 euros. When the offenses provided for in this Article have been committed by an organized gang or if the facts are on dangerous for human health safety, the penalty is increased up to five years' imprisonment and 500 000 Euros of fine. In case of recidivism, or if the offender is or has been bound by the damaged party, the penalties involved shall be doubled.

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
		The perpetrators may also be deprived for a time not exceeding five years of election right and eligibility for commercial courts, chambers of commerce and industry and chambers of trade and for industrial tribunals.

1.3.4 GERMANY – ENFORCEMENT POWERS UNDER ARTICLE 4(6) OF CPC REGULATION

LEGAL FRAMEWORK

Regulation (EC) No 2006/2004 on Consumer Protection Cooperation (CPC Regulation) is implemented through the EC Consumer Protection Enforcement Act (*EG-Verbraucherschutzdurchsetzungsgesetz* (VSchDG)).²⁷ For the description of the implementation of Art. 4(6) of CPC Regulation in Germany see the detailed country report. The BVL is the "single liaison office" in Germany for the European cooperation in consumer protection. At the same time, it is the competent authority for cross-border enforcement of a large number of consumer protection laws. Consequently, the BVL assumes a dual function in the European network of authorities. As competent authority, the BVL is responsible for legal enforcement in the areas of unfair commercial practices, doorstep selling, consumer-credit transactions, package travel, unfair terms in consumer contracts, timeshare and related contracts, distance-selling contracts, sale of consumer goods as well as electronic commerce and unsolicited communications. If collective consumer interests in these areas have been violated, then the BVL will take the necessary measures, provided the required conditions are met.

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING

PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (Quotation or Summary)
Article 4(6)		The powers of the competent authorities are laid down in the EG- VerbraucherschutzdurchsetzungsGesetz (VSchDG) ²⁸
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:		§5 VSchDG - Powers of the competent authority (1) The competent authority shall take the measures necessary to establish, eliminate or prevent future intra-Community infringements of consumer protection legislation. In particular it may
(a) to have access to any relevant document, in any	§ 5(1) sentence 2 Nr. 2 VSchDG (information from seller or service provider), Nr. 3	§5 VSchDG - Powers of the competent authority (1) The competent authority shall take the measures necessary to establish, eliminate or prevent future intra-Community infringements of consumer protection legislation. In particular it may

²⁷ [___official BGBL reference.___]. See also the preparatory legislative debate Drucksache 16/2930.

Translation taken from the Bundesamt für Verbraucherschutz und Lebensmittelsicherheit, "Report in accordance with Article 21(2) of Regulation (EC) No 2006/2004 for 2009/2010".

	DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (Quotation or Summary)	
form, related to the intra-Community infringement;	VSchDG (particular information from third parties), Nr. 4 VSchDG (print-outs of electronic data); § 5(2) sentence 1 Nr. 1 VSchDG (powers of access to necessary documents)	1. () 2. require the seller or supplier to provide all the necessary information within a adequate period of time to be laid down, 3. oblige persons, which commercially provide postal, telecommunications or telemedia services or which participate in the provision thereof, to communicate the name and delivery address of a user of postal, telecommunications or telemedia services within within a adequate period of time to be laid down, in so far as that information can be exclusively obtained by means of the stock data available to those obliged to provide this information 4. require print-outs of electronically stored data 5. take the measures required to enforce the powers under (2). () (2) Where it is necessary for the purposes of implementing Regulation (EC) No 2006/2004 and this Act, the competent authority's staff responsible for determining intra-Community infringements are authorised to 1. examine any necessary media of data retention belonging to the seller or supplier, in particular notes, contracts and advertisement documents, and to make or require to be made, copies, extracts or print-outs thereof ()	
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	§ 5 (1) sentence 2 nr. 2 VSchDG (duty to supply information) § 5 (3) VSchDG (conditions under which a person may withhold information) § 6 VSchDG (Duty of toleration and cooperation)	§5 VSchDG - Powers of the competent authority (1) Die zuständige Behörde trifft die notwendigen Maßnahmen, die zur Feststellung, Beseitigung oder Verhütung innergemeinschaftlicher Verstöße gegen Gesetze zum Schutz der Verbraucherinteressen erforderlich sind. It may in particular 1. () 2. require the seller or supplier to provide all the necessary information within a adequate period of time to be laid down, 3. oblige persons, which commercially provide postal, telecommunications or telemedia services or which participate in the provision thereof, to communicate the name and delivery address of a user of postal, telecommunications or telemedia services within within a adequate period of time to be laid down, in so far as that information can be exclusively obtained by means of the stock data available to those obliged to provide this information 4. require print-outs of electronically stored data 5. take the measures required to enforce the powers under (2). () (2) Where it is necessary for the purposes of implementing Regulation (EC) No	

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PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
		2006/2004 and this Act, the competent authority's staff responsible for determining intra-Community infringements are authorised to 1. examine any necessary media of data retention belonging to the seller or supplier, in particular notes, contracts and advertisement documents, and to make or require to be made, copies, extracts or print-outs thereof () (3) The person obliged to provide information under paragraph 1 sentence 2 Nr 2 can refuse the answer to those questions, which would for himself or one of the familiars named in § 383 Abs. 1 Nr. 1 to 3 of the Zivilprozessordnung risk a criminal persecution or a procedure under the Administrative Offences Act. He is to be informed of his right to refuse the provision of information. § 6 VSchDG Duty of toleration and cooperation The seller or supplier () is obliged to 1. () 2. support the competent authorities charged with the examination of intra-Community infringements in the course of their duties. ()
(c) to carry out necessary on-site inspections;	§ 5 (2) sentence 1 nr. 2 VSchDG	§5 VSchDG - Powers of the competent authority () (2) Where it is necessary for the purposes of implementing Regulation (EC) No 2006/2004 and this Act, the competent authority's staff responsible for determining intra-Community infringements are authorised to 1. () 2. Enter the property and business premises as well as the associated offices oft he seller or supplier during the regular business or opening hours, in so far as this is necessary according to Nr 1.
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	§ 5 (1) VSchDG	§5 VSchDG - Powers of the competent authority (1) The competent authority shall take the measures necessary to establish, eliminate or prevent future intra-Community infringements of consumer protection legislation. In particular it may 1. require the responsible seller or supplier within the meaning of Article 3(h) of Regulation (EC) No 2006/2004 (seller or supplier) to desist from an existing intra-Community infringement or refrain from committing future infringements, ()

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PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)	
REGULATION	rakagraffi, Law)		
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra-Community infringement; and, where appropriate, to publish the resulting undertaking	§ 5 (1) VSchDG (cessation) § 5 (4) VSchDG (publication)	§5 VSchDG - Powers of the competent authority (1) The competent authority shall take the measures necessary to establish, eliminate or prevent future intra-Community infringements of consumer protection legislation. In particular it may 1. require the responsible seller or supplier within the meaning of Article 3(h) of Regulation (EC) No 2006/2004 (seller or supplier) to desist from an existing intra-Community infringement or refrain from committing future infringements, () (4) The competent authority may publish decisions under (1) sentence 2 No 1 within three months of these entering into force in the Bundesanzeiger or the electronic Bundesanzeiger, if this is necessary to prevent intra-Community infringements in the future. Data relating to specific persons may be made public only if the public interest in information takes precedence over the protected interest of the person affected or where the affected person has given his or her assent. The competent authority shall refrain from publication if the seller or supplier makes a comparable public announcement. Sentences 1 to 3 apply in so far as the seller or supplier has undertaken to refrain from the intra-Community infringement in order to avoid a decision being made by the authority in accordance with (1) sentence 2 No 1.	
Art. 4(6)f to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to publish resulting decisions;	§ 5 (1) 1 VSchDG (necessary measures: declaratory, cessation, prevention) § 5 (4) VSchDG (publication)	§5 VSchDG - Powers of the competent authority (1) The competent authority shall take the measures necessary to establish, eliminate or prevent future intra-Community infringements of consumer protection legislation. In particular it may 1. require the responsible seller or supplier within the meaning of Article 3(h) of Regulation (EC) No 2006/2004 (seller or supplier) to desist from an existing intra-Community infringement or refrain from committing future infringements, () (4) The competent authority may publish decisions under (1) sentence 2 No 1 within three months of these entering into force in the Bundesanzeiger or the electronic Bundesanzeiger, if this is necessary to prevent intra-Community infringements in the future. Data relating to specific persons may be made public only if the public interest in information takes precedence over the protected interest of the person affected or where the affected person has given his or her assent. The competent authority shall refrain from publication if the seller or supplier makes a comparable public announcement. Sentences 1 to 3 apply in so far as the seller or supplier has undertaken to refrain from the intra-Community infringement in order to avoid a decision being made by the authority in accordance with (1) sentence 2 No 1.	

PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	§ 9 VSchDG (administrative fine) § 10 VSchDG (enforcement penalty)	§9 Administrative fines (1) It is an offence deliberately or negligently to 1. fail to comply with an enforceable order in accordance with §5(1, sentence 2 No 2 or 3, or 2. to fail to comply with a measure or to support a competent or commissioned person in breach of §6 sentence 1, No 1 or 2. (2) Administrative offences can be punished by a fine of up to EUR 10,000. (3) administrative authorities for the purposes of §36(1) No 1 Gesetz über Ordnungswidrigkeiten (Act on Administrative Offences), are, within the confines of their competencies, those named in §2 No 1, 2 or 3, in as far as they are implementing the Act. §10 Enforcement The competent authority can enforce its instructions in accordance with the provisions for the enforcement of administrative measures. The penalty payment for decisions under §5(1) sentence 2 No 1 is a maximum of EUR 250,000 for each individual case. [].

1.3.5 ITALY - ENFORCEMENT POWERS UNDER ARTICLE 4(6) OF CPC REGULATION

LEGAL FRAMEWORK

Legislative Decree No 206 of 6 September 2005, known as the "Consumer Code" has implemented all the legislation on consumer protection

In Italy, the enforcement of consumer protection law has been at the centre of a complex legislative and jurisdictional debate. While the internal enforcement competences were split between the Minister of Economic Development, the Italian Competition authorities and the other sectorial authorities, *de facto* the AGCM was dealing with all the infringements as long as they could be included in the general category of the unfair commercial practices for which the AGCM retained exclusive competence. A decision of the Supreme Court in 2012 rejected this approach and clarified that the unfair commercial practices in sectors which have specific regulation introduced by the EU legislation should be dealt with by the sectorial authorities (in the specific case it was an unfair commercial practice in telecommunications sector).

Finally, a legislative reform adopted at the beginning 2014 in order to implement Directive 2011/83/EU, has transferred all the enforcement competence to the AGCM which is now in charge of the unfair commercial practices, unfair terms, distance selling. In case of infringements covered by sectoral rules, an opinion from the sectorial authority is required.

The reform introduced by the Legislative Decree of 21 February 2014 entered into force on 13 June 2014.

The AGCM procedural rules were adopted with Decision 8 August 2012 n. 23788 containing the Regulation on the procedural rules on unfair commercial practices, unfair terms and comparative and misleading advertising. The rules are applicable also to the infringements under CPC Regulation.

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING			
Provision Cpc Regulation	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national Law (Quotation or Summary)	
Article 4(6)			
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:			

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING			
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)	
Article 4(6)			
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Art.12 of AGCM Regulation on the investigative procedures on comparative and misleading advertising, unfair commercial practices and unfair commercial terms.	Art.12 § 1 provides that the responsible of the investigative procedure has the right obtain, during the procedure, any elements which is useful in order to evaluate the alleged infringement. He may ask information and documents to private and public persons.	
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	See above	See above	
(c) to carry out necessary on- site inspections;	Art. 14 of AGCM Regulation on the investigative procedures on comparative and misleading advertising, unfair commercial practices and unfair commercial terms.	Art. 14 provides that the President and the members of the Authority authorise the inspections proposed by the responsible of the investigations at the premises of the subject that may have documents useful for the investigations. The officials of the Authority charged by the responsible of the investigation to carry on the inspections enforce their powers on the presentation of a written document which indicates the object of investigation and the sanctions in case of refusal, omissions or delay in allowing officials to perform the investigations without justifiable reasons as well as in case are provided false documents.	
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;			
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking;	Art. 9 of AGCM Regulation on the investigative procedures on comparative and misleading advertising, unfair commercial	Within 45 days from the commencement of the proceedings, the trader may propose undertakings to the Authority in order to remove the infringement. The undertakings are submitted using the form annex to the AGCM Regulation. The AGCM evaluates the undertakings and if it considers that are satisfactory, adopts a decision of acceptance and closes the proceedings. If the AGCM considers that the undertakings are not satisfactory requires the trader to integrate them. If the infringement is particularly serious and the undertakings are considered insufficient to remove the detriment caused by the infringement, it rejects them.	
(f) to require the cessation or prohibition of any intra-	Art. 17 of AGCM Regulation on the investigative procedures on comparative	Art. 17 provides that the Authority, at the end of the investigation may adopt a decision on a violation of the Directive 2005/29/EC accompanied by a warning to the author of the infringement, pecuniary	

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING			
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national Law (QUOTATION OR SUMMARY)	
Article 4(6)			
Community infringement and, where appropriate, to publish resulting decisions;	and misleading advertising, unfair commercial practices and unfair commercial terms	sanctions and the publication of the decision with an obligation to the author of the infringement to publish a remedial announcement.	
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Art. 8 of Legislative Decree 145/2007	Art. 8 § 9, provides that the Authority may impose a fine ranging from 5,000.00 € to 500,000.00 €, taking into account the gravity and the duration of the infringement.	

DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS			
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)	
Article 4(6)			
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:			
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Art.12 of AGCM Regulation on the investigative procedures on comparative and misleading advertising, unfair commercial practices and unfair commercial terms.	Art.12 § 1 provides that the responsible of the investigative procedure has the right obtain, during the procedure, any elements which is useful in order to evaluate the alleged infringement. He may ask information and documents to private and public persons.	

DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	See above	See above
(c) to carry out necessary on-site inspections;	Art. 14 of AGCM Regulation on the investigative procedures on comparative and misleading advertising, unfair commercial practices and unfair commercial terms.	Art. 14 provides that the President and the members of the Authority authorise the inspections proposed by the responsible of the investigations at the premises of the subject that may have documents useful for the investigations. The officials of the Authority charged by the responsible of the investigation to carry on the inspections enforce their powers on the presentation of a written document which indicates the object of investigation and the sanctions in case of refusal, omissions or delay in allowing officials to perform the investigations without justifiable reasons as well as in case are provided false documents.
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Art. 21 of AGCM Regulation on the investigative procedures on comparative and misleading advertising, unfair commercial	Except for the cases of serious infringements and when the unfairness of the term is apparent, the responsible of the proceeding may inform in wirting the trader of the probable unfairness of the term in the contract in order to exercise the moral suasion.
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking	Art. 22 of AGCM Regulation on the investigative procedures on comparative and misleading advertising, unfair commercial	The trader may ask to the Authority to give an opinion the the terms they intend to use in their contracts in order to comply with the legislation. The request must be made through the from on the Authority website and it has to indicate the reason for which the trader intends to use the terms. From the day of the request, the Authority has 120 days to issue a decion on the terms. An opinion may be asked to the Chambers of Commerce. The request for opinion may be published on the Authority's website except if confidentiality is asked by the professional.
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;		
(g) to require the losing defendant to make payments into the public	Art. 8 of Legislative Decree 145/2007	Art. 8 § 9, provides that the Authority may impose a fine ranging from EUR 5,000.00 to EUR 500,000.00 taking into account the seriousness and the duration of the infringement.

DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)
Article 4(6)		
purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.		

1.3.6 LATVIA - ENFORCEMENT POWERS UNDER ARTICLE 4(6) OF CPC REGULATION

LEGAL FRAMEWORK

Regulation (EC) No 2006/2004 is fully in force in Latvia and Latvia has taken part into CPC system by sending and receiving information and enforcement requests as well as participating in various other projects such as Sweep days. The powers necessary to investigate and enforce action against intra-Community consumer rights infringements are implemented mainly in the Consumer Rights Protection Law and its supplementing Regulations No 632 of Cabinet of Ministers, adopted on 1 August 2006. The Unfair Commercial Practice Prohibition Law also contains provisions stating the duties, functions and powers of designated monitoring body, which under law is the Consumer Rights Protection Centre (CRPC). Competent authorities are able to take enforcement measures only against the traders situated within jurisdiction of Latvia and on the basis of substantive law of Latvia.

The competent authorities in Latvia are legally entitled to decide whether a trader has infringed the consumer protection legislation, if this infringement is provided in law. Competent authorities in Latvia may act only in accordance with law within the limits it sets. However, in relevant situations, where infringement is mostly formal, authorities use some informal mechanisms, organising negotiations with the traders, communication via e-mail about non-substantial infringements of consumer rights, consulting/advising traders in advance about legal requirements to prevent infringements.

All competent authorities in Latvia are public bodies; therefore they may act only within the framework of the Administrative Procedure Law and other applicable laws. CRPC is designated as the single liaison office for the purposes of CPC Regulation. It is also the competent authority for supervision of implementation of European Directive 2005/29/EC on Unfair Commercial Practices, Directive 2000/31/EC on Electronic Commerce; Directive 97/7/EC on Distance Contracts, Directive 90/314/EEC on Travel, Package Holidays and Package Tours and Directive 2002/65/EC on Distance Marketing of Consumer Financing Services. With regards to these directives some competence has been transferred also to Health Inspectorate and Food and Veterinary Service; however they must report to CRPC.

The Consumer Rights Protection Law permits consumers to create associations for protection of their rights. Those associations are private bodies that have market monitoring and consumer complaint investigation powers; however, as they do not have public authority, they must act in cooperation with CRPC. They have also power to represent consumers at court. In practice, that means that they make prima facie detection of infringement and then transfer it to CRPC that may invite them to participate in further investigation.

According to law CRPC is empowered to carry out surveillance of the products, services, contract terms and unfair commercial practices. To do that, CRPC may carry out investigations, acquiring all the necessary information and evidence, requesting the supplementary information, evaluating compliance with law, proposing traders to undertake in writing the obligations. If necessary, CRPC may issue binding administrative decisions and bans of the unfair commercial practices performance and publish these decisions.

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW (ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)

Article 4(6)		
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:	Section 15(1) of "Unfair Commercial Practice Prohibition Law", Sections 25(4) and 25(6) of "Consumer Rights Protection Law"	Both laws describe the duties for competent authority to monitor the market for consumer protection laws compliance. Investigation may be started by CRPC initiative, by application/complaint of consumer and by submissions of other authorities.
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Section 15(2) of "Unfair Commercial Practice Prohibition Law", Section 4.2, 4.3 and 6.3 of Cabinet of Ministers Regulation No. 632 of 1 August 2006 "By-law of the Consumer Rights Protection Centre"	Competent institution while evaluating the conformity of commercial goods and practices with the requirements of the law, the conformity of the information provided by trader, is entitled to request and to receive from the performer of commercial practices all information, documents and other evidence regarding the veracity of the utilised information, the conformity of the activity with the requirements of the law, as well as to determine the time period for the submission of the documents and evidence necessary for the clarification of the case.
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Sections 15.(2). and 15.(8).1. of "Unfair Commercial Practice Prohibition Law", Section 4.4 and 6.3 of Cabinet of Ministers Regulation No. 632 of 1 August 2006 "By-law of the Consumer Rights Protection Centre"	Competent institution may request additional information and evidence regarding goods and services, as well as the manufacturer, seller or service provider, as well as to control the fulfilment of the requirements regarding the provision of information. The law also specifies that it should be free of charge.
(c) to carry out necessary on- site inspections;	Section 6.1 of Cabinet of Ministers Regulation No. 632 of 1 August 2006 "By-law of the Consumer Rights Protection Centre", Section 25.6 ¹ . of "Consumer Rights Protection Law"	CRPC Officials may within the scope of authority and without special permission, payment or other restrictions; visit unhindered any buildings, premises, territories and other places.
(d) to request in writing that the seller or supplier concerned cease the intra- Community infringement;	Section 15.(4).1. of "Unfair Commercial Practice Prohibition Law", Section 25.8.1 of "Consumer Rights Protection Law"	CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period.
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra Community infringement; and, where appropriate, to publish the	Sections 15.(4).2.and 15.(11) of "Unfair Commercial Practice Prohibition Law", Section 25.8.2. and 25.8.3. of "Consumer Rights Protection Law"	CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities. CRPC is also entitled to publish the decision taken either fully or partially on the home page of the CPRC and in the Official Journal - <i>Latvijas Vēstnesis</i> .

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW (ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
resulting undertaking (f) to require the cessation or prohibition of any intra-Community infringement and, whereappropriate, to publish resulting decisions;	Sections 15.(8).2. and 15.(11) of "Unfair Commercial Practice Prohibition Law", Sections 25.8.2 and 25.8.3. of "Consumer Rights Protection Law"	CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities. CRPC is also entitled to publish the decision taken either fully or partially on the home page of the CPRC and in the Official Journal - <i>Latvijas Vēstnesis</i> .
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Sections 15.(6), 15.(7) and 15.(8).5. of "Unfair Commercial Practice Prohibition Law", Section 35 of "Consumer Rights Protection Law"	If the manufacturer, trader or service provider has not eliminated the defects of the goods or the service within 30 days from the day when the consumer submitted a claim regarding the defects of the goods or services, or within the time period specified by appropriately authorised supervisory and monitoring institutions, it is his or her duty to compensate all losses caused to the consumer due to the delay.

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE			
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)	
Article 4(6)			
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:	Sections 25.(4). and 25.(6). of "Consumer Rights Protection Law"	Law describes the duties of the competent authority to monitor the market for consumer protection laws compliance. Investigation may be started by CRPC initiative, by application/complaint of consumer and by submissions of other authorities.	
(a) to have access to any relevant document, in any	Sections 4.2, 4.3 and 6.3 of Cabinet of Ministers Regulation No. 632	Competent institution while evaluating the conformity of commercial goods and practices with the requirements of the law, the conformity of the information provided by trader, is entitled to request and	

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
form, related to the intra- Community infringement;	of 1 August 2006 "By-law of the Consumer Rights Protection Centre"	to receive from the performer of commercial practices all information, documents and other evidence regarding the veracity of the utilised information, the conformity of the activity with the requirements of the law, as well as to determine the time period for the submission of the documents and evidence necessary for the clarification of the case.
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Section 4.4 and 6.3 of Cabinet of Ministers Regulation No. 632 of 1 August 2006 "By-law of the Consumer Rights Protection Centre"	Competent institution may request additional information and evidence regarding goods and services, as well as the manufacturer, seller or service provider, as well as to control the fulfilment of the requirements regarding the provision of information. The law also specifies that it should be free of charge.
(c) to carry out necessary on- site inspections;	Section 6.1 of Cabinet of Ministers Regulation No. 632 of 1 August 2006 "By-law of the Consumer Rights Protection Centre", Section 25.6 ¹ . of "Consumer Rights Protection Law"	CRPC officials may within the scope of competency and without special permission, payment or other restrictions; visit unhindered any buildings, premises, territories and other places.
(d) to request in writing that the seller or supplier concerned cease the intra- Community infringement;	Section 25.8.1 of "Consumer Rights Protection Law"	CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period.
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking	Sections 25.8.2. and 25.8.3. of "Consumer Rights Protection Law"	CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities. CRPC is also entitled to publish the decision taken either fully or partially on the home page of the CPRC and in the Official Journal - <i>Latvijas Vēstnesis</i> .
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to	Sections 25.8.2 and 25.8.3. of "Consumer Rights Protection Law"	CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities.

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE			
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)	
Article 4(6)			
publish resulting decisions;		CRPC is also entitled to publish the decision taken either fully or partially on the home page of the CPRC and in the Official Journal - Latvijas Vēstnesis.	
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Section 35 of "Consumer Rights Protection Law"	If the manufacturer, trader or service provider has not eliminated the defects of the goods or the service within 30 days from the day when the consumer submitted a claim regarding the defects of the goods or services, or within the time period specified by appropriately authorised supervisory and monitoring institutions, it is his or her duty to compensate all losses caused to the consumer due to the delay.	

	DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)	
Article 4(6)			
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:	Sections 25.(4). and 25.(6). of "Consumer Rights Protection Law"	Unfair Contract Terms directive is implemented in Consumer Rights Protection Law. It describes the duties for competent authority to monitor the market for consumer protection laws compliance. Investigation may be started by CRPC initiative, by application/complaint of consumer and by submissions of other authorities. Directive on distance contracts is implemented in Consumer Rights Protection Law. It describes the duties for competent authority to monitor the market for consumer protection laws compliance. Investigation may be started by CRPC initiative, by application/complaint of consumer and by submissions of other authorities.	
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Sections 4.2, 4.3 and 6.3 of Cabinet of Ministers Regulation No. 632 of 1 August 2006 "By-law of the Consumer Rights Protection Centre"	Competent institution while evaluating the conformity of commercial goods and practices with the requirements of the law, the conformity of the information provided by trader, is entitled to request and to receive from the performer of commercial practices all information, documents and other evidence regarding the veracity of the utilised information, the conformity of the activity with the requirements of the law, as well as to determine the time period for the submission of the documents and evidence necessary for the clarification of the case.	

DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)
Article 4(6)		
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Sections 4.4 and 6.3 of Cabinet of Ministers Regulation No. 632 of 1 August 2006 "By-law of the Consumer Rights Protection Centre"	Competent institution may request additional information and evidence regarding goods and services, as well as the manufacturer, seller or service provider, as well as to control the fulfilment of the requirements regarding the provision of information. The law also specifies that it should be free of charge.
(c) to carry out necessary on- site inspections;	Section 6.1 of Cabinet of Ministers Regulation No. 632 of 1 August 2006 "By-law of the Consumer Rights Protection Centre", Section 25.6 ¹ . of "Consumer Rights Protection Law"	CRPC Officials may within the scope of competency and without special permission, payment or other restrictions; visit unhindered any buildings, premises, territories and other places.
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Section 25.8.1 of "Consumer Rights Protection Law"	CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period.
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking;	Sections 25.8.2. and 25.8.3. of "Consumer Rights Protection Law"	CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities. CRPC is also entitled to publish the decision taken either fully or partially on the home page of the CPRC and in the Official Journal - <i>Latvijas Vēstnesis</i> .
(f) to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to publish resulting decisions; (g) to require the losing	Sections 25.8.2 and 25.8.3. of "Consumer Rights Protection Law" Section 35 of "Consumer Rights	CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities. CRPC is also entitled to publish the decision taken either fully or partially on the home page of the CPRC and in the Official Journal - <i>Latvijas Vēstnesis</i> . If the manufacturer, trader or service provider has not eliminated the defects of the goods or the
defendant to make payments	Protection Law"	service within 30 days from the day when the consumer submitted a claim regarding the defects of the

DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)
Article 4(6)		
into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.		goods or services, or within the time period specified by appropriately authorised supervisory and monitoring institutions, it is his or her duty to compensate all losses caused to the consumer due to the delay.

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:	Sections 25.(4). and 25.(6). of "Consumer Rights Protection Law"	Directive on Misleading and Comparative Advertising is implemented in Advertising Law. This law designates CRPC as competent authority that is regulated by Consumer Rights Protection Law. It describes the duties for competent authority to monitor the market for consumer protection laws compliance. Investigation may be started by CRPC initiative, by application/complaint of consumer and by submissions of other authorities.
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Sections 4.2, 4.3 and 6.3 of Cabinet of Ministers Regulation No. 632 of 1 August 2006 "By-law of the Consumer Rights Protection Centre"	Competent institution while evaluating the conformity of commercial goods and practices with the requirements of the law, the conformity of the information provided by trader, is entitled to request and to receive from the performer of commercial practices all information, documents and other evidence regarding the veracity of the utilised information, the conformity of the activity with the requirements of the law, as well as to determine the time period for the submission of the documents and evidence necessary for the clarification of the case.
(b) to require the supply by any person of relevant information related	Sections 4.4 and 6.3 of Cabinet of Ministers Regulation No. 632 of 1 August 2006 "By-law of the Consumer Rights	Competent institution may request additional information and evidence regarding goods and services, as well as the manufacturer, seller or service provider, as well as to control the fulfillment of the requirements regarding the provision of information. The law also specifies that it should be free of

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
to the intra-Community infringement;	Protection Centre"	charge.
(c) to carry out necessary on- site inspections;	Section 6.1 of Cabinet of Ministers Regulation No. 632 of 1 August 2006 "By-law of the Consumer Rights Protection Centre", Section 25.6 ¹ . of "Consumer Rights Protection Law"	CRPC Officials may within the scope of competency and without special permission, payment or other restrictions; visit unhindered any buildings, premises, territories and other places.
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Section 25.8.1 of "Consumer Rights Protection Law"	CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period.
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking	Sections 25.8.2. and 25.8.3. of "Consumer Rights Protection Law"	CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities. CRPC is also entitled to publish the decision taken either fully or partially on the home page of the CPRC and in the Official Journal - <i>Latvijas Vēstnesis</i> .
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Sections 25.8.2 and 25.8.3. of "Consumer Rights Protection Law"	CRPC, having evaluated the nature and essence of the violation, as well as other aspects, is entitled to take a decision, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities. CRPC is also entitled to publish the decision taken either fully or partially on the home page of the CPRC and in the Official Journal - Latvijas Vēstnesis.
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under	Section 35 of "Consumer Rights Protection Law"	If the manufacturer, trader or service provider has not eliminated the defects of the goods or the service within 30 days from the day when the consumer submitted a claim regarding the defects of the goods or services, or within the time period specified by appropriately authorised supervisory and monitoring institutions, it is his or her duty to compensate all losses caused to the consumer due to the delay.

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national legislation, in the event of failure to comply with the decision.		

1.3.7 POLAND – ENFORCEMENT POWERS UNDER ARTICLE 4(6) OF CPC REGULATION

LEGAL FRAMEWORK

Article 4(6) of the CPC Regulation has been mainly implemented into the Polish legal system by virtue of provisions of the Act on Competition and Consumers Protection dated 16th of February 2007 (hereinafter referred to as the "CCPA"). Based on provisions of the CCPA the President of the Competition and Consumers Protection Office has been given various tools of consumers protection, which are more detailed but inspired with the tools described in general in Article 4(6) of the CPC Regulation. The President of the Competition and Consumers Protection Office is a public and administrative authority and he fulfils a function of single liaison officer and the competent authority (as defined in the CPC Regulation).

Additionally there are some other legal acts by virtue of which the CPC Regulation and EU Directives connected with it have been implemented into the Polish law, i.e. the Pharmaceutical Law Act dated 6th of September 2001, the Aviation Law Act dated 3rd of July 2002 and the Act on Radio and Television Broadcasting dated 29th of December 1992 (for more details please see tables below). The following authorities: the Chief Pharmaceutical Inspector, the Chief Veterinary Inspector, the President of the Civil Aviation Office and the National Council of Radio and Television Broadcasting, perform functions of the competent authorities (as defined in the CPC Regulation) based on the provisions of the aforementioned legal acts. All of the aforementioned authorities are public ones.

Additionally, provisions of the Act on counteracting of unfair commercial practices dated 23rd of August 2007, which implements Directive 2005/29/EC on unfair commercial practices into the Polish legal system, indicate that the Human Rights Defender, the Insured Ombudsman, the national or regional organization, which statutory purpose is protection of the consumers interests and the county (municipal) consumers Ombudsman are entitled to take some actions regarding consumers protection in connection with cases of unfair commercial practices by initiation of civil proceedings before a common court of law. The national or regional organizations, which statutory purpose is protection of the consumers interests have a status of private authorities. All the other aforementioned authorities are public ones.

The enforcement powers of the authorities mentioned above for each directive covered by this analysis are presented in details in the table below.

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE,	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
	Paragraph, Law)	
Article 4(6)		
6. The powers referred to in		
paragraph 3 shall only be exercised		
where there is a reasonable		
suspicion of an intra-		
Community		

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
infringement and shall include, at least, the right:		
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Article 50 of the Act on Competition and Consumers Protection dated 16 th of February 2007 (hereinafter referred to as the "CCPA")	 Article 50 of the CCPA: Undertakings shall be obliged to provide all necessary information and documents upon request of the President of the Office. The request referred to in paragraph 1 should include: indicating the scope of such information; indicating the objective of the request; the time limit for providing information; an instruction about sanctions for non-delivery of information or for providing false or misleading information. Everyone shall be entitled to submit in a written form, on their own initiative or upon request of the President of the Office, explanations concerning essential circumstances of a given case.
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	See above	See above
(c) to carry out necessary on-site inspections;	Article 105a – 105l of the CCPA (Chapter 5 of the CCPA)	Article 105a of the CCPA: 1. During proceedings before the President of the Office, an inspection may be held at each undertaking involved, hereinafter referred to as the "inspected party", with reference to the proceedings; such inspection shall be performed by an authorised employee of the Office or Trade Inspection, hereinafter referred to as the "inspecting party". 2. The President of the Office may authorise the following persons to participate in the inspection: 1) an employee of a competition protection authority of a Member State, referred to in Article 22 of Regulation No. 1/2003/EC; 2) an employee of the applicant authority within the meaning Article 3, subparagraph f of Regulation No. 2006/2004/EC in instances referred to in Article 6, paragraph 3 thereof; 3) persons holding specific information if such information is required to perform the inspection. 3. With respect to matters falling within the competencies of branch offices or with respect to matters entrusted to branch offices by the President of the Office pursuant to Article 33, paragraphs 4 and 5, the employees of the branch offices shall perform inspections on the basis of authority of the director of the branch offices issued on behalf of the President of the Office. 4. The authority to perform inspection shall specify: 1) identification of the inspecting authority;

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
		2) providing the legal basis; 3) date and place of issue; 4) first and last name and position of the inspecting person and number of his/her official ID; if persons referred to in paragraph 2 are authorised to participate in the inspection – first and last names of such persons, number of their passport or another ID document; 5) identification of the inspected party; 6) identification of the subject and scope of inspection; 7) identification of commencement date of the inspection and the anticipated completion date thereof; 8) signature of the authorising person with details of his/her position or function; 9) instruction of the rights and obligations of the inspected entity. 5. The authority to perform inspection, referred to in paragraph 1 may be issued by the President of the Office as well as voivodeship inspectors of the Trade Inspection upon the proposal of the Chief Inspector of the Trade Inspection. 6. The inspecting persons shall deliver the authority to hold the inspection to the inspected party or the person authorized thereof and present their official IDs whereas the persons authorised to participate in the inspection, referred to in paragraph 3 – their ID cards, passport or other document confirming their identity. 7. If the inspected party or persons authorised thereby are absent, the authority to perform the inspection or official IDs, ID cards, passport or other documents confirming the identity shall be presented to another employee of the inspected party who may be recognised to be the person referred to in Article 97 of the Act of 23 April 1964 – Civil Code, or to a witness who shall be a public official while not being an employee of the inspecting authority. In such circumstances, the authority shall be delivered to the inspected party without delay, however not later than on the third day from initiating the inspection.
		Article 105b: 1. The inspecting persons shall be authorised to: 1) access the site and the buildings, other premises and means of transportation held by the inspected party; 2) request presentation of files, books, all kinds of documents and data carriers related to the subject of the inspection as well as true copies and extracts thereof and to make notes of their content; 3) request the persons referred to in Article 105d, paragraph 1 to provide oral explanations on the subject of the inspection.
		2. Persons authorized to participate in inspections pursuant to Article 105a, paragraph 2 shall hold the same authority as the inspecting person with respect to access to the site and the buildings, other

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PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
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		premises and means of transportation held by the inspected party and access to files, books, all kinds of documents and data carriers related to the subject of the inspection as well as true copies and extracts thereof and to make notes of their content as well as shall be entitled to participate jointly with the inspecting person in the search referred to in Article 91 and 105c. 3. During the inspection, the inspecting party may be assisted by functionaries of other State inspection authorities or the Police. State inspection authorities and the Police shall perform operations on instructions of the inspecting person. 4. In justified instances, the proceedings of inspections or any specific operations thereof may be recorded with video and audio equipment subject to the prior notification thereof to the inspected party. Electronic data carriers within the meaning of the regulations on informatisation of operations of entities carrying out public tasks, on which the proceedings of inspections or any specific operations thereof have been registered, shall be attached to the inspection protocol.
		Article 105c of the CCPA: 1. During the inspection, the inspecting persons may search the premises or objects subject to the consent of the court of Competition and Consumers Protection, provided upon the request of the President of the Office. 2. If there is a justified suspicion of a serious breach of the Act, in particular when evidence could be obliterated, the request referred to in paragraph 1 may be filed by the President of the Office before antimonopoly proceedings are initiated. 3. The court of Competition and Consumers Protection shall issue its decision with respect to the matter referred to in paragraph 1 within 48 hours. Decisions of the court of Competition and Consumers Protection may not be appealed. 4. In all matters not provided for in the Act, the provisions of the Act of 6 June 1997 – Criminal Procedure Code relating to search shall apply accordingly.
		Article 105d of the CCPA: 1. The inspected party, the person authorised thereby, the holder of apartments, premises, buildings or means of transportation referred to in Article 91, paragraph 1 shall be obliged to: 1) provide the requested information; 2) provide access to the site and buildings or other premises and means of transportation; 3) provide access to files, books and all kinds of documents or other data carriers. 2. The persons referred to in paragraph 1 may refuse to provide information or collaborate only when that could lead to criminal responsibility for themselves or their spouses, ascendants, descendants,

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PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
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		brothers and sisters as well as relatives in the same line or degree and co-habiting persons as well as persons who have been adopted, stay under the guardianship or care thereof. Such right to refuse information or collaboration shall survive the marriage or the relationship of adoption, guardianship or care.
		Article 105e of the CCPA: 1. The inspected party shall provide the inspecting persons and other persons authorised to participate in the inspection with conditions and facilities required for efficient performance of the inspection, in particular the inspected party shall: 1) make copies of documents, including printouts from data carriers requested by the inspecting persons; 2) provide if possible a lockable separate room if this is required to perform the inspection; 3) provide a separate place to store documents and secured objects; 4) provide available means of telecommunications to the extent required to perform the inspection. 2. The inspected party shall certify the copies of documents and printouts for compliance with original. If this is refused, the documents shall be certified by the inspecting persons with a record in the inspection protocol.
		Article 105f of the CCPA: 1. The inspecting persons or the persons authorised to participate in the inspection shall ascertain facts on the basis of evidence collected during the inspection, in particular documents, objects, site inspections as well as oral or written explanations and statements and other data carriers. 2. The evidence referred to in paragraph 1 may be secured by way of: 1) storing such evidence in a separate, locked and sealed premises with the inspected party; 2) deposit against receipt to the inspecting persons in the premises of the Office or a voivodeship branch of Trade Inspection.
		Article 105g of the CCPA: 1. During the inspection referred to in Article 105a, paragraph 1, the President of the Office may issue a decision on seizing files, books, all kinds of documents or data carriers within the meaning of the regulations on informatisation of operations of entities carrying out public tasks and of other entities that may be used as evidence in the matter, for the duration of the inspection, however not longer than 7 days. 2. The person holding the objects referred to in paragraph 1 shall be requested by the inspecting persons to deliver the objects voluntarily and if this is refused, the objects may be seized pursuant to

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		the regulations on enforcement procedure in administration. 3. The decision on seizing the objects may be appealed by persons whose rights have been violated. The appeal, if any, does not stop the enforcement of the decision. 4. The provisions of paragraphs 1 to 3 do not apply to the securing at the inspection site, with the purpose of performing inspection operations, of files, books, all other documents or data carriers and other objects that may be used as evidence in the matter and to the premises of the inspected entity where the documents or objects are stored.
		Article 105h of the CCPA: 1. The objects that are subject to the seizure referred to in Article 105g, paragraph 1, released, seized or found during the inspection, after visual inspection and drafting a seizure protocol, shall be taken away or left on deposit with a trustworthy person with an obligation to deliver them upon each request of the authority carrying out the proceedings. 2. The seizure protocol shall identify the case to which the seizure of objects or search is related, and the exact time of commencing and closing the operations, the precise list of seized objects and, to the extent required a description thereof as well as reference to the decision of the President of the Office on the seizure. The protocol shall be signed by the person performing the seizure and a representative of the inspected party. 3. The person seizing the objects referred to in paragraph 1 shall be obliged to deliver to the interest parties a receipt specifying the objects that were seized and by whom and to notify without delay the undertaking whose objects were seized. 4. The seized objects shall be returned as soon as they are found unnecessary to the carried out proceedings or by annulling by the court of Competition and Consumers Protection of the decision to seize such objects, however not later than after expiry of the period referred to in Article 105g, paragraph 1.
		Article 105i of the CCPA: Without initiating separate proceedings, the President of the Office may carry out an inspection, including a search pursuant to Article 91 or Article 105c: 1) upon the request of the European Commission if the undertaking or a person authorised to represent the undertaking or holder of apartments, premises, buildings or means of transportation referred to in Article 91, paragraph 1, object to holding an inspection by the European Commission during proceedings held pursuant to the provisions of Regulation No. 1/2003/EC or Regulation No. 139/2004/EC; 2) upon the request of the European Commission or the competition authority of a Members State in

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		the situation specified in Article 22 of Regulation No. 1/2003/EC or Article 12 of Regulation No. 139/2004/EC.
		Article 105j of the CCPA: 1. The operations performed during the inspection shall be recorded by the inspecting persons in an inspection protocol. 2. The inspection protocol shall specify in particular: 1) identification of the name or first and last name and address of the inspected party; 2) date of commencement and end of the inspection; 3) first and last name and position of the inspecting persons; 4) identification of the subject and scope of inspection; 5) description of facts ascertained during the inspection; 6) description of attachments; 7) instruction given to the inspected party on their rights to make reservations to the protocol and a right to refuse to sign the protocol. 3. The evidence collected during the inspection shall be attached to the inspection protocol. Article 105k of the CCPA:
		 The inspection protocol shall be signed by the inspecting person and the inspected party. Being presented the protocol within 7 days prior to the signature thereof, the inspected party may submit written reservations to the protocol. If reservations referred to in paragraph 2 are submitted, the inspecting person shall make an analysis thereof and, if required, take additional inspection actions; if the reservations are found justified, the inspecting person shall amend or make additions to the relevant part of the protocol in the form of an annex to the protocol. If the reservations are not found to be justified in whole or in part, the inspecting person shall notify the inspected party thereof in writing. Refusal to sign the protocol shall be mentioned in the protocol by the inspecting person. The protocol shall be made in two counterparts one of which shall be delivered to the inspected party with the exception of the evidence kept by the inspecting person. Article 105l of the CCPA: Inspection of business operations of an undertaking shall be subject to the provisions of chapter 5 of the Act of 2 July 2004 on freedom of business operations (Journal of Laws of 2007, No. 155, item 1095, as amended.

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(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Article 26 of the CCPA	 Article 26 of the CCPA: The President of the Office shall issue a decision on pronouncing a practice as violating collective consumer interests and ordering that the same be discontinued, if he identifies a breach of the prohibition specified in Article 24. The President of the Office may identify, in the decision referred to in paragraph 1, measures for removing lasting effects of the violation of collective consumer interests with a view to ensuring compliance with the order, in particular commit the undertaking to issue a single or recurring declaration with such contents and in such form as may be prescribed in the decision. The President of the Office may also order the decision to be published in whole or in part at the expense of the undertaking.
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking	Article 28 of the CCPA Article 12 of the Act on counteracting of unfair commercial practices dated 23 rd August 2007	Article 28 1. If, in the course of proceedings regarding practices violating collective interests of consumers, it has been rendered plausible — on the basis of the circumstances of a given case, information comprised in the notification referred to in Article 100, paragraph 1, or information forming the basis for instituting proceedings — that the undertaking concerned uses the practice referred to in Article 24, whereas the undertaking charged with infringing such provision, has undertaken to take or discontinue certain actions aiming at preventing those infringements, then the President of the Office may, by way of a decision, impose an obligation to exercise the undertaken commitments. 2. In the decision referred to in paragraph 1, the President of the Office may determine the final date(s) for implementing the undertaken commitments. 3. In the decision referred to in paragraph 1, the President of the Office shall impose upon the undertaking an obligation to provide, within the fixed date(s), information regarding the stage of implementation of the assumed commitments. 4. In the event that a decision referred to in paragraph 1 is issued, Articles 26 and 27 and Article 106, paragraph 1, subparagraph 4 shall not apply, subject to paragraph 7. 5. The President of the Office may, on an ex officio basis, revoke the decision referred to in paragraph 1, in the event that: 1) it has been issued on the basis of false, incomplete or misleading information or documents; 2) the undertaking has not fulfilled commitments or obligations imposed thereupon in the decision referred to in paragraphs 1 to 3. 6. The President of the Office may, upon consent of the undertaking concerned, revoke the decision referred to in paragraph 1, if the circumstances that may have a significant impact on the issuance of such decision, have changed.

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(f) to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to publish resulting decisions;	Article 26 of the CCPA Article 12 of the Act on counteracting of unfair commercial practices dated 23 rd August 2007	 7. In the event that the decision is revoked, the President of the Office shall adjudicate on the merits of the case. Article 12 of the Act on conteracting of unfair commercial practices dated 23rd August 2007 provides that a consumer, the Human Rights Defender, the Insured Ombudsman, the national or regional organization, which statutory purpose is protection of the consumers interests and the county (municipal) consumers Ombudsman are entitled to demand making of one or multiple statements of appropriate content and form by an undertaking, which committed/commits unfair commercial practices (this claim may be pursued in the civil proceedings). Article 26 of the CCPA: 1. The President of the Office shall issue a decision on pronouncing a practice as violating collective consumer interests and ordering that the same be discontinued, if he identifies a breach of the prohibition specified in Article 24. 2. The President of the Office may identify, in the decision referred to in paragraph 1, measures for removing lasting effects of the violation of collective consumer interests with a view to ensuring compliance with the order, in particular commit the undertaking to issue a single or recurring declaration with such contents and in such form as may be prescribed in the decision. The President of the Office may also order the decision to be published in whole or in part at the expense of the undertaking. Article 12 of the Act on conteracting of unfair commercial practices dated 23rd August 2007 provides that a consumer, the Human Rights Defender, the Insured Ombudsman, the national or regional organization, which statutory purpose is protection of the consumers interests and the county (municipal) consumers Ombudsman are entitled to demand cessation of unfair commercial practices (this claim may be pursued in the civil proceedings).
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Article 107 and 108 of the CCPA Article 12 of the Act on conteracting of unfair commercial practices dated 23 rd August 2007	Article 107 of the CCPA: The President of the Office may impose by way of a decision a fine of equivalent of up to EUR 10,000 on an undertaking for each day of delay in execution of the decisions issued pursuant to Article 10, Article 12, paragraph 1, Article 19, paragraph 1, Article 20, paragraph 1, Article 21, paragraphs 2 and 4, Article 26, Article 28, paragraph 1 and Article 89, paragraphs 1 and 3, decisions issued pursuant to Article 105g, paragraph 1 or court judgements in cases concerning competition-restricting practices, practices violating collective interests of consumers and concentration; the fine shall be imposed as of the date specified in the decision. Article 108 of the CCPA:

	DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES		
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		 The President of the Office may, by way of a decision, impose on a person holding a managerial post or being a member of a managing authority of the undertaking, a maximum fine of fifty-fold the average remuneration, should such a person, intentionally or unintentionally, have not: executed any of the decisions, resolutions or judgments referred to in Article 107; notified an intention of concentration referred to in Article 13; provided information, or have provided unreliable or misleading information, as required by the President of the Office pursuant to Article 50. The President of the Office may impose the fine referred to in Article paragraph 1 on: 	

	DIRECTIVE 9	2000/31/EC ON ELECTRONIC COMMERCE 03/13/EEC ON UNFAIR CONTRACT TERMS /E 97/7/EC ON DISTANCE CONTRACTS
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)

Article 4(6)		
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right: (a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Article 50 of the CCPA	Article 50 of the CCPA: 1. Undertakings shall be obliged to provide all necessary information and documents upon request of the President of the Office. 2. The request referred to in paragraph 1 should include: 1) indicating the scope of such information; 2) indicating the objective of the request; 3) the time limit for providing information; 4) an instruction about sanctions for non-delivery of information or for providing false or misleading information.
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	See above	Everyone shall be entitled to submit in a written form, on their own initiative or upon request of the President of the Office, explanations concerning essential circumstances of a given case. See above
(c) to carry out necessary on-site inspections;	Article 105a – 105I of the CCPA (Chapter 5 of the CCPA)	Article 105a of the CCPA: 1. During proceedings before the President of the Office, an inspection may be held at each undertaking involved, hereinafter referred to as the "inspected party", with reference to the proceedings; such inspection shall be performed by an authorised employee of the Office or Trade Inspection, hereinafter referred to as the "inspecting party". 2. The President of the Office may authorise the following persons to participate in the inspection: 1) an employee of a competition protection authority of a Member State, referred to in Article 22 of Regulation No. 1/2003/EC; 2) an employee of the applicant authority within the meaning Article 3, subparagraph f of Regulation No. 2006/2004/EC in instances referred to in Article 6, paragraph 3 thereof; 3) persons holding specific information if such information is required to perform the inspection. 3. With respect to matters falling within the competencies of branch offices or with respect to matters entrusted to branch offices by the President of the Office pursuant to Article 33, paragraphs 4 and 5, the employees of the branch offices shall perform inspections on the basis of authority of the director of the branch offices issued on behalf of the President of the Office. 4. The authority to perform inspection shall specify:

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
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		1) identification of the inspecting authority; 2) providing the legal basis; 3) date and place of issue; 4) first and last name and position of the inspecting person and number of his/her official ID; if persons referred to in paragraph 2 are authorised to participate in the inspection – first and last names of such persons, number of their passport or another ID document; 5) identification of the inspected party; 6) identification of the subject and scope of inspection; 7) identification of commencement date of the inspection and the anticipated completion date thereof; 8) signature of the authorising person with details of his/her position or function; 9) instruction of the rights and obligations of the inspected entity. 5. The authority to perform inspection, referred to in paragraph 1 may be issued by the President of the Office as well as voivodeship inspectors of the Trade Inspection upon the proposal of the Chief Inspector of the Trade Inspection. 6. The inspecting persons shall deliver the authority to hold the inspection to the inspected party or the person authorized thereof and present their official IDs whereas the persons authorised to participate in the inspection, referred to in paragraph 3 – their ID cards, passport or other document confirming their identity. 7. If the inspected party or persons authorised thereby are absent, the authority to perform the inspection or official IDs, ID cards, passport or other documents confirming the identity shall be presented to another employee of the inspected party who may be recognised to be the person referred to in Article 97 of the Act of 23 April 1964 – Civil Code, or to a witness who shall be a public official while not being an employee of the inspecting authority. In such circumstances, the authority shall be delivered to the inspected party without delay, however not later than on the third day from initiating the inspection. Article 105b: 1. The inspecting persons shall be authorised to: 1) access the site and the buildings, other premises and m

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
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		subject of the inspection. 2. Persons authorized to participate in inspections pursuant to Article 105a, paragraph 2 shall hold the same authority as the inspecting person with respect to access to the site and the buildings, other premises and means of transportation held by the inspected party and access to files, books, all kinds of documents and data carriers related to the subject of the inspection as well as true copies and extracts thereof and to make notes of their content as well as shall be entitled to participate jointly with the inspecting person in the search referred to in Article 91 and 105c. 3. During the inspection, the inspecting party may be assisted by functionaries of other State inspection authorities or the Police. State inspection authorities and the Police shall perform operations on instructions of the inspecting person. 4. In justified instances, the proceedings of inspections or any specific operations thereof may be recorded with video and audio equipment subject to the prior notification thereof to the inspected party. Electronic data carriers within the meaning of the regulations on informatisation of operations of entities carrying out public tasks, on which the proceedings of inspections or any specific operations thereof have been registered, shall be attached to the inspection protocol. Article 105c of the CCPA: 1. During the inspection, the inspecting persons may search the premises or objects subject to the consent of the court of Competition and Consumers Protection, provided upon the request of the President of the Office. 2. If there is a justified suspicion of a serious breach of the Act, in particular when evidence could be obliterated, the request referred to in paragraph 1 may be filed by the President of the Office before antimonopoly proceedings are initiated. 3. The court of Competition and Consumers Protection shall issue its decision with respect to the matter referred to in paragraph 1 within 48 hours. Decisions of the court of Competition and
		Consumers Protection may not be appealed. 4. In all matters not provided for in the Act, the provisions of the Act of 6 June 1997 – Criminal Procedure Code relating to search shall apply accordingly.
		Article 105d of the CCPA: 1. The inspected party, the person authorised thereby, the holder of apartments, premises, buildings or means of transportation referred to in Article 91, paragraph 1 shall be obliged to:

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		1) provide the requested information; 2) provide access to the site and buildings or other premises and means of transportation; 3) provide access to files, books and all kinds of documents or other data carriers. 2. The persons referred to in paragraph 1 may refuse to provide information or collaborate only when that could lead to criminal responsibility for themselves or their spouses, ascendants, descendants, brothers and sisters as well as relatives in the same line or degree and co-habiting persons as well as persons who have been adopted, stay under the guardianship or care thereof. Such right to refuse information or collaboration shall survive the marriage or the relationship of adoption, guardianship or care. Article 105e of the CCPA: 1. The inspected party shall provide the inspecting persons and other persons authorised to participate in the inspection with conditions and facilities required for efficient performance of the inspection, in particular the inspected party shall: 1) make copies of documents, including printouts from data carriers requested by the inspecting persons; 2) provide if possible a lockable separate room if this is required to perform the inspection; 3) provide a separate place to store documents and secured objects; 4) provide available means of telecommunications to the extent required to perform the inspection. 2. The inspected party shall certify the copies of documents and printouts for compliance with original. If this is refused, the documents shall be certified by the inspecting persons with a record in the inspection protocol. Article 105f of the CCPA: 1. The inspecting persons or the persons authorised to participate in the inspection shall ascertain facts on the basis of evidence collected during the inspection, in particular documents, objects, site inspections as well as oral or written explanations and statements and other data carriers. 2. The evidence referred to in paragraph 1 may be secured by way of: 1) storing such evidence in a separate, locked and
		Article 105g of the CCPA:

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		 During the inspection referred to in Article 105a, paragraph 1, the President of the Office may issue a decision on seizing files, books, all kinds of documents or data carriers within the meaning of the regulations on informatisation of operations of entities carrying out public tasks and of other entities that may be used as evidence in the matter, for the duration of the inspection, however not longer than 7 days. The person holding the objects referred to in paragraph 1 shall be requested by the inspecting persons to deliver the objects voluntarily and if this is refused, the objects may be seized pursuant to the regulations on enforcement procedure in administration. The decision on seizing the objects may be appealed by persons whose rights have been violated. The appeal, if any, does not stop the enforcement of the decision. The provisions of paragraphs 1 to 3 do not apply to the securing at the inspection site, with the purpose of performing inspection operations, of files, books, all other documents or data carriers and other objects that may be used as evidence in the matter and to the premises of the inspected entity where the documents or objects are stored. Article 105h of the CCPA: The objects that are subject to the seizure referred to in Article 105g, paragraph 1, released, seized or found during the inspection, after visual inspection and drafting a seizure protocol, shall be taken away or left on deposit with a trustworthy person with an obligation to deliver them upon each request of the authority carrying out the proceedings. The seizure protocol shall identify the case to which the seizure of objects or search is related, and the exact time of commencing and closing the operations, the precise list of seized objects and, to the extent required a description thereof as well as reference to the decision of the President of the Office on the seizure. The protocol shall be signed by the person performing

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		Article 105i of the CCPA: Without initiating separate proceedings, the President of the Office may carry out an inspection, including a search pursuant to Article 91 or Article 105c: 1) upon the request of the European Commission if the undertaking or a person authorised to represent the undertaking or holder of apartments, premises, buildings or means of transportation referred to in Article 91, paragraph 1, object to holding an inspection by the European Commission during proceedings held pursuant to the provisions of Regulation No. 1/2003/EC or Regulation No. 139/2004/EC; 2) upon the request of the European Commission or the competition authority of a Members State in the situation specified in Article 22 of Regulation No. 1/2003/EC or Article 12 of Regulation No. 139/2004/EC.
		Article 105j of the CCPA: 1. The operations performed during the inspection shall be recorded by the inspecting persons in an inspection protocol. 2. The inspection protocol shall specify in particular: 1) identification of the name or first and last name and address of the inspected party; 2) date of commencement and end of the inspection; 3) first and last name and position of the inspecting persons; 4) identification of the subject and scope of inspection; 5) description of facts ascertained during the inspection; 6) description of attachments; 7) instruction given to the inspected party on their rights to make reservations to the protocol and a right to refuse to sign the protocol. 3. The evidence collected during the inspection shall be attached to the inspection protocol.
		Article 105k of the CCPA: 1. The inspection protocol shall be signed by the inspecting person and the inspected party. 2. Being presented the protocol within 7 days prior to the signature thereof, the inspected party may submit written reservations to the protocol. 3. If reservations referred to in paragraph 2 are submitted, the inspecting person shall make an analysis thereof and, if required, take additional inspection actions; if the reservations are found justified, the inspecting person shall amend or make additions to the relevant part of the protocol in the

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(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Article 26 of the CCPA	form of an annex to the protocol. 4. If the reservations are not found to be justified in whole or in part, the inspecting person shall notify the inspected party thereof in writing. 5. Refusal to sign the protocol shall be mentioned in the protocol by the inspecting person. 6. The protocol shall be made in two counterparts one of which shall be delivered to the inspected party with the exception of the evidence kept by the inspecting person. Article 105I of the CCPA: Inspection of business operations of an undertaking shall be subject to the provisions of chapter 5 of the Act of 2 July 2004 on freedom of business operations (Journal of Laws of 2007, No. 155, item 1095, as amended. Article 26 of the CCPA: 1. The President of the Office shall issue a decision on pronouncing a practice as violating collective consumer interests and ordering that the same be discontinued, if he identifies a breach of the prohibition specified in Article 24. 2. The President of the Office may identify, in the decision referred to in paragraph 1, measures for removing lasting effects of the violation of collective consumer interests with a view to ensuring compliance with the order, in particular commit the undertaking to issue a single or recurring declaration with such contents and in such form as may be prescribed in the decision. The President of the Office may also order the decision to be published in whole or in part at the expense of the undertaking.
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking	Article 28 of the CCPA	Article 28 1. If, in the course of proceedings regarding practices violating collective interests of consumers, it has been rendered plausible – on the basis of the circumstances of a given case, information comprised in the notification referred to in Article 100, paragraph 1, or information forming the basis for instituting proceedings – that the undertaking concerned uses the practice referred to in Article 24, whereas the undertaking charged with infringing such provision, has undertaken to take or discontinue certain actions aiming at preventing those infringements, then the President of the Office may, by way of a decision, impose an obligation to exercise the undertaken commitments. 2. In the decision referred to in paragraph 1, the President of the Office may determine the final date(s) for implementing the undertaken commitments.

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		 In the decision referred to in paragraph 1, the President of the Office shall impose upon the undertaking an obligation to provide, within the fixed date(s), information regarding the stage of implementation of the assumed commitments. In the event that a decision referred to in paragraph 1 is issued, Articles 26 and 27 and Article 106, paragraph 1, subparagraph 4 shall not apply, subject to paragraph 7. The President of the Office may, on an ex officio basis, revoke the decision referred to in paragraph 1, in the event that: it has been issued on the basis of false, incomplete or misleading information or documents; the undertaking has not fulfilled commitments or obligations imposed thereupon in the decision referred to in paragraphs 1 to 3. The President of the Office may, upon consent of the undertaking concerned, revoke the decision referred to in paragraph 1, if the circumstances that may have a significant impact on the issuance of such decision, have changed. In the event that the decision is revoked, the President of the Office shall adjudicate on the merits of the case.
(f) to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to publish resulting decisions;	Article 26 of the CCPA	 Article 26 of the CCPA: 4. The President of the Office shall issue a decision on pronouncing a practice as violating collective consumer interests and ordering that the same be discontinued, if he identifies a breach of the prohibition specified in Article 24. 5. The President of the Office may identify, in the decision referred to in paragraph 1, measures for removing lasting effects of the violation of collective consumer interests with a view to ensuring compliance with the order, in particular commit the undertaking to issue a single or recurring declaration with such contents and in such form as may be prescribed in the decision. The President of the Office may also order the decision to be published in whole or in part at the expense of the undertaking.
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply	Article 107 and 108 of the CCPA	Article 107 of the CCPA: The President of the Office may impose by way of a decision a fine of equivalent of up to EUR 10,000 on an undertaking for each day of delay in execution of the decisions issued pursuant to Article 10, Article 12, paragraph 1, Article 19, paragraph 1, Article 20, paragraph 1, Article 21, paragraphs 2 and 4, Article 26, Article 28, paragraph 1 and Article 89, paragraphs 1 and 3, decisions issued pursuant to Article 105g, paragraph 1 or court judgements in cases concerning competition-restricting practices, practices violating collective interests of consumers and

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with the decision.		concentration; the fine shall be imposed as of the date specified in the decision. Article 108 of the CCPA: 1. The President of the Office may, by way of a decision, impose on a person holding a managerial post or being a member of a managing authority of the undertaking, a maximum fine of fifty-fold the average remuneration, should such a person, intentionally or unintentionally, have not: 1) executed any of the decisions, resolutions or judgements referred to in Article 107; 2) notified an intention of concentration referred to in Article 13; 3) provided information, or have provided unreliable or misleading information, as required by the President of the Office pursuant to Article 50. 2. The President of the Office may impose the fine referred to in Article paragraph 1 on: 1) persons authorised by the inspected party referred to in Article 105a, paragraph 6, holders of apartments, premises, buildings or means of transportation referred to in Article 91, paragraph 1 and the persons referred to in Article 105a, paragraph 7 for: a) failure to provide information or providing incorrect or misleading information requested by the President of the Office, b) failure to collaborate during an inspection held within proceedings pursuant to Article 105a; 2) witnesses for refusal to make testimony without valid reason.

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6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable		

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suspicion of an intra- Community infringement and shall include, at least, the right:		
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Article 50 of the CCPA Article 63 of the Pharmaceutical Law Act dated 6 th of September 2001 Article 10 sec. 2 of the Radio and Television Broadcasting Act dated 29 th of December 1992	 Article 50 of the CCPA: Undertakings shall be obliged to provide all necessary information and documents upon request of the President of the Office. The request referred to in paragraph 1 should include: indicating the scope of such information; indicating the objective of the request; the time limit for providing information; an instruction about sanctions for non-delivery of information or for providing false or misleading information. Everyone shall be entitled to submit in a written form, on their own initiative or upon request of the President of the Office, explanations concerning essential circumstances of a given case. Article 63 of the Pharmaceutical Law Act dated 6th of September 2001 (hereinafter referred to as the "PLA") provides that the responsible undertaking is obliged to provide the Pharmaceutical Inspection authorities on each request with: a sample of each advertisement addressed to the public, along with information on the manner and the date of its distribution; information on any advertisement addressed to the persons authorized to issue prescriptions and to the persons conducting supply of medicinal products. Article 10 sec. 2 of the Radio and Television Broadcasting Act dated 29th of December 1992 (hereinafter referred to as the "RTBA") provides that President of the National Council of Radio and Television Broadcasting is authorized to request from the media service provider to submit materials, documents and to provide clarifications in the extent necessary in order to control compliance of actions of this provider with the provisions of the RTBA, conditions of the concession and self-binding acts (whereas the provisions of RTBA regulate amongst others matters related to advertisement).
(b) to require the supply by	See above	See above

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any person of relevant information related to the intra-Community infringement;				
(c) to carry out necessary on-site inspections;	Article 105a – 105 I of the CCPA (Chapter 5 of the CCPA)	Article 105a of the CCPA: 1. During proceedings before the President of the Office, an inspection may be held at each undertaking involved, hereinafter referred to as the "inspected party", with reference to the proceedings; such inspection shall be performed by an authorised employee of the Office or Trade Inspection, hereinafter referred to as the "inspecting party". 2. The President of the Office may authorize the following persons to participate in the inspection: 1) an employee of a competition protection authority of a Member State, referred to in Article 22 of Regulation No. 1/2003/EC; 2) an employee of the applicant authority within the meaning Article 3, subparagraph f of Regulation No. 2006/2004/EC in instances referred to in Article 6, paragraph 3 thereof; 3) persons holding specific information if such information is required to perform the inspection. 3. With respect to matters falling within the competencies of branch offices or with respect to matters entrusted to branch offices by the President of the Office pursuant to Article 33, paragraphs 4 and 5, the employees of the branch offices shall perform inspections on the basis of authority of the director of the branch offices issued on behalf of the President of the Office. 4. The authority to perform inspection shall specify: 1) identification of the inspecting authority; 2) providing the legal basis; 3) date and place of issue; 4) first and last name and position of the inspecting person and number of his/her official ID; if persons referred to in paragraph 2 are authorized to participate in the inspection – first and last names of such persons, number of their passport or another ID document; 5) identification of the inspected party; 6) identification of the subject and scope of inspection; 7) identification of the authorizing person with details of his/her position or function; 9) instruction of the rights and obligations of the inspected entity. 5. The authority to perform inspection, referred to in paragraph 1 may be issued		

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		person authorized thereof and present their official IDs whereas the persons authorised to participate in the inspection, referred to in paragraph 3 – their ID cards, passport or other document confirming their identity. 7. If the inspected party or persons authorized thereby are absent, the authority to perform the inspection or official IDs, ID cards, passport or other documents confirming the identity shall be presented to another employee of the inspected party who may be recognized to be the person referred to in Article 97 of the Act of 23 April 1964 – Civil Code, or to a witness who shall be a public official while not being an employee of the inspecting authority. In such circumstances, the authority shall be delivered to the inspected party without delay, however not later than on the third day from initiating the inspection. Article 105b: 1. The inspecting persons shall be authorized to: 1) access the site and the buildings, other premises and means of transportation held by the inspected party; 2) request presentation of files, books, all kinds of documents and data carriers related to the subject of the inspection as well as true copies and extracts thereof and to make notes of their content; 3) request the persons referred to in Article 105d, paragraph 1 to provide oral explanations on the subject of the inspection. 2. Persons authorized to participate in inspections pursuant to Article 105a, paragraph 2 shall hold the same authority as the inspecting person with respect to access to the site and the buildings, other premises and means of transportation held by the inspected party and access to files, books, all kinds of documents and data carriers related to the subject of the inspection as well as true copies and extracts thereof and to make notes of their content as well as shall be entitled to participate jointly with the inspecting person in the search referred to in Article 91 and 105c. 3. During the inspection, the inspecting party may be assisted by functionaries of other State inspect

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		Article 105c of the CCPA: 1. During the inspection, the inspecting persons may search the premises or objects subject to the consent of the court of Competition and Consumers Protection, provided upon the request of the President of the Office. 2. If there is a justified suspicion of a serious breach of the Act, in particular when evidence could be obliterated, the request referred to in paragraph 1 may be filed by the President of the Office before antimonopoly proceedings are initiated. 3. The court of Competition and Consumers Protection shall issue its decision with respect to the matter referred to in paragraph 1 within 48 hours. Decisions of the court of Competition and Consumers Protection may not be appealed. 4. In all matters not provided for in the Act, the provisions of the Act of 6 June 1997 – Criminal Procedure Code relating to search shall apply accordingly. Article 105d of the CCPA: 1. The inspected party, the person authorized thereby, the holder of apartments, premises, buildings
		or means of transportation referred to in Article 91, paragraph 1 shall be obliged to: 1) provide the requested information; 2) provide access to the site and buildings or other premises and means of transportation; 3) provide access to files, books and all kinds of documents or other data carriers. 2. The persons referred to in paragraph 1 may refuse to provide information or collaborate only when that could lead to criminal responsibility for themselves or their spouses, ascendants, descendants, brothers and sisters as well as relatives in the same line or degree and co-habiting persons as well as persons who have been adopted, stay under the guardianship or care thereof. Such right to refuse information or collaboration shall survive the marriage or the relationship of adoption, guardianship or care.
		Article 105e of the CCPA: 1. The inspected party shall provide the inspecting persons and other persons authorised to participate in the inspection with conditions and facilities required for efficient performance of the inspection, in particular the inspected party shall: 1) make copies of documents, including printouts from data carriers requested by the inspecting persons; 2) provide if possible a lockable separate room if this is required to perform the inspection; 3) provide a separate place to store documents and secured objects; 4) provide available means of telecommunications to the extent required to perform the inspection.

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		2. The inspected party shall certify the copies of documents and printouts for compliance with original. If this is refused, the documents shall be certified by the inspecting persons with a record in the inspection protocol.
		Article 105f of the CCPA: 1. The inspecting persons or the persons authorized to participate in the inspection shall ascertain facts on the basis of evidence collected during the inspection, in particular documents, objects, site inspections as well as oral or written explanations and statements and other data carriers. 2. The evidence referred to in paragraph 1 may be secured by way of: 1) storing such evidence in a separate, locked and sealed premises with the inspected party; 2) deposit against receipt to the inspecting persons in the premises of the Office or a voivodeship branch of Trade Inspection.
		Article 105g of the CCPA: 1. During the inspection referred to in Article 105a, paragraph 1, the President of the Office may issue a decision on seizing files, books, all kinds of documents or data carriers within the meaning of the regulations on informatisation of operations of entities carrying out public tasks and of other entities that may be used as evidence in the matter, for the duration of the inspection, however not longer than 7 days. 2. The person holding the objects referred to in paragraph 1 shall be requested by the inspecting persons to deliver the objects voluntarily and if this is refused, the objects may be seized pursuant to the regulations on enforcement procedure in administration. 3. The decision on seizing the objects may be appealed by persons whose rights have been violated. The appeal, if any, does not stop the enforcement of the decision. 4. The provisions of paragraphs 1 to 3 do not apply to the securing at the inspection site, with the purpose of performing inspection operations, of files, books, all other documents or data carriers and other objects that may be used as evidence in the matter and to the premises of the inspected entity where the documents or objects are stored.
		Article 105h of the CCPA: 1. The objects that are subject to the seizure referred to in Article 105g, paragraph 1, released, seized or found during the inspection, after visual inspection and drafting a seizure protocol, shall be taken away or left on deposit with a trustworthy person with an obligation to deliver them upon each request of the authority carrying out the proceedings. 2. The seizure protocol shall identify the case to which the seizure of objects or search is related, and

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		the exact time of commencing and closing the operations, the precise list of seized objects and, to the extent required a description thereof as well as reference to the decision of the President of the Office on the seizure. The protocol shall be signed by the person performing the seizure and a representative of the inspected party. 3. The person seizing the objects referred to in paragraph 1 shall be obliged to deliver to the interest parties a receipt specifying the objects that were seized and by whom and to notify without delay the undertaking whose objects were seized. 4. The seized objects shall be returned as soon as they are found unnecessary to the carried out proceedings or by annulling by the court of Competition and Consumers Protection of the decision to seize such objects, however not later than after expiry of the period referred to in Article 105g, paragraph 1. Article 105i of the CCPA: Without initiating separate proceedings, the President of the Office may carry out an inspection, including a search pursuant to Article 91 or Article 105c: 1) upon the request of the European Commission if the undertaking or a person authorised to represent the undertaking or holder of apartments, premises, buildings or means of transportation referred to in Article 91, paragraph 1, object to holding an inspection by the European Commission during proceedings held pursuant to the provisions of Regulation No. 1/2003/EC or Regulation No. 139/2004/EC; 2) upon the request of the European Commission or the competition authority of a Members State in the situation specified in Article 22 of Regulation No. 1/2003/EC or Article 12 of Regulation No. 139/2004/EC. Article 105j of the CCPA: 1. The operations performed during the inspection shall be recorded by the inspecting persons in an inspection protocol. 2. The inspection protocol shall specify in particular: 1) identification of the name or first and last name and address of the inspected party; 2) date of commencement and end of the inspection;	
		 3) first and last name and position of the inspecting persons; 4) identification of the subject and scope of inspection; 5) description of facts ascertained during the inspection; 6) description of attachments; 7) instruction given to the inspected party on their rights to make reservations to the protocol and a 	

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(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Article 26 of the CCPA	right to refuse to sign the protocol. 3. The evidence collected during the inspection shall be attached to the inspection protocol. Article 105k of the CCPA: 1. The inspection protocol shall be signed by the inspecting person and the inspected party. 2. Being presented the protocol within 7 days prior to the signature thereof, the inspected party may submit written reservations to the protocol. 3. If reservations referred to in paragraph 2 are submitted, the inspecting person shall make an analysis thereof and, if required, take additional inspection actions; if the reservations are found justified, the inspecting person shall amend or make additions to the relevant part of the protocol in the form of an annex to the protocol. 4. If the reservations are not found to be justified in whole or in part, the inspecting person shall notify the inspected party thereof in writing. 5. Refusal to sign the protocol shall be mentioned in the protocol by the inspecting person. 6. The protocol shall be made in two counterparts one of which shall be delivered to the inspected party with the exception of the evidence kept by the inspecting person. Article 105l of the CCPA: Inspection of business operations of an undertaking shall be subject to the provisions of chapter 5 of the Act of 2 July 2004 on freedom of business operations (Journal of Laws of 2007, No. 155, item 1095, as amended. Article 26 of the CCPA: 1. The President of the Office shall issue a decision on pronouncing a practice as violating collective consumer interests and ordering that the same be discontinued, if he identifies a breach of the prohibition specified in Article 24. 2. The President of the Office may identify, in the decision referred to in paragraph 1, measures for removing lasting effects of the violation of collective consumer interests with a view to ensuring compliance with the order, in particular commit the undertaking to issue a single or recurring declaration with such contents and in such form as may be prescribed in the decisi
	Article 10 sec. 3 of the RTBA	President of the Office may also order the decision to be published in whole or in part at the expense of the undertaking. Article 10 sec. 3 of the RTBA:
		Pursuant to this provision the President of the National Council of Radio and Television Broadcasting

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		may call the media service provider to cease actions in the area of providing media services, if they infringe the provisions of the RTBA (including these regulating matters connected with advertisement), resolutions of the National Council of Radio and Television Broadcasting or conditions of the concession.
		The provision described above applies respectively to distribution of radio and television programmes.
(e) to obtain from the seller or supplier responsible for intra-Community infringements an undertaking to cease the intra-Community infringement; and, where appropriate, to publish the resulting undertaking	Article 28 of the CCPA	Article 28 1. If, in the course of proceedings regarding practices violating collective interests of consumers, it has been rendered plausible — on the basis of the circumstances of a given case, information comprised in the notification referred to in Article 100, paragraph 1, or information forming the basis for instituting proceedings — that the undertaking concerned uses the practice referred to in Article 24, whereas the undertaking charged with infringing such provision, has undertaken to take or discontinue certain actions aiming at preventing those infringements, then the President of the Office may, by way of a decision, impose an obligation to exercise the undertaken commitments. 2. In the decision referred to in paragraph 1, the President of the Office may determine the final date(s) for implementing the undertaken commitments. 3. In the decision referred to in paragraph 1, the President of the Office shall impose upon the undertaking an obligation to provide, within the fixed date(s), information regarding the stage of implementation of the assumed commitments. 4. In the event that a decision referred to in paragraph 1 is issued, Articles 26 and 27 and Article 106, paragraph 1, subparagraph 4 shall not apply, subject to paragraph 7. 5. The President of the Office may, on an ex officio basis, revoke the decision referred to in paragraph 1, it has been issued on the basis of false, incomplete or misleading information or documents; 2) the undertaking has not fulfilled commitments or obligations imposed thereupon in the decision referred to in paragraphs 1 to 3. 6. The President of the Office may, upon consent of the undertaking concerned, revoke the decision referred to in paragraph 1, if the circumstances that may have a significant impact on the issuance of such decision, have changed. 7. In the event that the decision is revoked, the President of the Office shall adjudicate on the merits of the case.
(f) to require the cessation	Article 26 of the CCPA	Article 26 of the CCPA:

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PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Article 62 of the PLA Article 10 sec. 4 of the RTBA	 The President of the Office shall issue a decision on pronouncing a practice as violating collective consumer interests and ordering that the same be discontinued, if he identifies a breach of the prohibition specified in Article 24. The President of the Office may identify, in the decision referred to in paragraph 1, measures for removing lasting effects of the violation of collective consumer interests with a view to ensuring compliance with the order, in particular commit the undertaking to issue a single or recurring declaration with such contents and in such form as may be prescribed in the decision. The President of the Office may also order the decision to be published in whole or in part at the expense of the undertaking. Article 62 of the PLA:
		Pursuant to this provision the Chief Pharmaceutical Inspector is authorized to (or in case of veterinary products the Chief Veterinary Inspector) exercise supervisory over compliance with the provisions of the PLA with respect to advertisement.
		The Chief Pharmaceutical Inspector (or the Chief Veterinary Inspector) may by virtue of a decision order: 1) cessation of publication or of advertising of medicinal products in violation of applicable law; 2) publication of the issued decision in places where advertisement inconsistent with applicable law appeared, and publication of rectification of the erroneous advertisement; 3) removal of the identified infringements.
		Pursuant to Article 62 sec. 3 of the PLA the decisions issued by the Chief Pharmaceutical Inspector (or by the Chief Veterinary Inspector) are immediately effective.
		Article 10 sec. 4 of the RTBA: Pursuant to this provision the President of the National Council of Radio and Television Broadcasting based on a resolution of the National Council of Radio and Television may issue a decision ordering cessation by the media service provider of the activities from the area of providing media services, if they infringe the provisions of the RTBA, resolutions of the National Council of Radio and Television Broadcasting or conditions of the concession.
(g) to require the losing	Article 107 and 108 of the CCPA	The provision described above applies respectively to distribution of radio and television programmes. <u>Article 107 of the CCPA:</u>

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Article 53 of the RTBA	The President of the Office may impose by way of a decision a fine of equivalent of up to EUR 10,000 on an undertaking for each day of delay in execution of the decisions issued pursuant to Article 10, Article 12, paragraph 1, Article 29, paragraph 1, Article 21, paragraphs 2 and 4, Article 26, Article 28, paragraph 1 and Article 89, paragraphs 1 and 3, decisions issued pursuant to Article 105g, paragraph 1 or court judgements in cases concerning competition-restricting practices, practices violating collective interests of consumers and concentration; the fine shall be imposed as of the date specified in the decision. Article 108 of the CCPA: 1. The President of the Office may, by way of a decision, impose on a person holding a managerial post or being a member of a managing authority of the undertaking, a maximum fine of fifty-fold the average remuneration, should such a person, intentionally or unintentionally, have not: 1) executed any of the decisions, resolutions or judgements referred to in Article 107; 2) notified an intention of concentration referred to in Article 13; 3) provided information, or have provided unreliable or misleading information, as required by the President of the Office pursuant to Article 50. 2. The President of the Office may impose the fine referred to in Article paragraph 1 on: 1) persons authorised by the inspected party referred to in Article 105a, paragraph 6, holders of apartments, premises, buildings or means of transportation referred to in Article 91, paragraph 1 and the persons referred to in Article 105a, paragraph 7 for: a) failure to provide information or providing incorrect or misleading information requested by the President of the Office, b) failure to collaborate during an inspection held within proceedings pursuant to Article 105a; 2) witnesses for refusal to make testimony without valid reason. Article 53 of RTBA: Pursuant to this provision the President of the National Council of Radio and Television Broadcasting is authorized to impose a pecuniary

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE,	Provision national law (quotation or Summary)
	Paragraph, Law)	
Article 4(6)		
		The aforementioned penalty is payable from the income after taxation or from other form of excess revenue over expenses, reduced by taxes.
		The pecuniary penalty may not be imposed, if 1 year has lapsed from the date of the infringement.

1.3.8 SLOVAK REPUBLIC – ENFORCEMENT POWERS UNDER ARTICLE 4(6) OF CPC REGULATION

LEGAL FRAMEWORK

Act No 250/2007 on Consumer protection and amending Act No 372/1990 on offences, as amended, contains the general principles of consumer protection. This Act also delegates the main powers of the relevant bodies of consumer protection control, stating that unless mentioned otherwise, the relevant body is the Slovak Trade Inspection. The procedural aspects of inspection carried out by the Slovak Trade Inspection are contained in Act No 128/2002 Coll. on State control of the internal market in matters of consumer protection as amended. The Slovak Trade Inspection is the competent authority in matters of unfair commercial practices, electronic commerce, unfair contractual terms and distance contracts. The control of advertising (commercials), which is regulated by several laws and agencies, depending on the sector being advertised (e.g. foodstuff, drugs, cosmetics, tobacco products etc...). is an exception, in that it is regulated by 5 different bodies, based on the sector of the product or service being promoted. The powers of those bodies are much more limited compared to those of the Slovak Trade Inspection.

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
Provision CPC Regulation Reference To National Law(Article, Provision national Law (Quotation or Summary) Paragraph, Law)		
Article 4(6)		
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:		
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Section 4(3)b of Act No 128/2002 Coll. on State control of the internal market with respect to consumer protection and on amendments to certain acts as amended.	Section 4 Powers of Slovak Trade Inspection [] (3) When conducting internal market inspections, the Slovak Trade Inspection may [] (b) request necessary information and documents from inspected persons; []
(b) to require the supply by any person of relevant information related to the intra-Community	Section 4(3)b of Act No 128/2002 Coll. on State control of the internal market with respect to consumer protection and on amendments to certain acts as	Section 4 Powers of Slovak Trade Inspection – [] (3) When conducting internal market inspections, the Slovak Trade Inspection may []

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES
DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE
DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS
DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS

Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
infringement; (c) to carry out necessary on-site inspections;	amended. Section 7(2)b of Act No 128/2002 Coll. on State control of the internal market with respect to consumer protection and on amendments to certain acts as amended	(b) request necessary information and documents from inspected persons; Quotation: Section 7 Rights and Obligations of Inspected Persons [] (2) The inspected person must allow the inspectors and any invited visitors to conduct the inspection, in particular allow their access to sites, establishments, land and other premises that are connected with the sale of products and provision of services.
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Section 4(3)a of Act No 128/2002 Coll. on State control of the internal market with respect to consumer protection and on amendments to certain acts as amended	Section 4 Powers of Slovak Trade Inspection [] (3) When conducting internal market inspections, the Slovak Trade Inspection may: (a) issue binding orders to remove any deficiencies found; []
(e) to obtain from the seller or supplier responsible for intra-Community infringements an undertaking to cease the intra-Community infringement; and, where appropriate, to publish the resulting undertaking	Section 4(3)a of Act No 128/2002 Coll. on State control of the internal market with respect to consumer protection and on amendments to certain acts as amended	Section 4 Powers of Slovak Trade Inspection [] (3) When conducting internal market inspections, the Slovak Trade Inspection may: (a) issue binding orders to remove any deficiencies found; []
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Section 4(3)a of Act No 128/2002 Coll. on State control of the internal market with respect to consumer protection and on amendments to certain acts as amended	Quotation: Section 4 Powers of Slovak Trade Inspection [] (3) When conducting internal market inspections, the Slovak Trade Inspection may: (a) issue binding orders to remove any deficiencies found; []
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Section 24 of Act No 250/2007 on Consumer protection and amending Act No 372/1990 on offences, as amended.	Quotation: Section 24 – Sanctions (1) Where the obligations laid down in this Act or in legally binding acts of the European Union on consumer protection are breached, the supervisory authority shall fine the producer, trader, importer or supplier or the person referred to in Section 26 not more than SKK 2,000,000; where the breach recurs within 12 months the authority shall impose a fine of not more than SKK 5,000,000. (2) The supervisory authority shall impose a fine of not more than SKK 10,000,000 upon the producer, trader, importer, supplier or the person referred to in Section 26 who had produced, sold, imported or supplied a product whose defect caused harm to life or health. Same amount of fine shall be imposed

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national Law (QUOTATION OR SUMMARY)
Article 4(6)		
		upon anyone who caused such harm by defective delivery of a service. The fine must not be imposed on persons who demonstrate that they could not have prevented such harm from occurring, in spite of having taken all efforts that could have been reasonably expected of them. (3) A disciplinary fine of not more than SKK 50,000 shall be imposed by the supervisory authority upon the producer, trader, importer and supplier or the person referred to in Section 26 who frustrates, thwarts or otherwise hinders the performance of supervisory activities or who, as the case might be, fails to meet the binding instruction referred to in Section 20(3)(h); the fine may be imposed repeatedly. (4) The fine referred to in paragraph 1 shall not be imposed where a fine under a separate law was imposed, or if the fine referred to in paragraph 2 may be imposed. (5) When determining the amount of the fine, an account shall be taken of the nature of the unlawful conduct, gravity of the breach of an obligation and the method and consequences of the breach. (6) Revenues from the fines imposed pursuant to paragraph 1 through 3 constitute revenues of the State budget. (7) The fine may be imposed within one year of the day when the supervisory authority found the breach of an obligation under this Act, however no later than within three years for fines set out in paragraphs 1 and 3 and, for fines set out in paragraph 2, no later than ten years from the day on which such breach occurred.

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING

NOTE: The rules on control of advertising are contained in Act No. 147/2001 Coll. on Advertising as amended, which states 5 different relevant bodies for control/supervision over advertising, depending on the sector:

- Authority of State Control of Food Administration for foodstuffs,
- State Institute for Drug Control for drug advertising,
- Institute for State Control of Veterinary Biologicals and Medicaments for veterinary medicaments,
- Public Health Authority of Slovak Republic, for cosmetic products commercials, foods for particular nutritional cases including toddler products and following supplementing nutrition, nutrition supplements and consumer bottled mineral water, stream water and drinkable water,
- Slovak Trade Inspection carries out inspections for tobacco products commercials and commercials, which are not covered by other organs.

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:		
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	n/a	
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	n/a	
(c) to carry out necessary on- site inspections;	n/a	
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	n/a	
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the	n/a	

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (Quotation or Summary)
Article 4(6)		
resulting undertaking		
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Section 11(1) of Act No 147/2001 Coll. on advertising as amended	This provision contains the right of the controlling body to ban the advertisement. It also provides for the right to publish such decision.
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Section 11(3) of Act No 147/2001 Coll. on advertising as amended	This provision contains the right of the controlling body to impose fines.

1.3.9 SPAIN – ENFORCEMENT POWERS UNDER ARTICLE 4(6) OF CPC REGULATION

LEGAL FRAMEWORK

SUMMARY

- 1. Legislative framework
 - 1.1. Allocation of competences in the field of consumer protection (State vs Autonomous Regions)
 - 1.2. State legislation in the field of consumer protection
 - 1.3. Regional legislation in the field of consumer protection
- 2. Description of the implementation of Art. 4(6) of the CPC Regulation in Spain
 - 2.1. Specific measures taken after the introduction of the CPC Regulation
 - 2.2. Existence of the minimum powers of Article 4(6) of the CPC Regulation.
 - 2.3. Additional powers
- 3. Overview of the national authorities involved in the enforcement of the 5 directives covered by the study
 - 3.1. The single liaison office: the National Institute for Consumer Affairs (Instituto Nacional de Consumo)
 - 3.2. Other competent authorities (i): regional authorities
 - 3.3. Other competent authorities (ii): local entities

ANNEX 2-A (STATE LEGISLATION)

ANNEX 2-B (REGIONAL LEGISLATION)

1. Legislative framework

The allocation of competences in the field of consumer protection in Spain is complex. This is because two levels of government hold some normative competences in this field (the central State and the Autonomous Regions) and up to three levels hold some executive competences (the central State, the Autonomous Regions and local entities). The allocation of executive competences shall be analysed below (section 3 – "Overview of the national authorities involved in the enforcement of the 5 directives covered by the study"). Our focus here will be on normative competences.

1.1. Allocation of competences in the field of consumer protection (State vs Autonomous Regions)

The complexity of the system derives from the absence of a single constitutional basis clearly assigning the competence to legislate in the field of consumer protection. Article 51.1 of the Spanish Constitution contains a mandate to ensure that consumers and users' rights are upheld²⁹; yet, according to the case law of the Constitutional Court, it does not constitute a sufficient ground to legislate on this subject. Consequently, the competence to legislate in the field of consumer protection needs to be grounded elsewhere. This is the reason why Royal Legislative Decree 1/2007 (the State's General Law on the Protection of Consumers and Users), as well as the other consumer laws that are relevant to this study, are grounded on up to five different Constitutional provisions, which assign to the State the exclusive competence to lay down the basic conditions which guarantee the equality of all Spaniards in the exercise of their rights (Art. 149.1.1 of the Spanish Constitution), to adopt commercial, criminal, prison and procedural legislation (Art. 149.1.6), civil legislation (Art. 149.1.8), the bases and coordination of general planning and economic activity (Art. 149.1.13) and the bases and general coordination of health (Art. 149.1.16).

At the same time, all of the Spanish Autonomous Regions (with the exception of the Autonomous cities of Ceuta and Melilla) have assumed in their respective Statutes of Autonomy normative competences in the field of consumer protection. They have done so on the basis of Art. 149.3 of the Constitution, according to which the Autonomous

²⁹ Article 51.1 states: "The public authorities shall guarantee the defence of the consumers and users, protecting their safety, health, and legitimate economic interests through effective procedures". Not only is it not a sufficient ground to grant legislative powers, but it does not assign the competence to any specific authority.

Regions may assume competences on any matter not expressly assigned to the State. And they have all exercised this competence, adopting their own rules on consumer protection.

It follows that the system of consumer protection in Spain is made up of national and regional laws. The interplay between both sets of rules is fraught with difficulties, as a result of the overlap between the constitutional bases relevant to this field. In general terms, however, their relationship responds to the following scheme: State legislation is directly applicable when adopted upon a constitutional basis that confers an exclusive competence to the State; in all other matters, State legislation will apply in accordance with the subsidiarity rule enshrined in Article 149.3 *in fine* of the Constitution, which has been consistently upheld by the Constitutional Court³⁰. In those cases, State legislation will therefore be applicable to fill in the gaps left by regional legislation.

1.2. State legislation in the field of consumer protection

State consumer legislation is made up of an important number of laws, each of which deals with a specific issue. Royal Legislative Decree 1/2007 merged several of those into a "General Law on the Protection of Consumers and Users". The scope of this law is quite broad, but it does not codify the whole field of consumer protection in Spain. In particular, some of the directives covered by this study were implemented into that law, while others were not. It is therefore necessary to specify, in relation to each of them, whether they are covered by the General Law on the Protection of Consumers and Users.

Three different situations can be distinguished:

- 1) The implementing laws of two of the directives covered by the study (Directives 1993/13/EC and Directives 1997/7/EC) were incorporated into the General Law on the Protection of Consumers and Users.
- 2) The implementing laws of two other directives (Directive 2005/29/EC and Directive 2006/114/EC) were not merged into the General Law on the Protection of Consumers and Users, but their enforcement is subject to the institutional provisions laid down therein.
- 3) The implementing law of the last directive (Directive 2000/31/EC) is independent, for all purposes, of the General Law on the Protection of Consumers and Users. The following table describes into more detail the relevant legal framework for each of these directives. The central column indicates the legal instrument through which each directive was implemented and (where appropriate) the law into which it was originally incorporated. The last column indicates (where appropriate) the law or provision that connects the implementing instruments of each directive with the General Law on the Protection of Consumers and Users.

Directive	Implementation	Connection with the General Law on the Protection of Consumers and Users
Directive 2005/29/EC on	Incorporated into Law	Law 29/2009 also reformed Art. 49.1.I of the General Law on the Protection of Consumers and Users, adding to
Unfair Commercial	3/1991, on Unfair	the list of infringements in the field of consumer protection "the use of unfair commercial practices against
Practices	Competition, by Law	consumers and users". This implies that unfair commercial practices are subject to the institutional provisions of
	29/2009.	the General Law on the Protection of Consumers and Users.
Directive 2000/31/EC on	Transposed by Law	No connection.
Electronic Commerce	34/2002, on Information	
	Society Services and	
	Electronic Commerce	
Directive 93/13/EC on Unfair	Originally transposed by	Royal Legislative Decree 1/2007 merged the provisions on unfair contract terms of Law 7/1998 into the General
Contract Terms	Law 7/1998, on General	Law on the Protection of Consumers and Users (Book II, Title II, Chapter II, Arts. 82-91).
	Contracting Conditions.	
Directive 97/7/EC on	Originally incorporated into	Royal Legislative Decree 1/2007 merged the provisions on distance contracts of Law 7/1996 into the General Law
Distance Contracts	Law 7/1996, on Retail	on the Protection of Consumers and Users (Book II, Title III, Arts. 92-106).
	Trade, by Law 47/2002.	
Directive 2006/114/EC on	Incorporated into Law	Law 29/20009 modified Art. 5.6 of Law 34/1988, which provides that any infringement of the Law on Advertising
Misleading And	34/1988, on Advertising, by	will also be considered an infringement of the General Law on the Protection of Consumers and Users. This

³⁰ See, for example, the 15/1989 ruling on the constitutionality of the Law 26/1984 on the Protection of Consumers and Users, now merged into the General Law passed by Royal Legislative Decree 1/2007.

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Comparative Advertising	Law 29/2009	implies that misleading and comparative advertising is subject to the institutional provisions of the General Law on
		the Protection of Consumers and Users.

1.3. Regional legislation in the field of consumer protection

Spain's decentralization is asymmetrical, in that not all Autonomous Regions may necessarily hold the same competences. As noted earlier, however, all the Autonomous Regions into which Spain is divided have taken up normative and executive competences in the field of consumer protection (except for the Autonomous cities of Ceuta and Melilla, which have only assumed executive competences). This has been done through their Statutes of Autonomy. Pursuant to this competence, Spanish Autonomous Regions have developed their own legislation in the field of consumer protection.

As noted earlier, the 5 directives that are covered by this study were implemented through State legislation. Regional legislation is relevant, however, to the extent that it lays down the institutional regime of the competent executive authorities within that region (since, as will be explained below, enforcement is almost completely decentralized in Spain). The

following table indicates the main laws adopted by each region in the field of consumer protection:

Autonomous Region	Consumer protection law
Andalucía	Law 13/2003 of Andalucía on the Protection of
	Consumers and Users
Aragón	Law 16/2006 of Aragón on the Protection of
	Consumers and Users
Asturias	Law 11/2002 of Asturias on Consumers and Users
Islas Baleares	Law 1/1998 of Islas Baleares enacting the
	Consumer and User Statute
Canarias	Law 3/2003 of Canarias enacting the Consumer
	and User Statute
Cantabria	Law 1/2006 of Cantabria on the Protection of
	Consumers and Users
Castilla - La Mancha	Law 11/2005 of Castilla-La Mancha enacting the
	Consumer Statute
Castilla y León	Law 11/1998 of Castilla-León on the Protection of
	Consumers and Users
Cataluña	Law 22/2010 of Cataluña enacting the Consumer
	Code
Extremadura	Law 6/2001 of Extremadura enacting the
	Consumer Statute
Galicia	Law 2/2012 of Galicia on General Protection of
	Consumers and Users
Madrid	Law 11/1998 of Madrid on the Protection of
	Consumers and Users
Murcia	Law 4/1996 of Murcia enacting the Consumer and
	User Statute (as amended by Law 1/2008 of
	Murcia)
Navarra	Law 7/2006 of Navarra on the Protection of
	Consumers and Users
La Rioja	Law 5/2013 of La Rioja on the Protection of
	Consumers and Users
País Vasco	Law 6/2003 of País Vasco enacting the Consumer

	and User Statute (as amended by Law 2/2012 of País Vasco)
Valencia	Law 1/2011 of Valencia enacting the Consumer and User Statute
Ceuta	No normative competence
Melilla	No normative competence

2. Description of the implementation of Art. 4(6) of the CPC Regulation in Spain

It is against this background that we have investigated the existence in Spain of the powers required by Article 4(6) of the CPC Regulation.

2.1. Specific measures taken after the introduction of the CPC Regulation

Our research indicates that Spain has not adopted any particular measure specifically aimed at complying with Article 4(6) of the CPC Regulation. Given the overlap between national and regional competences in the field of consumer protection, we have surveyed the intricate body of laws that make up State legislation in the field of consumer protection, as well as the legislation adopted in this field by each of the 17 Autonomous Regions. We have found no provision specifically aimed at transposing Article 4(6) of the CPC regulation in its integrity.

2.2. Existence of the minimum powers of Article 4(6) of the CPC Regulation.

It has therefore been necessary to carry out a more general study in order to assess whether the Spanish competent authorities in the field of consumer protection enjoy the list of minimum powers spelled out by that article, despite the lack of specific transposition.

- This study has followed two axes:
 - General and sector-specific legislation.- The body of laws that is relevant to this study is not restricted to legislation in the field of consumer protection (be it State or regional). This study is concerned with a series of enforcement powers, whose foundation may well be outside sector-specific legislation in the field of consumer protection. This is the reason why the references included in the analytical tables of Annex 2 point to sector-specific legislation in some cases (consumer legislation), and to general provisions in others (administrative law or procedural law provisions).
 - State and regional legislation.- Given the allocation of competences in the field of consumer protection in Spain (overlapping normative competences and decentralized enforcement) our study looks both at State and regional legislation. Annex 2-A focuses on State legislation, while Annex 2-B focuses on regional legislation. It should be noted that Annex 2-B contains a single table, and not one for each directive. This is because, as noted earlier, regional legislation is only relevant insofar as it lays down the institutional regime of the competent executive authorities within that region, which is invariably done through a general law that covers the whole range of activities exercised by each authority.

In order to understand the precise legislative framework that is relevant to each of the powers power listed in Article 4(6) of the CPC Regulation, it is useful to break down these powers into three groups:

- 1) The first group is constituted by the investigatory and inspection powers embodied in letters a), b) and c). It is generally considered that this type of powers impinge on personal liberty (Art. 1.1 of the Constitution) and that they therefore need to be founded on a legal (as opposed to infra-legal) basis. This is explicitly required by Article 39.1 of Law 30/1992, on the Legal Regime of Public Administrations and on Common Administrative Procedure, which provides that "citizens are only obliged to provide the Administration with reports and to facilitate its inspections and other investigatory actions in those cases foreseen by law". The law where this Article is located is a "basic law", which means that it binds State, regional and local administrations, and that regional legislation can develop it but must respect it as a floor. It follows that the powers listed in letters a), b) and c) of article 4(6) of the CPC Regulation need an explicit legal basis (which can be general, however). In relation to the application of the 5 directives covered by this study, this legal basis can be found on the State laws where they are implemented (see analytical tables of 2-A). Regional legislation provides an additional legal basis, since regional laws in the field of consumer protection invariably recognize these powers to their enforcement authorities (see Annex 2-B).
- 2) The second group is constituted by the declaratory powers listed in letters d) and e). These powers constitute, so to speak, an intermediate category, since they are neither investigatory or inspection powers, nor sanctioning powers (the two categories for which an explicit legal basis is required). The question in relation to them is whether Spanish administrative law in general allows public authorities to adopt this type of acts (i.e., a written request to cease infringement or a cessation undertaking from the infringer). The answer to this question does not depend on sector-specific legislation, but on general administrative law. As noted earlier, the basic legal regime of the three levels of

administration that exist in Spain is laid down by Law 30/1992, on the Legal Regime of Public Administrations and on Common Administrative Procedure, which shall therefore be the main focus of our study in relation to letters d) and e). We submit that both powers can be exercised by the competent authorities in the field of consumer protection, despite the absence of an explicit legal basis in State legislation in the case of letter e). As the table of Annex 2-B indicates, only rarely does regional legislation provide an additional legal basis.

3) The last group is constituted by the powers listed in letters f) and g). The CPC Regulation does not impose a particular channel for the exercise of these powers (administrative or judicial). In Spain, they are to be exercised by means of a judicial action of cessation, which may be brought amongst others by the competent authorities in the field of consumer protection. The regulation of judicial procedures falls within the exclusive competence of the State. This is the reason why the exercise of these powers is exclusively governed by State legislation (more precisely, by the provisions on the action of cessation of the General Law on the Protection of Consumers and Users and of the Law on Civil Procedure) (see Annex 2-A). The legislation of some Autonomous Regions declare explicitly that the competent authorities may exercise this action (see Annex 2-B), but this should be seen as mere cross-reference to State legislation, which governs this issue exclusively.

2.3. Additional powers

Spanish legislation confers on consumer authorities the power to impose administrative penalties on traders (Articles 46 to 52 of the General Law on the Protection of Consumers and Users). This has to be done through a special "sanctioning procedure" that guarantees the rights of the defence of the trader. The procedure may result in the imposition of pecuniary fine ranging from € 3.005,06 to € 601.012,10 and in some "accessory sanctions", including the publication of the infringement and identity of the trader. Regional consumer laws also regulate this issue.

For constitutional reasons, the recognition of this power and of the fines that can be imposed needs to be explicit and detailed. This is the reason why Spanish consumer legislation is so careful in its regulation, which is in stark contrast with the approach that it takes with regard to the list of powers listed in Article 4(6) of the CPC Regulation. In any event, the existence of this sanctioning power is an important source of leverage for consumer authorities.

3. Overview of the national authorities involved in the enforcement of the 5 directives covered by the study

3.1. The single liaison office: the National Institute for Consumer Affairs (Instituto Nacional de Consumo) now AECOSAN

The National Institute for Consumer Affairs is the single liaison office designated by Spain in accordance with Article 4.1 of the CPC Regulation. Since the enforcement powers in the field of consumer protection have been assumed by the Autonomous Regions, it does not have any enforcement competence, besides the possibility to bring the action of cessation before the competent Courts in those cases where it has *locus standi*. From April 2014, the ICN has been replaced by the new authority, AECOSAN.

3.2. Other competent authorities (i): regional authorities

The table below indicates the authority that has been entrusted with the task of enforcing consumer legislation within each Autonomous Region.

<u>Autonomous Region</u>	Competent Authority
Andalucía	Directorate-General for Consumer Affairs
	(Dirección General de Consumo)
Aragón	Directorate-General for Consumer Affairs (Dirección General de Consumo)
Asturias	Environmental Health and Consumer Affairs Agency (Agencia de Sanidad Ambiental y Consumo)
Islas Baleares	Directorate-General for Public Health and Consumer Affairs (<i>Dirección General de Sanidad Pública y Consumo</i>)
Canarias	Directorate-General for Consumer Affairs (Dirección General de Consumo)
Cantabria	Directorate-General for Trade and Consumer

	Affairs (Dirección General de Comercio y Consumo)
Castilla - La Mancha	Institute for Consumer Affairs of Castilla-La Mancha (Instituto de Consumo de Castilla-La Mancha)
Castilla y León	Directorate-General for Trade and Consumer Affairs (<i>Dirección General de Comercio y</i> <i>Consumo</i>)
Cataluña	Catalan Agency for Consumer Affairs (Agencia Catalana del Consumo)
Extremadura	Institute for Consumer Affairs of Extremadura (Instituto de Consumo de Extremadura)
Galicia	Institute for Consumer Affairs of Galicia (Instituto de Consumo de Galicia)
Madrid	Directorate-General for Consumer Affairs (Dirección General de Consumo)
Murcia	Directorate-General for Consumer Affairs, Trade and Craft Trades (<i>Dirección General de Comercio y Consumo</i>)
Navarra	Directorate-General for Social Policy and Consumer Affairs (<i>Dirección General de Política</i> Social y Consumo)
La Rioja	Directorate-General for Public Health and Consumer Affairs (<i>Dirección General de Salud Pública y Consumo</i>)
País Vasco	Basque Institute for Consumer Affairs (Instituto Vasco de Consumo)
Valencia	Directorate-General for Trade and Consumer Affairs (<i>Dirección General de Comercio y</i> <i>Consumo</i>)
Ceuta	Department of Health and Consumer Affairs (Consejería de Sanidad y Consumo)
Melilla	Directorate-General for Health and Consumer Affairs (<i>Dirección General de Sanidad y Consumo</i>)

The decentralization of enforcement in the field of consumer protection makes it necessary to coordinate the actions of the different competent authorities. There are no clear jurisdictional rules on this issue. The Sector Conference for Consumer Affairs and its executive body, the Cooperation Committee for Consumer Affairs, may establish operative criteria or guidelines, but to date, they have failed to do so. Therefore, in practice, the first competent authority to initiate a procedure in consumer affairs is the one that actually carries it out (including the inspection procedure and the imposition of penalties where relevant).

3.3. Other competent authorities (ii): local entities

Regional Statutes of Autonomy and subsequent regional legislation have conferred enforcement competences on local entities in the field of consumer protection. These local authorities are generally referred to as Municipal Information Offices for Consumer Affairs (*Oficina Municipal de Información al Consumidor, OMIC*). The exact powers entrusted to local entities vary between Regions. In general, however, these powers are subject to four types of limitations: territorial limitation (the jurisdiction of local entities is usually restricted to infringements that are circumscribed to their territory); subject-matter limitation (their jurisdiction is usually restricted to certain economic sectors); material limitation (their jurisdiction is usually restricted to certain powers, such as inspection procedures); quantitative limitations (with regard to the maximum penalties that they may impose).

A. STATE LEGISLATION

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES					
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)			
Article 4(6)					
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right: (a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Art. 49.1.h of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users) Art. 13.2 and 14.1 of Royal Decree 1945/1983	Art. 49.1.h classifies as an infringement to the rules on consumer protection "the obstruction or refusal to submit information or to facilitate the functions of information, supervision or inspection" Art. 13.2 empowers the inspectors of the competent authorities in the field of consumer protection to "have direct access to the industrial, commercial and accounting information of the undertakings that they inspect when they deem it necessary". Art. 14.1 provides that natural and legal persons shall be obliged, upon request of the competent authorities, "to show them any document relating to made transactions, to the prices and margins applied and to the concepts in which they are broken down" and "to facilitate the possibility to obtain copies of the above mentioned documents".			
(b) to require the supply by any person of relevant information related to the intra-Community	Art. 49.1.h of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 49.1.h classifies as an infringement to the rules on consumer protection "the obstruction or refusal to submit information or to facilitate the functions of information, supervision or inspection"			

infringement:		
infringement;	Art. 13.2 and 14.1 of Royal Decree 1945/1983	Art. 13.2 empowers the inspectors of the competent authorities in the field of consumer protection to "have direct access to the industrial, commercial and accounting information of the undertakings that they inspect when they deem it necessary".
		Art. 14.1 provides that natural and legal persons shall be obliged, upon request of the competent authorities, "to provide them with all kind of information with regard to their facilities, products or services"
(c) to carry out necessary on-site inspections;	Art. 49.1.h of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 49.1.h classifies as an infringement to the rules on consumer protection "the obstruction or refusal to submit information or to facilitate the functions of information, supervision or inspection"
	Art. 13.2 and 14.1 of Royal Decree 1945/1983	Art. 13.2 empowers the inspectors of the competent authorities in the field of consumer protection to "have direct access to the industrial, commercial and accounting information of the undertakings that they inspect when they deem it necessary".
		Art. 14.1 provides that natural and legal persons shall be obliged, upon request of the competent authorities, "to allow on-site inspections and to facilitate them in all possible ways".
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	No specific provision. See comments.	
(e) to obtain from the seller or supplier responsible for intra-Community infringements	Art. 88.1 and 2 of Law 30/1992, on the Legal Regime of Public Administrations and on the Common Administrative Procedure	Art. 88.1 empowers the administration to "celebrate agreements, convenants or contracts with private and public persons". It further specifies that these agreements can put an end to the administrative procedure, or be taken in the course of it, prior to its termination.
an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking		Art. 88.2 <i>in fine</i> provides that the instruments where these agreements are reflected "may or may not be published, depending on their nature and on their addressees".
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish	Art. 53 and 54.1 of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 53: "The action of cessation is aimed at obtaining a judgment compelling the respondent to cease its conduct and to prohibit its reiteration in the future. It may also be exercised to prohibit the future deployment of a conduct after the time limit for the exercise of the action has expired, if there are sufficient signs to fear its immediate repetition".
resulting decisions;		Art. 54.3 provides that the standing to exercise the action of cessation against the infringements omitted in subsection 1 (which brings unfair commercial practices within subsection 3) will be governed by Article 11 of Law 1/2000 on Civil Procedure, which confers standing on individual consumers and consumer associations. Art. 54.3 aditionaly confers standing on the Instituto Nacional

				de Consumo and regional, competent authorities in the field of consumer protection.
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Art. 711.2 of Law Procedure	1/2000 on	Civil	Art. 711.2. "The judgment upholding an action of cessation in defence of the collective and diffuse interests of consumers and users shall impose () a fine that will range from six hundred to sixty thousand euro for each day of delay in the execution of the order after the deadline fixed by the judgment, depending on the nature of the infringement and on the wealth of the respondent. The fine shall be paid to the Public Treasury".

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE			
Provision CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)	
Article 4(6)			
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right: (a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Art. 36.1 § 2 Law 34/2002, on Information Society Services and Electronic Commerce	"[Information services providers] shall allow inspection agents and staff access to their facilities and the consultation of any document that is relevant tot eh supervisory activity at stake ()".	
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Art. 36.1 §1 Law 34/2002, on Information Society Services and Electronic Commerce	"Information services providers have the duty to facilitate to the [competent national and regional authorities] all the information and collaboration that is necessary for the exercise of their functions".	
(c) to carry out necessary on-site inspections;	Art. 35.2 Law 34/2002, on Information Society Services and Electronic Commerce	"The organs referred to in the first indent of this article shall be authorized to carry out the inspections that are necessary for the exercise of their supervisory function. [Their staff] shall have the consideration of public authority".	
(d) to request in writing that the seller or supplier concerned cease the intra-Community	No specific provision. See comment.		

infringement		
infringement; (e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking	Art. 88.1 and 2 of Law 30/1992, on the Legal Regime of Public Administrations and on the Common Administrative Procedure	Art. 88.1 empowers the administration to "celebrate agreements, convenants or contracts with private and public persons". It further specifies that these agreements can put an end to the administrative procedure, or be taken in the course of it, prior to its termination. Art. 88.2 <i>in fine</i> provides that the instruments where these agreements are reflected "may or may not be published, depending on their nature and on their addressees".
(f) to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to publish resulting decisions;	Art. 30 and 31 of Law 34/2002, on Information Society Services and Electronic Commerce	Art. 30.2 defines the action of cessation as "aimed at obtaining a judgment compelling the respondent to cease its conduct and to prohibit its reiteration in the future. It may also be exercised to prohibit the future deployment of a conduct after the time limit for the exercise of the action has expired, if there are sufficient signs to fear its immediate repetition" Art. 30.3 provides that the action of cessation will be exercised in accordance with Law 1/2000, on Civil Procedure. Art. 31 confers standing on: - Natural and legal persons holding a legitimate interest - Consumer groups - General Attorney - The Instituto Nacional de Consumo and the other competent authorities in the field of consumer protection - Entities from other Member States constituted for the protection of the collective or diffuse interests of consumers and recognised by the European Commission
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Art. 711.2 of Law 1/2000 on Civil Procedure	Art. 711.2. "The judgment upholding an action of cessation in defence of the collective and diffuse interests of consumers and users shall impose () a fine that will range from six hundred to sixty thousand euro for each day of delay in the execution of the order after the deadline fixed by the judgment, depending on the nature of the infringement and on the wealth of the respondent. The fine shall be paid to the Public Treasury".

DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS			
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE,	Provision national law (quotation or Summary)	
	Paragraph, Law)		
Article 4(6)			

6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:		
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Art. 49.1.h of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 49.1.h classifies as an infringement to the rules on consumer protection "the obstruction or refusal to submit information or to facilitate the functions of information, supervision or inspection"
	Art. 13.2 and 14.1 of Royal Decree 1945/1983	Art. 13.2 empowers the inspectors of the competent authorities in the field of consumer protection to "have direct access to the industrial, commercial and accounting information of the undertakings that they inspect when they deem it necessary".
		Art. 14.1 provides that natural and legal persons shall be obliged, upon request of the competent authorities, "to show them any document relating to made transactions, to the prices and margins applied and to the concepts in which they are broken down" and "to facilitate the possibility to obtain copies of the above mentioned documents".
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Art. 49.1.h of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 49.1.h classifies as an infringement to the rules on consumer protection "the obstruction or refusal to submit information or to facilitate the functions of information, supervision or inspection"
	Art. 13.2 and 14.1 of Royal Decree 1945/1983	Art. 13.2 empowers the inspectors of the competent authorities in the field of consumer protection to "have direct access to the industrial, commercial and accounting information of the undertakings that they inspect when they deem it necessary".
		Art. 14.1 provides that natural and legal persons shall be obliged, upon request of the competent authorities, "to provide them with all kind of information with regard to their facilities, products or services"
(c) to carry out necessary on-site inspections;	Art. 49.1.h of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 49.1.h classifies as an infringement to the rules on consumer protection "the obstruction or refusal to submit information or to facilitate the functions of information, supervision or inspection"

	Art. 13.2 and 14.1 of Royal Decree 1945/1983	Art. 13.2 empowers the inspectors of the competent authorities in the field of consumer protection to "have direct access to the industrial, commercial and accounting information of the undertakings that they inspect when they deem it necessary". Art. 14.1 provides that natural and legal persons shall be obliged, upon request of the competent
		authorities, "to allow on-site inspections and to facilitate them in all possible ways".
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	No specific provision. See comments.	
(e) to obtain from the seller or supplier responsible for intra- Community infringements	Art. 88.1 and 2 of Law 30/1992, on the Legal Regime of Public Administrations and on the Common Administrative Procedure	Art. 88.1 empowers the administration to "celebrate agreements, convenants or contracts with private and public persons". It further specifies that these agreements can put an end to the administrative procedure, or be taken in the course of it, prior to its termination.
an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the		Art. 88.2 <i>in fine</i> provides that the instruments where these agreements are reflected "may or may not be published, depending on their nature and on their addressees".
resulting undertaking (f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Art. 53 and 54.1 of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 53: "The action of cessation is aimed at obtaining a judgment compelling the respondent to cease its conduct and to prohibit its reiteration in the future. It may also be exercised to prohibit the future deployment of a conduct after the time limit for the exercise of the action has expired, if there are sufficient signs to fear its immediate repetition". Art. 54.3 provides that the standing to exercise the action of cessation against the infringements
		omitted in subsection 1 (which brings unfair commercial practices within subsection 3) will be governed by Article 11 of Law 1/2000 on Civil Procedure, which confers standing on individual consumers and consumer associations. Art. 54.3 aditionally confers standing on the Instituto Nacional de Consumo and regional, competent authorities in the field of consumer protection.
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Art. 711.2 of Law 1/2000 on Civil Procedure	Art. 711.2. "The judgment upholding an action of cessation in defence of the collective and diffuse interests of consumers and users shall impose () a fine that will range from six hundred to sixty thousand euro for each day of delay in the execution of the order after the deadline fixed by the judgment, depending on the nature of the infringement and on the wealth of the respondent. The fine shall be paid to the Public Treasury".

	DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS				
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)			
Article 4(6)					
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right: (a) to have access to any	Art. 49.1.h of Royal Legislative Decree	Art. 49.1.h classifies as an infringement to the rules on consumer protection "the obstruction or refusal			
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Art. 49.1.n of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users) Art. 13.2 and 14.1 of Royal Decree 1945/1983	to submit information or to facilitate the functions of information, supervision or inspection" Art. 13.2 empowers the inspectors of the competent authorities in the field of consumer protection to "have direct access to the industrial, commercial and accounting information of the undertakings that they inspect when they deem it necessary".			
		Art. 14.1 provides that natural and legal persons shall be obliged, upon request of the competent authorities, "to show them any document relating to made transactions, to the prices and margins applied and to the concepts in which they are broken down" and "to facilitate the possibility to obtain copies of the above mentioned documents".			
(b) to require the supply by any person of relevant information related to the intra-Community	Art. 49.1.h of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 49.1.h classifies as an infringement to the rules on consumer protection "the obstruction or refusal to submit information or to facilitate the functions of information, supervision or inspection"			
infringement;	Art. 13.2 and 14.1 of Royal Decree 1945/1983	Art. 13.2 empowers the inspectors of the competent authorities in the field of consumer protection to "have direct access to the industrial, commercial and accounting information of the undertakings that they inspect when they deem it necessary".			
		Art. 14.1 provides that natural and legal persons shall be obliged, upon request of the competent authorities, "to provide them with all kind of information with regard to their facilities, products or services"			
(c) to carry out necessary on-site inspections;	Art. 49.1.h of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 49.1.h classifies as an infringement to the rules on consumer protection "the obstruction or refusal to submit information or to facilitate the functions of information, supervision or inspection"			

(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Art. 13.2 and 14.1 of Royal Decree 1945/1983 No specific provision. See comments.	Art. 13.2 empowers the inspectors of the competent authorities in the field of consumer protection to "have direct access to the industrial, commercial and accounting information of the undertakings that they inspect when they deem it necessary". Art. 14.1 provides that natural and legal persons shall be obliged, upon request of the competent authorities, "to allow on-site inspections and to facilitate them in all possible ways".
(e) to obtain from the seller or supplier responsible for intra- Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking	Art. 88.1 and 2 of Law 30/1992, on the Legal Regime of Public Administrations and on the Common Administrative Procedure	Art. 88.1 empowers the administration to "celebrate agreements, covenants or contracts with private and public persons". It further specifies that these agreements can put an end to the administrative procedure, or be taken in the course of it, prior to its termination. Art. 88.2 <i>in fine</i> provides that the instruments where these agreements are reflected "may or may not be published, depending on their nature and on their addressees".
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Art. 53 and 54.1 of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 53: "The action of cessation is aimed at obtaining a judgment compelling the respondent to cease its conduct and to prohibit its reiteration in the future. It may also be exercised to prohibit the future deployment of a conduct after the time limit for the exercise of the action has expired, if there are sufficient signs to fear its immediate repetition". Art. 54.3 provides that the standing to exercise the action of cessation against the infringements omitted in subsection 1 (which brings unfair commercial practices within subsection 3) will be governed by Article 11 of Law 1/2000 on Civil Procedure, which confers standing on individual consumers and consumer associations. Art. 54.3 additionally confers standing on the Instituto Nacional de Consumo and regional, competent authorities in the field of consumer protection.
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Art. 711.2 of Law 1/2000 on Civil Procedure	Art. 711.2. "The judgment upholding an action of cessation in defence of the collective and diffuse interests of consumers and users shall impose () a fine that will range from six hundred to sixty thousand euro for each day of delay in the execution of the order after the deadline fixed by the judgment, depending on the nature of the infringement and on the wealth of the respondent. The fine shall be paid to the Public Treasury".

	DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING				
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)			
Article 4(6)					
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:					
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Art. 49.1.h of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users) Art. 13.2 and 14.1 of Royal Decree 1945/1983	Art. 49.1.h classifies as an infringement to the rules on consumer protection "the obstruction or refusal to submit information or to facilitate the functions of information, supervision or inspection" Art. 13.2 empowers the inspectors of the competent authorities in the field of consumer protection to "have direct access to the industrial, commercial and accounting information of the undertakings that they inspect when they deem it necessary". Art. 14.1 provides that natural and legal persons shall be obliged, upon request of the competent			
		authorities, "to show them any document relating to made transactions, to the prices and margins applied and to the concepts in which they are broken down" and "to facilitate the possibility to obtain copies of the above mentioned documents".			
(b) to require the supply by any person of relevant information related to the intra-Community	Art. 49.1.h of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 49.1.h classifies as an infringement to the rules on consumer protection "the obstruction or refusal to submit information or to facilitate the functions of information, supervision or inspection"			
infringement;	Art. 13.2 and 14.1 of Royal Decree 1945/1983	Art. 13.2 empowers the inspectors of the competent authorities in the field of consumer protection to "have direct access to the industrial, commercial and accounting information of the undertakings that they inspect when they deem it necessary".			
		Art. 14.1 provides that natural and legal persons shall be obliged, upon request of the competent authorities, "to provide them with all kind of information with regard to their facilities, products or services"			
(c) to carry out necessary on-site inspections;	Art. 49.1.h of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 49.1.h classifies as an infringement to the rules on consumer protection "the obstruction or refusal to submit information or to facilitate the functions of information, supervision or inspection"			

	<u> </u>	
	Art. 13.2 and 14.1 of Royal Decree 1945/1983	Art. 13.2 empowers the inspectors of the competent authorities in the field of consumer protection to "have direct access to the industrial, commercial and accounting information of the undertakings that they inspect when they deem it necessary".
		Art. 14.1 provides that natural and legal persons shall be obliged, upon request of the competent authorities, "to allow on-site inspections and to facilitate them in all possible ways".
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	No specific provision. See comments.	
(e) to obtain from the seller or supplier responsible for intra- Community infringements	Art. 88.1 and 2 of Law 30/1992, on the Legal Regime of Public Administrations and on the Common Administrative Procedure	Art. 88.1 empowers the administration to "celebrate agreements, convenants or contracts with private and public persons". It further specifies that these agreements can put an end to the administrative procedure, or be taken in the course of it, prior to its termination.
an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking	T Toolada o	Art. 88.2 in fine provides that the instruments where these agreements are reflected "may or may not be published, depending on their nature and on their addressees".
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish	Art. 53 and 54.1 of Royal Legislative Decree 1/2007 (General Law on the Protection of Consumers and Users)	Art. 53: "The action of cessation is aimed at obtaining a judgment compelling the respondent to cease its conduct and to prohibit its reiteration in the future. It may also be exercised to prohibit the future deployment of a conduct after the time limit for the exercise of the action has expired, if there are sufficient signs to fear its immediate repetition".
resulting decisions;		Art. 54.3 provides that the standing to exercise the action of cessation against the infringements omitted in subsection 1 (which brings unfair commercial practices within subsection 3) will be governed by Article 11 of Law 1/2000 on Civil Procedure, which confers standing on individual consumers and consumer associations. Art. 54.3 additionally confers standing on the Instituto Nacional de Consumo and regional, competent authorities in the field of consumer protection.
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Art. 711.2 of Law 1/2000 on Civil Procedure	Art. 711.2. "The judgment upholding an action of cessation in defence of the collective and diffuse interests of consumers and users shall impose () a fine that will range from six hundred to sixty thousand euro for each day of delay in the execution of the order after the deadline fixed by the judgment, depending on the nature of the infringement and on the wealth of the respondent. The fine shall be paid to the Public Treasury".

B: REGIONAL LEGISLATION

Note 1: As noted earlier (section 2.2) this annex contains a single table. This is because regional legislation is only relevant insofar as it lays down the institutional regime of the competent executive authorities within that region, which is invariably done through a general law that covers the whole range of activities exercised by each authority.

Note 2: The following table indicates, for each autonomous region, the provision where each power may be grounded. In the absence of an explicit legal basis, however, regional authorities may ground these powers on national legislation, which means that the cells that are left in blank should not be read as implying the absence of the power considered in each case.

	Article 4.6(a) of the CPC	Article 4.6(b) of the CPC	Article 4.6(c) of the CPC Regulation	Article 4.6(d) of the CPC	Article 4.6(e) of the CPC	Article 4.6(f) of the CPC Regulation	Article 4.6(g) of the CPC Regulation
Andalucía	Art. 47.1(b) of the Law 13/2003 of Andalucía on the Protection of Consumers and Users	Regulation Art. 47.1(b) of the Law 13/2003 of Andalucía on the Protection of Consumers and Users	Art. 47.1(a) of the Law 13/2003 of Andalucía on the Protection of Consumers and Users	Regulation	Regulation	Art. 63.2 of the Law 13/2003 of Andalucía on the Protection of Consumers and Users	
Aragón	Art. 65.1(b) of the Law 16/2006 of Aragón on the Protection of Consumers and Users	Art. 65.1(a) of the Law 16/2006 of Aragón on the Protection of Consumers and Users	Arts. 65.1(e) and 68 of the Law 16/2006 of Aragón on the Protection of Consumers and Users				
Asturias	Art. 31.3 of the Law 11/2002 of Asturias on Consumers and Users	Art. 31.3 of the Law 11/2002 of Asturias on Consumers and Users	Art. 31.3 of the Law 11/2002 of Asturias on Consumers and Users				
Islas Baleares	Art. 40.1(3) of the Law 1/1998 of Islas Baleares enacting the Consumer and User Statute	Art. 40.2 of the Law 1/1998 of Islas Baleares enacting the Consumer and User Statute	Art. 40.1(1) of the Law 1/1998 of Islas Baleares enacting the Consumer and User Statute				
Canarias	Art. 32(b) of the Law 3/2003 of Canarias enacting the Consumer and User Statute	Art. 32(b) of the Law 3/2003 of Canarias enacting the Consumer and User Statute	Art. 32(a) of the Law 3/2003 of Canarias enacting the Consumer and User Statute				
Cantabria	Art. 36.1 of the Law 1/2006 of Cantabria on the	Arts. 36.1 of the Law 1/2006 of Cantabria on the	Art. 37 of the Law 1/2006 of Cantabria on the Protection of			Art. 31 of the Law 1/2006 of Cantabria on the Protection of Consumers	

	Protection of Consumers and Users	Protection of Consumers and Users	Consumers and Users		and Users	
Castilla - La Mancha	Art. 25(4) of the Law 11/2005 of Castilla-La Mancha enacting the Consumer Statute	Art. 26(a) of the Law 11/2005 of Castilla-La Mancha enacting the Consumer Statute	Art. 25(4) of the Law 11/2005 of Castilla-La Mancha enacting the Consumer Statute			
Castilla - León	Art. 34(b) of the Law 11/1998 of Castilla-León on the Protection of Consumers and Users	Art. 34(b) and (f) of the Law 11/1998 of Castilla-León on the Protection of Consumers and Users	Art. 34(a) of the Law 11/1998 of Castilla- León on the Protection of Consumers and Users			
Cataluña	Art. 322-2(b) of the Law 22/2010 of Cataluña enacting the Consumer Code	Art. 322-2(b) of the Law 22/2010 of Cataluña enacting the Consumer Code	Art. 322-2(a) of the Law 22/2010 of Cataluña enacting the Consumer Code		Art. 311-1(3) of the Law 22/2010 of Cataluña enacting the Consumer Code	
Extremadura	Art. 24.3 of the Law 6/2001 of Extremadura enacting the Consumer Statute	Art. 25.1 of the Law 6/2001 of Extremadura enacting the Consumer Statute	Art. 24.3 of the Law 6/2001 of Extremadura enacting the Consumer Statute		Art. 10.1(i) of the Law 6/2001 of Extremadura enacting the Consumer Statute	
Galicia	Art. 56.2 of the Law 2/2012 of Galicia on General Protection of Consumers and Users	Art. 56.2 of the Law 2/2012 of Galicia on General Protection of Consumers and Users	Art. 56.2 of the Law 2/2012 of Galicia on General Protection of Consumers and Users	Art. 57 of the Law 2/2012 of Galicia on General Protection of Consumers and Users	Art. 55.1 of the Law 2/2012 of Galicia on General Protection of Consumers and Users	
Madrid	Art. 36.1 of the Law 11/1998 of Madrid on the Protection of Consumers and Users	Art. 36.1 of the Law 11/1998 of Madrid on the Protection of Consumers and Users	Art. 36.1 of the Law 11/1998 of Madrid on the Protection of Consumers and Users			
Murcia	Art. 23.2(b) of the Law 4/1996 of Murcia enacting the Consumer and	Art. 23.2(c) of the Law 4/1996 of Murcia enacting the Consumer and	Art. 23.2(a) of the Law 4/1996 of Murcia enacting the Consumer and User	Art. 20.4 of the Law 4/1996 of Murcia enacting the Consumer	Art. 45.2(e) of the Law 4/1996 of Murcia enacting the Consumer and User Statute (as amended by	

Navarra	User Statute (as amended by Law 1/2008 of Murcia) Art. 30.3(b) of the Law 7/2006 of	User Statute (as amended by Law 1/2008 of Murcia) Art. 30.3(f) of the Law 7/2006 of	Statute (as amended by Law 1/2008 of Murcia) Art. 30.3(a) of the Law 7/2006 of	and User Statute (as amended by Law 1/2008 of Murcia)	Law 1/2008 of Murcia)	
	Navarra on the Protection of Consumers and Users	Navarra on the Protection of Consumers and Users	Navarra on the Protection of Consumers and Users			
La Rioja	Art. 45.1(d) of the Law 5/2013 of La Rioja on the Protection of Consumers and Users	Art. 45.1(d) of the Law 5/2013 of La Rioja on the Protection of Consumers and Users	Art. 45.1(a) of the Law 5/2013 of La Rioja on the Protection of Consumers and Users			
País Vasco	Art. 46.3 of the Law 6/2003 of País Vasco enacting the Consumer and User Statute (as amended by Law 2/2012 of País Vasco)	Art. 46.2 of the Law 6/2003 of País Vasco enacting the Consumer and User Statute (as amended by Law 2/2012 of País Vasco)	Art. 46.2 of the Law 6/2003 of País Vasco enacting the Consumer and User Statute (as amended by Law 2/2012 of País Vasco)			
Valencia	Art. 42.2 of the Law 1/2011 of Valencia enacting the Consumer and User Statute	Art. 42.5 of the Law 1/2011 of Valencia enacting the Consumer and User Statute	Art. 42.1 of the Law 1/2011 of Valencia enacting the Consumer and User Statute			
Ceuta						
Melilla						

1.3.10THE UNITED KINDGOM – ENFORCEMENT POWERS UNDER ARTICLE 4(6) OF CPC REGULATION

LEGAL FRAMEWORK

The main piece of legislation containing the enforcement powers for consumer protection in United Kingdom is Part 8 of the Enterprise Act 2002, which has replaced the Fair Trading Act 1973 and the Stop Now Orders Regulation 2001 in UK. Part 8 applies to a wide range of UK consumer protection legislation and also applies to UK and other EEA state legislation implementing those European Directives specified in the Injunction Directive. Part 8 is not a means to pursue individual redress. It applies only to an infringement which harms the collective interests of consumers. This must be established by the evidence gather by the enforcer.

Part 8 has been amended by the Statutory Instrument 2006 in order to implement the CPC Regulation in UK. The Enterprise Act 2002 as amended makes express reference to the enforcement powers of CPC enforcer.

Enforcement action under Part 8 of the Enterprise Act 2002 can be taken against:

- domestic infringements: a breach of UK laws by business that harms the collective interests of consumers. These cover a wide range of trading activities, including: misleading advertising; lotteries; credit; under age sales; sale of goods; estate agency; misleading health claims; trade descriptions and mock auctions.
- Community infringements: a breach of laws by a business which harms or is likely to harm the collective interests of consumers under the UK laws which transpose certain EC Directives. These UK laws cover activities such as distance selling; timeshare; unfair terms in consumer contracts; doorsteps selling; package travel and holidays and consumer credit.

Part 8 of the Act, which came into force on 20 June 2003, gives the OFT (now Competition and Markets Authority-CMA), Local authority Trading Standards Services (TSS) and certain other designated bodies stronger powers to take enforcement action trough the courts against business for domestic and community infringements. This enforcement action could include: undertakings (either to CMA or the court), enforcement orders or action for contempt of court.

In practice, before taking action (e.g. seeking an Enforcement Order) the enforcement bodies will usually invite the trader concerned to respond to the allegations against them. Instead of going to court, it may be possible for the trader to give a binding commitment to refrain from certain trading practice.

Part 8 of the Enforcement Act 2002 contains the general rules on enforcement of consumer protection which are enforceable by all the enforcement bodies, also by the local enforcement bodies. The tables following the first on Directive 2005/29/EC will only report the specific rules applicable for the EU selected acts.

Under Part 8 of the Act there four types of enforcers are identified:

- General enforcers;
- Designated enforcers;
- Community enforcers;
- CPC enforcers.

General enforcers are the CMA, the Trading Standard Service in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland. A designated enforcer is any public or private body in UK which the Secretary of State designates in a Statutory Instrument, having identified that it has the protection of collective interest of consumers as one of its purposes.

A Community enforcer is a qualified entity for the purpose of the Injunction Directive which is listed in the Official Journal of the European Communities but which is not a general or a designated enforcer. UK general and designated enforcers may cooperate with Community enforcers in other EEA states when that Community enforcer takes Part 8 action in the UK in respect of Community infringements.

A CPC enforcer is an EU based enforcer of consumer protection laws authorized under the CPC Regulation.

Any enforcer who wants to apply for an Enforcement Order in the UK must consult the CMA first. Enforcement partners should also tell the business concerned if they intend to take action to stop a breach of consumer protection law. This notice period, called a consultation period, must allow at least two weeks for the business to agree in writing to voluntarily stop its behaviour and comply with the law in future. If consumers' interests are so threatened that urgent action is required, the consultation period may be shortened.

PhonepayPlus in the delegated third party under Article 8(3) of the CPC Regulation. a separate table with its enforcement powers is added.

	DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES					
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (quotation or Summary)				
Article 4(6)						
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right: (a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Section 21, Consumer Protection form Unfair Trading Regulation 2008 Part 8 Enterprise Act 2002, Section 227B Section 227F	Power of entry and investigation, etc. 21. (1) A duly authorised officer of an enforcement authority may at all reasonable hours exercise the following powers— (d)he may seize and detain goods or documents which he has reason to believe may be required as evidence in proceedings for a breach of these Regulations. () (7) Where an officer seizes goods or documents in exercise of a power under this regulation they may not be detained— (a)for a period of more than 3 months; or (b)where the goods or documents are reasonably required by the enforcement authority in connection with the enforcement of these Regulations, for longer than they are so required. 227B Powers exercisable on the premises (3)An officer of a CPC enforcer may take copies of, or extracts from, any documents to which he has access by virtue of subsection (1). (4)But nothing in this section authorises action to be taken in relation to anything which, in proceedings in the High Court, a person would be entitled to refuse to produce on the grounds of legal professional privilege.				

	DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES				
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)			
Article 4(6)					
		(5)In this section document includes information recorded in any form. (6)The reference in subsection (1)(c) to the production of documents is, in the case of a document which contains information recorded otherwise than in legible form, a reference to the production of a copy of the information in legible form. (7)In its application to Scotland, this section has effect as if the reference in subsection (4)— (a)to proceedings in the High Court were a reference to proceedings in the Court of Session; and (b)to an entitlement on the grounds of legal professional privilege were a reference to an entitlement on the grounds of confidentiality of communications. 227F Retention of documents and goods (1)No documents seized under sections 227A to 227D may be retained for a period of more than three months. (2)No goods seized under sections 227A to 227D may be retained for a period of more than three months unless they are reasonably required in connection with the exercise of any function of a CPC enforcer under this Part. (3)Where goods are so required they may be retained for as long as they are so required			
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Section 21, Consumer Protection form Unfair Trading Regulation 2008 Part 8 Enterprise Act 2002, Sections 224, 225 and 227	Power of entry and investigation, etc. 21. (1) A duly authorised officer of an enforcement authority may at all reasonable hours exercise the following powers— (b) if he has reasonable cause to suspect that a breach of these Regulations has been committed, he may, for the purpose of ascertaining whether it has been committed, require any trader to produce any documents relating to his business and may take copies of, or of any entry in, any such document; 224 OFT (1) The OFT may for any of the purposes mentioned in subsection (2) give notice to any person requiring the person to provide it with the information specified in the notice. (2) The purposes are— (a) to enable the OFT to exercise or to consider whether to exercise any function it has under this Part; (b) to enable a designated enforcer to which section 225 does not apply to consider whether to exercise any function it has under this Part; (c) to enable a Community enforcer to consider whether to exercise any function it has under this Part; (d) to ascertain whether a person has complied with or is complying with an enforcement order, an			
		interim enforcement order or an undertaking given under section 217(9), 218(10) or 219. 225 Other enforcers (1)This section applies to—			

	DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES				
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)			
Article 4(6)					
		(a)every general enforcer (other than the OFT); (b)every designated enforcer which is a public body. [F16(c)every CPC enforcer (other than the OFT).] (2)An enforcer to which this section applies may for any of the purposes mentioned in subsection (3) give notice to any person requiring the person to provide the enforcer with the information specified in the notice. (3)The purposes are— (a)to enable the enforcer to exercise or to consider whether to exercise any function it has under this Part; (b)to ascertain whether a person has complied with or is complying with an enforcement order or an interim enforcement order made on the application of the enforcer or an undertaking given under section 217(9) or 218(10) (as the case may be) following such an application or an undertaking given to the enforcer under section 219. 227 Notices: enforcement (1)If a person fails to comply with a notice given under section 224 or 225 the enforcer who gave the notice may make an application under this section. (2)If it appears to the court that the person to whom the notice was given has failed to comply with the notice the court may make an order under this section. (3)An order under this section may require the person to whom the notice was given to do anything the court thinks it is reasonable for him to do for any of the purposes mentioned in section 224 or 225 (as the case may be) to ensure that the notice is complied with.			
(c) to carry out necessary on-site inspections;	Regulation 21, Consumer Protection form Unfair Trading Regulation 2008 Part 8 Enterprise Act 2002, Sections 227A, 227B and 227C.	Power of entry and investigation, etc. 21. (1) A duly authorised officer of an enforcement authority may at all reasonable hours exercise the following powers— (a)he may, for the purposes of ascertaining whether a breach of these Regulations has been committed, inspect any goods and enter any premises other than premises used only as a dwelling; () 227A Power to enter premises without warrant (1)An officer of a CPC enforcer who reasonably suspects that there has been, or is likely to be, a Community infringement may for any purpose relating to the functions of the CPC enforcer under this Part enter any premises to investigate whether there has been, or is likely to be, such an infringement. (2)An officer of a CPC enforcer who reasonably suspects that there is, or has been, a failure to comply with a relevant enforcement measure may for any purpose relating to the functions of the CPC enforcer under this Part enter any premises to investigate whether a person is complying with, or has			

	DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES				
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)			
Article 4(6)					
		complied with, the relevant enforcement measure. (3)An appropriate notice must be given to the occupier of the premises before an officer of a CPC enforcer enters them under subsection (1) and (2). (4)An appropriate notice is a notice in writing given by an officer of a CPC enforcer which— (a)gives at least two working days' notice of entry on the premises; (b)sets out why the entry is necessary; and (c)indicates the nature of the offence created by section 227E. (5)Subsection (3) does not apply if such a notice cannot be given despite all reasonably practicable steps having been taken to do so. (6)In that case, the officer entering the premises must produce to any occupier that he finds on the premises a document setting out why the entry is necessary and indicating the nature of the offence created by section 227E. 227B Powers exercisable on the premises (1)An officer of a CPC enforcer may, in the exercise of his powers under section 227A— (a)observe the carrying on of a business on the premises; (b)inspect goods or documents on the premises to produce goods or documents within such period as the officer considers to be reasonable; (d)seize goods or documents to carry out tests on them on the premises or seize, remove and retain them to carry out tests on them elsewhere; or (e)seize, remove and retain goods or documents which he reasonably suspects may be required as evidence of a Community infringement or a breach of a relevant enforcement measure. 227C Power to enter premises with warrant (1)A justice of the peace may issue a warrant authorising an officer of a CPC enforcer to enter premises for purposes falling within section 227A(1) or (2) if the justice of the peace considers that there are reasonable grounds for believing that — (a)condition A is that there are, on the premises, goods or documents to which an officer of a CPC enforcer acting under sections 227A and 227B has been, or would be likely to be, refused admission to the premises or access to the goods or documents. (4)Condition D is that			

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
		(6)A warrant under this section authorises the officer of the CPC enforcer— (a)to enter the premises specified in the warrant (using reasonable force if necessary); (b)to do anything on the premises that an officer of the CPC enforcer would be able to do if he had entered the premises under section 227A; (c)to search for goods or documents which he has required a person on the premises to produce where that person has failed to comply with such a requirement; (d)to the extent that it is reasonably necessary to do so, to require any person to whom subsection (7) applies to break open a container and, if that person does not comply with the requirement, or if such a person cannot be identified after all reasonably practicable steps have been taken to identify such a person, to do so himself; (e)to take any other steps which he considers to be reasonably necessary to preserve, or prevent interference with, goods or documents to which he would be entitled to have access under sections 227A and 227B. (7)This subsection applies to a person who is responsible for discharging any of the functions of the business being carried on at the premises under inspection. (8)A warrant under this section— (a)is issued on information on oath given by an officer of a CPC enforcer; (b)ceases to have effect at the end of the period of one month beginning with the day of issue; and (c)must, on request, be produced to the occupier of the premises for inspection. (9)Any reference in this section to goods or documents being interfered with includes a reference to them being destroyed. (10)In its application to Scotland, this section has effect as if— (a)the references in subsection (1) to a justice of the peace included references to a sheriff; and (b)the reference in subsection (8) to information on oath were a reference to evidence on oath. (11) In its application to Northern Ireland, this section has effect as if the references in subsection (1) to a justice of the peace were references to a lay magistrate.
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;		
(e) to obtain from the seller or supplier responsible for intra-	Part 8 Enterprise Act 2002, Section 219	219 Undertakings (1)This section applies if an enforcer has power to make an application under section 215. (2)In such a case the enforcer may accept from a person to whom subsection (3) applies an

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
Community infringements an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking		undertaking that the person will comply with subsection (4). (3)This subsection applies to a person who the enforcer believes— (a)has engaged in conduct which constitutes an infringement; (b)is engaging in such conduct; (c)is likely to engage in conduct which constitutes a Community infringement. (4)A person complies with this subsection if he— (a)does not continue or repeat the conduct; (b)does not engage in such conduct in the course of his business or another business; (c)does not consent to or connive in the carrying out of such conduct by a body corporate with which he has a special relationship (within the meaning of section 222(3)). (5)But subsection (4)(a) does not apply in the case of an undertaking given by a person in so far as subsection (3) applies to him by virtue of paragraph (c). [F13(5A)A CPC enforcer who has accepted an undertaking under this section may— (a)accept a further undertaking from the person concerned to publish the terms of the undertaking; or (b)take steps itself to publish the undertaking. (5B)In each case the undertaking shall be published in such form and manner and to such extent as the CPC enforcer thinks appropriate for the purpose of eliminating any continuing effects of the Community infringement.] (6)If an enforcer accepts an undertaking under this section it must notify the OFT— (a)of the terms of the undertaking; (b)of the identity of the person who gave it.
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Part 8 Enterprise Act 2002, Section 217	217 Enforcement orders (1)This section applies if an application for an enforcement order is made under section 215 and the court finds that the person named in the application has engaged in conduct which constitutes the infringement. (2)This section also applies if such an application is made in relation to a Community infringement and the court finds that the person named in the application is likely to engage in conduct which constitutes the infringement. (3)If this section applies the court may make an enforcement order against the person. (4)In considering whether to make an enforcement order the court must have regard to whether the person named in the application— (a)has given an undertaking under section 219 in respect of conduct such as is mentioned in subsection (3) of that section; (b)has failed to comply with the undertaking.

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
		(5)An enforcement order must— (a)indicate the nature of the conduct to which the finding under subsection (1) or (2) relates, and (b)direct the person to comply with subsection (6). (6)A person complies with this subsection if he— (a)does not continue or repeat the conduct; (b)does not engage in such conduct in the course of his business or another business; (c)does not consent to or connive in the carrying out of such conduct by a body corporate with which he has a special relationship (within the meaning of section 222(3)). (7)But subsection (6)(a) does not apply in the case of a finding under subsection (2). (8)An enforcement order may require a person against whom the order is made to publish in such form and manner and to such extent as the court thinks appropriate for the purpose of eliminating any continuing effects of the infringement— (a)the order; (b)a remedial announcement. (9)If the court makes a finding under subsection (1) or (2) it may accept an undertaking by the person— (a)to comply with subsection (6), or (b)to take steps which the court believes will secure that he complies with subsection (6). (10)An undertaking under subsection (9) may include a further undertaking by the person to publish in such form and manner and to such extent as the court thinks appropriate for the purpose of eliminating any continuing effects of the infringement— (a)the terms of the undertaking; (b)a remedial announcement. (11)If the court— (a)makes a finding under subsection (1) or (2), and (b)accepts an undertaking under subsection (9), it must not make an enforcement order in respect of the infringement to which the undertaking relates. (12)An enforcement order made by a court in one part of the United Kingdom has effect in any other part of the United Kingdom as if made by a court in that part.
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in	Regulation 13, The Consumer Protection from Unfair Trading Regulation 2008,	Penalty for offences 13. A person guilty of an offence under regulation 8, 9, 10, 11 or 12 shall be liable— (a)on summary conviction, to a fine not exceeding the statutory maximum; or (b)on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both.

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES		
Provision CPC	REFERENCE TO NATIONAL LAW(ARTICLE,	Provision national law (quotation or Summary)
REGULATION	Paragraph, Law)	
Article 4(6)		
or under national legislation, in the event of failure to comply with the decision.		

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE		
Provision CPC	REFERENCE TO NATIONAL LAW(ARTICLE,	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
REGULATION	Paragraph, Law)	
Article 4(6)		
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right: (a) to have access to any	Part 8 Enterprise Act 2002, Section 227B	See table on Directive 2005/29/EC
relevant document, in any form, related to the intra- Community infringement;	Section 227F	See table on Directive 2003/23/LO
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Part 8 Enterprise Act 2002, Sections 224, 225 and 227	See table on Directive 2005/29/EC
(c) to carry out necessary on-site inspections;	Part 8 Enterprise Act 2002, Sections 227A, 227B and 227C.	See table on Directive 2005/29/EC
(d) to request in writing	Regulation 14, The Electronic Commerce	Compliance with Regulation 9(3)

DIRECTIVE 2000/31/EC ON ELECTRONIC COMMERCE		
PROVISION CPC	REFERENCE TO NATIONAL LAW(ARTICLE,	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
REGULATION	Paragraph, Law)	
Article 4(6)		
that the seller or supplier concerned cease the intra-Community infringement;	Regulations 2002,	14. Where on request a service provider has failed to comply with the requirement in regulation 9(3), the recipient may seek an order from any court having jurisdiction in relation to the contract requiring that service provider to comply with that requirement.
(e) to obtain from the seller or supplier responsible for intra-Community infringements an undertaking to cease the intra-Community infringement; and, where appropriate, to publish the resulting undertaking	Part 8 Enterprise Act 2002, Section 219	See table on Directive 2005/29/EC
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Part 8 Enterprise Act 2002, Section 217	See table on Directive 2005/29/EC
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Regulation 4(6) The Electronic Commerce Regulations 2002,	6) To the extent that anything in these Regulations creates any new criminal offence, it shall not be punishable with imprisonment for more than two years or punishable on summary conviction with imprisonment for more than three months or with a fine of more than level 5 on the standard scale (if not calculated on a daily basis) or with a fine of more than £100 a day.

DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:		
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Part 8 Enterprise Act 2002, Section 227B Section 227F	See table on Directive 2005/29/EC
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Regulation 13(3). The Unfair Terms in Consumer Contracts Regulations 1999.	3) The Director may require any person to supply to him, and a qualifying body specified in Part One of Schedule 1 may require any person to supply to it— (a)a copy of any document which that person has used or recommended for use, at the time the notice referred to in paragraph (4) below is given, as a pre-formulated standard contract in dealings with consumers; (b)information about the use, or recommendation for use, by that person of that document or any other such document in dealings with consumers. (4) The power conferred by this regulation is to be exercised by a notice in writing which may— (a)specify the way in which and the time within which it is to be complied with; and (b)be varied or revoked by a subsequent notice. (5) Nothing in this regulation compels a person to supply any document or information which he would be entitled to refuse to produce or give in civil proceedings before the court. (6) If a person makes default in complying with a notice under this regulation, the court may, on the application of the Director or of the qualifying body, make such order as the court thinks fit for requiring the default to be made good, and any such order may provide that all the costs or expenses of and incidental to the application shall be borne by the person in default or by any officers of a company or other association who are responsible for its default.
(c) to carry out necessary	Part 8 Enterprise Act 2002, Sections	See table on Directive 2005/29/EC
on-site inspections; (d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	227A,227B and 227C.	

	DIRECTIVE 93/13/EEC ON UNFAIR CONTRACT TERMS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)	
Article 4(6)			
(e) to obtain from the seller or supplier responsible for intra-Community infringements an undertaking to cease the intraCommunity infringement; and, where appropriate, to publish theresulting undertaking	Regulation 14 The Unfair Terms in Consumer Contracts Regulations 1999	Notification of undertakings and orders to Director 14. A qualifying body shall notify the Director— (a)of any undertaking given to it by or on behalf of any person as to the continued use of a term which that body considers to be unfair in contracts concluded with consumers; (b)of the outcome of any application made by it under regulation 12, and of the terms of any undertaking given to, or order made by, the court; (c)of the outcome of any application made by it to enforce a previous order of the court.	
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Regulation 12 The Unfair Terms in Consumer Contracts Regulations 1999.	Injunctions to prevent continued use of unfair terms 12. (1) The Director or, subject to paragraph (2), any qualifying body may apply for an injunction (including an interim injunction) against any person appearing to the Director or that body to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with consumers. (2) A qualifying body may apply for an injunction only where— (a)it has notified the Director of its intention to apply at least fourteen days before the date on which the application is made, beginning with the date on which the notification was given; or (b)the Director consents to the application being made within a shorter period. (3) The court on an application under this regulation may grant an injunction on such terms as it thinks fit. (4) An injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any person.	
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Regulation 13 The Consumer Protection from Unfair Trading Regulation 2008,	See table on Directive 2005/29/EC	

DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (Quotation or Summary)
Article 4(6)	· · · · · · · · · · · · · · · · · · ·	
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:		
(a) to have access to any relevant document, in any form, related to the intra-Community infringement;	Part 8 Enterprise Act 2002, Section 227B, Section 227F	See Directive 2005/29/EC
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Part 8 Enterprise Act 2002, Sections 224,225 and 227	See Directive 2005/29/EC
(c) to carry out necessary on-site inspections; (d) to request in writing that the seller or supplier	Part 8 Enterprise Act 2202, Sections 227A,227B and 227C.	See Directive 2005/29/EC
concerned cease the intra-Community infringement; (e) to obtain from the	Regulation 28, The Consumer	Notification of undertakings and orders to the Director
seller or supplier responsible for intra-Community infringements an undertaking to cease the intra Community infringement; and, where appropriate, to publish the resulting undertaking	Protection (Distance Selling) Regulations 2000	28. An enforcement authority other than the Director shall notify the Director— (a)of any undertaking given to it by or on behalf of any person who appears to it to be responsible for a breach; (b)of the outcome of any application made by it under regulation 27 and of the terms of any undertaking given to or order made by the court; (c)of the outcome of any application made by it to enforce a previous order of the court.
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to	Regulation 27, The Consumer Protection (Distance Selling) Regulations 2000	Injunctions to secure compliance with these Regulations 27. (1) The Director or, subject to paragraph (2), any other enforcement authority may apply for an injunction (including an interim injunction) against any person who appears to the Director or that

DIRECTIVE 97/7/EC ON DISTANCE CONTRACTS		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
publish resulting decisions;		authority to be responsible for a breach. (2) An enforcement authority other than the Director may apply for an injunction only where— (a)it has notified the Director of its intention to apply at least fourteen days before the date on which the application is to be made, beginning with the date on which the notification was given; or (b)the Director consents to the application being made within a shorter period. (3) The court on an application under this regulation may grant an injunction on such terms as it thinks fit to secure compliance with these Regulations.
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Regulation 24(5), The Consumer Protection (Distance Selling) Regulations 2000	Inertia selling 24(5) () is guilty of an offence and liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
PROVISION CPC	REFERENCE TO NATIONAL LAW(ARTICLE,	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
REGULATION	Paragraph, Law)	
Article 4(6)		
6. The powers referred to		
in paragraph 3 shall only		
be exercised where there		
is a reasonable suspicion		
of an intra-Community		
infringement and shall		
include, at least, the right:		
(a) to have access to any	Regulation 23 (3) Business Protection	Power of entry and investigation, etc.

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
relevant document, in any form, related to the intra- Community infringement;	from Misleading Marketing Regulations 2008.	23 () (3) An officer seizing any goods or documents in exercise of his powers under this regulation shall— (a)inform the person from whom they are seized; and (b)where goods are seized from a vending machine, inform— (i)the person whose name and address are stated on the vending machine as being the proprietor's, or (ii)if there is no such name or address stated on the vending machine, the occupier of the premises on which the machine stands or to which it is affixed, that the goods or documents have been so seized. (4) In this regulation "document" includes information recorded in any form. (5) The reference in paragraph (1)(b) to the production of documents is, in the case of a document which contains information recorded otherwise than in legible form, a reference to the production of a copy of the information in legible form.
(b) to require the supply by any person of relevant information related to the intra-Community infringement;	Regulation 21 Business Protection from Misleading Marketing Regulations 2008.	Powers of Enforcement Authorities to obtain information 21. (1) For the purpose of determining whether to bring proceedings for an injunction under regulation 15, an enforcement authority may by notice in writing require a person to provide to it such information as may be specified or described in the notice or to produce to it any documents so specified or described. (2) A notice under paragraph (1) may— (a)specify the way in which and the time within which it is to be complied with; and (b)be varied or revoked by a subsequent notice. (3) Nothing in this regulation gives an enforcement authority any power to require another person to provide or produce any information or document which the other person would be entitled to refuse to provide or produce in proceedings in the High Court on the grounds of legal professional privilege or (in Scotland) in proceedings in the Court of Session on the grounds of confidentiality of communications. (4) In paragraph (3) "communications" means— (a)communications between a professional legal adviser and his client; or (b)communications made in connection with or in contemplation of legal proceedings and for the purposes of those proceedings. (5) Nothing in this regulation shall be construed as requiring a person to provide information if to do so might incriminate him. (6) If a person does not comply with a notice under paragraph (1) the court may, on the application of an enforcement authority, make such order as the court thinks fit for requiring the default to be made good, and any such order may provide that all the costs or expenses of and incidental to the application shall be borne by the person in default or by any officers of a company or other association who are

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
		responsible for its default.
(c) to carry out necessary on-site inspections;	Regulation 23 (1) Business Protection from Misleading Marketing Regulations 2008. Regulation 24 Business Protection from Misleading Marketing Regulations 2008.	Power of entry and investigation, etc. 23. (1) A duly authorised officer of an enforcement authority may at all reasonable hours exercise the following powers— (a)he may, for the purpose of ascertaining whether a breach of these Regulations has been committed, inspect any goods and enter any premises other than premises used only as a dwelling; (b)if he has reasonable cause to suspect that a breach of these Regulations has been committed, he may, for the purpose of ascertaining whether it has been committed, require any trader to produce any documents relating to his trade, business, craft or profession and may take copies of, or of any entry in, any such document; (c)if he has reasonable cause to believe that a breach of these Regulations has been committed, he may seize and detain any goods for the purpose of ascertaining, by testing or otherwise, whether the breach has been committed; and (d)he may seize and detain goods or documents which he has reason to believe may be required as evidence in proceedings for a breach of these Regulations. Power to enter premises with a warrant 24. (1) If a justice of the peace by a written information on oath is satisfied— (a)that there are reasonable grounds for believing that Condition A or B is met, and (b)that Condition C, D or E is met, the justice may by warrant under his hand authorise an officer of an enforcement authority to enter the premises at all reasonable times, if necessary by force. (2) Condition A is that there are on any premises goods or documents which a duly authorised officer of the enforcement authority has power under regulation 23(1) to inspect and that their inspection is likely to disclose evidence of a breach of these Regulations. (3) Condition B is that a breach of these Regulations has occurred, is occurring or is about to occur on any premises. (4) Condition D is that an application for admission, or the giving of a notice of intention to apply for a warrant, would defeat the object of the entry. (6) Condition E is that the prem

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING		
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)
Article 4(6)		
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;		
(e) to obtain from the seller or supplier responsible for intra-Community infringements an undertaking to cease the intra-Community infringement; and, where appropriate, to publish the resulting undertaking	Regulation 16 Business Protection from Misleading Marketing Regulations 2008. Regulation 20 Business Protection from Misleading Marketing Regulations 2008.	Undertakings 16. Where an enforcement authority considers that there has been or is likely to be a breach of regulation 3, 4 or 5 it may accept from the person concerned or likely to be concerned with the breach an undertaking that he will comply with those regulations. Publication, information and advice 20. (1) The OFT must arrange for the publication, in such form and manner as it considers appropriate, of— (a)details of any undertaking or order notified to it under regulation 19; (b)details of any undertaking given to it under regulation 16; (c)details of any application made by it under regulation 15 and of the terms of any undertaking given to, or order made by, the court; (d)details of any application made by it to enforce a previous order of the court. (2) The OFT may arrange for the dissemination, in such form and manner as it considers appropriate, of such information and advice concerning the operation of these Regulations as appear to it to be expedient to give to the public and to all persons likely to be affected by these Regulations.
(f) to require the cessation or prohibition of any intra- Community infringement and, where appropriate, to publish resulting decisions;	Regulation 15 Business Protection from Misleading Marketing Regulations 2008.	Injunctions to secure compliance with the Regulations 15. (1) This regulation applies where an enforcement authority considers that there has been or is likely to be a breach of regulation 3, 4 or 5. (2) Where this regulation applies an enforcement authority may, subject to paragraph (3), if it thinks it appropriate to do so, bring proceedings for an injunction (in which proceedings it may also apply for an interim injunction) against any person appearing to it to be concerned or likely to be concerned with the breach. (3) Where the enforcement authority is a local weights and measures authority in Great Britain it may apply for an injunction only if— (a)it has notified the OFT of its intention to apply for an injunction at least fourteen days before the date on which the application is made; or (b)the OFT consents to the application for an injunction being made within a shorter period. (4) Proceedings referred to in paragraph (2) are not invalid by reason only of the failure to comply with

DIRECTIVE 2006/114/EC ON MISLEADING AND COMPARATIVE ADVERTISING				
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)		
Article 4(6)				
		paragraph (3).		
(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.	Regulation 7, Business Protection from Misleading Marketing Regulations 2008.	Penalty for offence under regulation 6 7. A person guilty of an offence under regulation 6 shall be liable— (a)on summary conviction, to a fine not exceeding the statutory maximum; or (b)on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both.		
DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES PHONEPAYPLUS (UNDER ARTICLE 8(3) OF CPC REGULATION				
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national Law (QUOTATION OR SUMMARY)		
Article 4(6)				
6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:	Rule 4.2.1 Part 4 of the Code of Compliance	Rule 4.2.1 PhonepayPlus will consider, and where appropriate investigate, all complaints which it receives, provided the complaint is made within a reasonable time from when it arose.		
(a) to have access to any relevant document, in any form, related to the intra- Community infringement;				
(b) to require the supply by any person of relevant information related to the intra-Community	Rule 4.2.3 and Rule 4.2.5 Part 4 of the Code of Compliance	Rule 4.2.3 During an investigation PhonepayPlus may direct any Network operator, Level 1 or Level 2 provider (referred to in this section as a party') to disclose, subject to the confidentiality provision set out in paragraph 1.6, and within a time period which PhonepayPlus may specify, any relevant information or		

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES PHONEPAYPLUS (UNDER ARTICLE 8(3) OF CPC REGULATION				
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	PROVISION NATIONAL LAW (QUOTATION OR SUMMARY)		
Article 4(6)				
infringement;		copies of documents. This may include, but is not limited to: (a) call volumes, patterns and revenues; (b) details of numbers allocated to any relevant party; (c) details of any services operating on any specified premium rate number, shortcode or other means of access; (d) evidence of consumer consents; (e) evidence of consumer complaint handling; (f) evidence of due diligence; (g) evidence of risk assessment and control; (h) arrangements between Network operator and premium rate service providers; (i) arrangements between any premium rate service providers and any other relevant party. A party must not fail to disclose to PhonepayPlus when requested any information that is reasonably likely to have a regulatory benefit in an investigation		
(c) to carry out necessary on-site inspections;				
(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;	Rule 4.4.1. and4.4.2 Part 4 of the Code of Compliance	Rule 4.4.1 PhonepayPlus will provide the relevant party with all necessary information about the alleged breach or breaches of the Code. This will include details of any service and/or promotional material and will refer to the relevant provisions of the Code; Rule 4.4.2 The relevant party will be given a reasonable period of time in which to respond and provide any information requested. A response will normally be required within ten working days. In exceptional circumstances PhonepayPlus may set a shorter or longer time limit but it will never be less than one working day, nor longer than 15 working days;		
(e) to obtain from the seller or supplier responsible for intra-Community infringements	Rule 4.3.1. 4.3.2 and 4.3.3 Part 4 of the Code of Compliance	Rule 4.3.1 The relevant party will be contacted and informed of the apparent breach. PhonepayPlus will provide the relevant party with a set of actions which it believes is necessary to remedy the breach and prevent any repetition together with a deadline for the actions ('the action plan'). PhonepayPlus may		

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES PHONEPAYPLUS (UNDER ARTICLE 8(3) OF CPC REGULATION			
PROVISION CPC REGULATION	REFERENCE TO NATIONAL LAW(ARTICLE, PARAGRAPH, LAW)	Provision national law (Quotation or Summary)	
Article 4(6)			
an undertaking to cease the intra- Community infringement; and, where appropriate, to publish the resulting undertaking		invoice the relevant party for its reasonable administrative costs; Rule 4.3.2 If the action plan is accepted, the relevant party must demonstrate to PhonepayPlus that it has been followed and the breach remedied on or before the deadline. If this is not done PhonepayPlus will assume that the breach has not been remedied and the Track 2 procedure may be invoked; Rule 4.3.3 Where the relevant party does not agree to any part of the action plan (including the deadline), it must clearly set out its disagreement in writing within five working days of receipt by it of the action plan. PhonepayPlus will consider such representations and may decide to alter the action plan as a result. If no agreement can be reached, the Track 2 procedure may be invoked;	
(f) to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to publish resulting decisions;	Rules 4.4. and following of Part 4 of the Code of Compliance. Rule 4.6 of Part 4 of the Code of Compliance.	Rule 4.4.3 If the relevant party fails to respond within the required period, PhonepayPlus will proceed with the case on the assumption that it does not wish to respond; Rule 4.4.4 PhonepayPlus will prepare a report of its allegations and investigation including any responses from the relevant party, together with relevant supporting evidence, which will be placed before a Tribunal to adjudicate on the matter; Rule 4.4.5 The relevant party will be notified by PhonepayPlus of the date of the Tribunal consideration, and entitled to make informal representations to it on that date in person in order to clarify any matter. Rule 4.6 The Tribunal will make a decision as to whether the Code has been breached on the basis of the evidence presented to it. When considering whether there has been a breach of the Code, a factor the Tribunal may take into account where relevant is the extent to which the relevant party followed any relevant Guidance published by PhonepayPlus. Relevant parties will be informed in writing of the outcome of the case. A full reasoned decision (the 'Tribunal decision') will be prepared and provided to the relevant party. The relevant party will be informed of its right under the Code to apply for a review and/or an oral hearing. The Tribunal decision will be published on the PhonepayPlus website, and in any other way that PhonepayPlus shall determine	
(g) to require the losing defendant to make	Rule 4.8.2 (d) of Part 4 of the Code of Compliance.	Rule 4.8.2 The Tribunal can apply a range of sanctions depending upon the seriousness with which it regards the	

DIRECTIVE 2005/29/EC ON UNFAIR COMMERCIAL PRACTICES PHONEPAYPLUS (UNDER ARTICLE 8(3) OF CPC REGULATION			
Provision Cpc	REFERENCE TO NATIONAL LAW(ARTICLE,	Provision national law (quotation or Summary)	
REGULATION	Paragraph, Law)		
Article 4(6)			
payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.		breach(es) upheld. Having taken all relevant circumstances into account, the Tribunal may impose any of the following sanctions singularly or in any combination in relation to each breach: () d) impose a fine on the relevant party to be paid to PhonepayPlus; ()	

CHAPTER 2 - THEME 2

2.1 NATIONAL REPORTS

The national reports were prepared on the basis of the current legislative and enforcement structures in place at the end of 2013. However, some of the analysed Member States have undergone, at the end of 2013 and in the first months of 2014, an extensive revision of their consumer protection legislation, also within the implementation of Directive 2011/83/EU31. Major reforms concern consumer protection legislation in Belgium, France, and Italy. In the United Kingdom the reform was extended to reforming the competent national authority.

The national reports will take into consideration the legislative reforms, and the legislation is quoted according to the new references.

The national reports cover Deliverable 3 and Deliverable 4 under Theme 2 of the Task Specifications, which require a typology of the national procedural rules framing intervention by competent authorities in relation to proceedings to enforce consumer legislation covered by the CPC Regulation and the overview of their application in purely domestic contexts.

2.1.1 BELGIUM

2.1.1.1 INTRODUCTION

In Belgium, the main piece of legislation dealing with almost all aspects of consumer protection was the Law of 6 April 2010 on commercial practices and consumer protection ³² (hereinafter, "the LPMC"). Since 12 May 2010, the Law replaced the Act of 14 July 1991 on commercial practices, information and consumer protection (LPC). Like the Law of 14 July 1991, the LPMC mainly covers relations between businesses and consumers. It has a dual purpose: on the one hand, it tends to ensure fair competition in trade relations and, on the other, attempts to ensure consumer protection and the presence of sufficient and adequate information.

From 31 May 2014, the relevant rules on consumer protection are included in the "Code of Droit Economique" (Code of Business Law, "the Code"). The Belgian legislator decided to regroup all economic regulations into a single Code via the technique of "law elements." Concretely, this means that the various books of the Code are introduced step by step. At present, there are 18 Books in total. Within the implementation of Directive 2011/83/EU and the reforms needed to comply with some decisions of the European Court of Justice, the Belgian Legislator moved the provisions of the LPMC under the Code.

The Act of 21 December 2013³³ enriches the Code of Book VI: *Market Practices and Consumer Protection*. The Code is also supplemented by corresponding definitions on market practices and consumer protection in Book I and the provisions of law enforcement in Book XV. The new provisions are in force from 31 May 2014. They do not fundamentally change the structure of public enforcement in Belgium, although the new Code should provide a more consistent and uniform approach.

³¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304 of 22.11.2011.

³²Loi relative aux pratiques du marché et à la protection du consommateur du 6 avril 2010, M.B. 12 avril 2010 No 108.

³³ 21 Décembre 2013, Loi portant insertion du titre VI " Pratiques du marché et protection du consommateur " dans le Code de droit économique et portant insertion des définitions propres au livre VI, et des dispositions d'application de la loi propres au livre VI, dans les Livres ler et XV du Code de droit économique, Moniteur Belge 30.12.2013.

The Service public fédéral Economie, P.M.E., Classes Moyennes et Energie (hereinafter « SPF Economie ») is the competent national authority for enforcing the Code through its department Direction General du Contrôle et de la Médiation (hereinafter "DGCM"), with the exception of the enforcement competences for the unfair commercial practices regarding the financial services that were transferred to the Financial Services and Market Authority (FSMA).

The public enforcement system in Belgium is primarily a judicial system, where the competent national authority is in charge of investigations and the Courts are in charge of decisions. The judicial procedure used to punish infringements is, with some exceptions, mainly criminal proceedings. Academics and practitioners have defined the Belgian situation as "the criminalisation of consumer protection"³⁴.

The procedural rules are laid down by the *Loi du 6 avril 2010 concernant le règlement de certaines procédures dans le cadre de la loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur* ³⁵(RPLPMC) and by the Judicial Code. These rules have remained in place with regard to the cease and desist order.

The Code regulates issues as varied as price and quantity, distance contracts concluded outside of business premises, misleading advertising and unfair commercial practices for both, consumers and businesses, forced purchases, and unfair contractual terms. It is also the main instrument for implementing European directives aimed at protecting consumers.

All relevant acts in Annex I of the CPC Regulation, including those examined under Theme 2, are implemented into the Code. A safeguard clause was introduced in the Code with reference to the CPC Regulation. All violations of the provisions in the Annex of the CPC Regulation are covered by the provisions of the Code and are considered unfair commercial practices. In our opinion, the provision will help to tackle cross-border infringements: all provisions in the Annex of the CPC Regulation, regardless of how they are implemented in another Member State, may be prosecuted according to the provision of the Code when the act or omission was committed in Belgium or the trader is in Belgium. This should help with the issue of the applicable law and allow the direct application of the CPC Regulation³⁶.

Until the Book VI of the Code entered into force, in order to improve the cooperation under the CPC Regulation, the DGCM signed various protocols with the competent bodies for consumer protection in various Member States, including France, the United Kingdom, Hungary, and a cooperation with Benelux members.

Within the context of cooperation with foreign competent bodies for consumer protection referred to in the CPC Regulation, the DGCM's 2009 annual report announced that requests for cooperation were accompanied by requests to clarify certain rules before showing the investigation file to the DGCM ³⁷. In the past, Dutch, French and the United Kingdom authorities received most requests for cooperation since the linguistic proximity (Dutch and French, as well as English as international working languages) facilitated cooperation.

2.1.1.2 CEASE AND DESIST ORDERS

³⁴L. KERZMANN, H. JACQUEMIN, *Le point sur les sanctions pénales dans la loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur*, DCCF n 92, 3/2011, p. 29.

36 Article VI.96. [1 Est également interdit, tout acte ou toute omission contraire aux lois protégeant les intérêts des consommateurs - c'est-à-dire aux règlements mentionnés dans l'Annexe du Règlement (CE) n° 2006/2004 du Parlement européen et du Conseil du 27 octobre 2004 relatif à la coopération entre les autorités nationales chargées de veiller à l'application de la législation en matière de protection des consommateurs ou aux directives également mentionnées à l'Annexe susdite telles qu'elles ont été transposées - qui porte atteinte ou est susceptible de porter atteinte aux intérêts collectifs des consommateurs domiciliés dans un autre Etat membre de l'Union européenne que celui où l'acte ou l'omission en question a son origine ou a eu lieu, sur le territoire duquel l'entreprise ou le fournisseur responsable est établi ou dans lequel se trouvent des preuves ou des actifs en rapport avec l'acte ou l'omission.

³⁵Loi du 6 avril 2010 concernant le règlement de certaines procédures dans le cadre de la loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur, M.B. 12 avril 2010 No 108.

³⁷Direction générale du Contrôle et de la Médiation, Rapport Annuel 2009 p. 138.

Article 110 of LPMC and Article 2 of RPLPMC discipline cease and desist orders in Belgium. This part of the LPMC has remained in place since cease and desist orders were included in Book XVII. The Law of 21 December 2013 has left in place Articles from 110 to 118 of the LPMC.

Under Article 2 of the RPLPMC, all violations that also constitute criminal offences may be pursued with a cease and desist order. The use of cease and desist orders is thus based on the *catchall* principle.

The 2010 reform broadened the possibility of any recognised European entity using cease and desist orders against any action affecting consumers' rights and breaching legislation on consumer protection³⁸.

Competent Authority

Article 113 of the LPMC lists those who may file for cease and desist orders. With the exception of the association of professionals and consumers and the Minister, subjects permitted to take action are the same as those set out in Articles 17 and 18 of the Judicial Code.

Concerning public enforcement, the Ministry of the Economy or the Director General of the DGCM may initiate the action under Article 113(2) LPMC.

The Ministry and the Director General are prevented from enacting cease and desist orders only when they involve unfair commercial practices (former Article 95 LPMC, now Article VI. 104 of the Code) concerning business-to-business. The Ministry and the Director General do not frequently use the power of action, and it has been observed that this must be due to the possibility of issuing a warning against the infringer and imposing administrative sanctions³⁹.

Infringements that may be addressed and that are addressed by cease and desist orders

As cited above, the LPMC implements the *catch all* principle, which means that all violations of the Code (former LPMC), including those that constitute criminal offences, may be object of cease and desist orders (Article 2 RPLPMC). The only expressly provided exceptions are for piracy (Article 3(1) RPLPMC) and violations to the rule of normal, maximum, and imposed prices or the obligation to declare price increases in advance.

According to the doctrine, cease and desist orders apply to all violations of the LPMC provided that there is a violation of honest practices.

Among the prohibited practices, the new Article VI.96 includes all acts or omissions that are contrary to the legal acts, regulations and transposed directives included in the Annex to the CPC Regulation and that protect the interest of consumers who are in another Member State⁴⁰. The article removes uncertainties concerning the application of the Belgian legislation to act or the cessation of the damage to the consumer abroad. Moreover, on the basis of the *catchall* principle, it will attract all violations of the CPC Regulation within the scope of the Code and of the application of the procedural rules provided.

Competence Ratione Materiae

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³⁸Arrêté royal du 29 novembre 2010 transposant l'article 42 de la Directive 2006/123/CE du Parlement européen et du Conseil relative aux services dans le marché intérieur.

³⁹A. TALLON, *La procédure. Nouveautés et sanctions*, *Le pratiques du marché. Un loi pour le consommateur*, Coll. C : J : B : B :, Larcier 2011. p. 75.

⁴⁰ Article VI.96. Est également interdit, tout acte ou toute omission contraire aux lois protégeant les intérêts des consommateurs - c'està-dire aux règlements mentionnés dans l'Annexe du Règlement (CE) n° 2006/2004 du Parlement européen et du Conseil du 27 octobre
2004 relatif à la coopération entre les autorités nationales chargées de veiller à l'application de la législation en matière de protection
des consommateurs ou aux directives également mentionnées à l'Annexe susdite telles qu'elles ont été transposées - qui porte atteinte
ou est susceptible de porter atteinte aux intérêts collectifs des consommateurs domiciliés dans un autre Etat membre de l'Union
européenne que celui où l'acte ou l'omission en question a son origine ou a eu lieu, sur le territoire duquel l'entreprise ou le fournisseur
responsable est établi ou dans lequel se trouvent des preuves ou des actifs en rapport avec l'acte ou l'omission.

The competence of the Presiding Judge of the Commercial Court covers the whole LPMC. The material competence is determined by the complaint and not by the Court's examination of the case. Moreover, the Court cannot decide on matters other than cease and desist orders, such as the award of the damages. The Presiding judge of the Court can only establish if an act or omission constitutes an infringement and order the cessation.

➢ Competence Ratione Loci − National Procedural Rules

With regard to the competence *ratione loci*, Article 624 of the Judicial Code⁴¹ provides for the competence of the Court of the defendant, or where the infringement is committed or where it has or may have its effects, and the location of the bailiff serving the defendant when the defendant is abroad.

The place where damages occurred is not relevant since the purpose of the action is to have the infringement cease, and not to repair the damages. For infringement via Internet, there may be multiple *rationae loci* competences according to academics⁴². However, in cases of cross-border infringements, the Court established the competence of the Belgian Courts when a foreign website may cause damages to Belgian consumers and when it is also targeting the Belgian market.

Procedure

To commence proceedings for a cease and desist order, no prior notice or default is required to be issued on the infringing party⁴³.

Under Article 118 LPMC (which has not been repealed and remains in place as a special cease-and-desist procedure for the general cease and desist order under the Code), the cease and desist procedure is an interlocutory one ("L'action est instruite selon les formes du référé") whereby cases are decided within a short period of time. The action is introduced in the form of a subpoena.

It is worthwhile noting that, contrary to general interlocutory proceedings, the cease and desist order is a procedure on the merits.

The infringer is requested by subpoena to assist at the hearing within, at least, two days from being served the order (Article 1035 Judicial Code). Under Article 716 of the Judicial Code, the plea must be filed with the Court's registry at least the day before the hearing. Once this deadline expires, the plea may not be registered again. The deadline for the parties to present their claims is five days from the hearing, and the Court imposes a very short calendar setting out the deadlines for the parties' replies to the Court. In general, the calendar for replies is agreed between the parties and accepted by the Presiding Judge of the Commercial Court.

Under Article 2 of RPLPMC, the Presiding Judge of the Commercial Court ascertains the existence of an infringement and orders the cessation. The Presiding Judge cannot ascertain the infringement without ordering the cessation. If there is no recurrence and the cessation already occurred, there is no interest in ascertaining the infringement.

The cease and desist order must be formulated accurately. On the one hand, it may not be a mere repetition of the legal prohibition. On the other, it may not be narrowly formulated so as to allow the infringer to bypass

⁴¹Article 624. Hormis les cas où la loi détermine expressément le juge compétent pour connaître de la demande, celle-ci peut, aux choix du demandeur, être portée : 1° devant le juge du domicile du défendeur ou d'un des défendeurs;

^{2°} devant le juge du lieu dans lequel les obligations en litige ou l'une d'elles sont nées ou dans lequel elles sont, ont été ou doivent être

^{3°} devant le juge du domicile élu pour l'exécution de l'acte;

^{4°} devant le juge du lieu où l'huissier de justice a parlé à la personne du défendeur si celui-ci ni, le cas échéant, aucun des défendeurs n'a domicile en Belgique ou à l'étranger.

⁴²A. TALLON, *La procédure, id.* p.145-146.

⁴³H. DE BRAUW, *Enforcement*, in G. STRAETMANS, J STUYCK, *Commercial Practices*, ed Larcier 2014, p. 233.

the order. The cease and desist order does not need to be limited to the specific act but may be extended to all acts having an equivalent effect, provided that they are clearly described 44.

Good faith is not a defence against a request for a cease and desist order; an infringement of the LPMC is sufficient. Under Article 112 LPMC, the Presiding Judge of the Commercial Court may grant the defendant an extension of time to terminate the infringement if the nature of the infringement justifies this extension.

The second part of Article 112 LPMC introduces the possibility for remedy: the Presiding Judge of the Commercial Court may assign a deadline to the infringer within which the situation must be remedied (such as in the case when the infringer sells products without a licence). If the situation is not remedied within the time frame, the Presiding Judge orders the cessation. The deadline to remedy must be "reasonable". The definition of reasonable depends on the nature of the infringement and the action needed to remedy it.

When a criminal action started by the prosecutor occurs at the same time as a cease and desist order issued by the Presiding judge of the Commercial Court, the cease and desist order takes precedence over the criminal proceedings, as provided by Article 128 LPMC⁴⁵.

The prosecutor may intervene in the cease and desist proceedings according to Article 138*bis* of the Judicial Code. The provisions regulate the intervention of the prosecutor in civil actions by filing an action, an indictment or a legal opinion with the Court. The possibility for the prosecutor to intervene in court proceedings is justified by the fact that many LPMC violations are criminal offences. In some cases, the prosecutor intervenes in the civil proceedings to expedite the case when the criminal proceedings are suspended due to the priority of the civil action⁴⁶.

The Minister of Economic Affairs must be notified of any adopted cease and desist orders except when the action is started by the Ministry.

Burden of Proof

Under the LPMC, cease and desist orders follow general procedural rules concerning burden of proof. Under Article 870 of the Judicial Code, each party must demonstrate and support their request. The Presiding Judge of the Court has extensive autonomy with evaluating the evidence and with requesting additional evidence or measures when needed. Under Article 871 of the Judicial Code, the Court may order any party to disclose any evidence they have.

Article 103 LPMC gives the Presiding Judge of the Court the possibility to reverse the burden of proof and to ask the defendant business to provide evidence on the accuracy of factual claims on a commercial practice. However, the Presiding Judge of the Court cannot require the defendant to provide business secrets or confidential information. It is said that the level of confidentiality concerning business secrets is higher than with investigative and administrative proceedings, due to the necessity to secure the rights of defence in a trial. Under Article 12 of Directive 2005/29/EC, if the defendant does not provide the requested evidence or if the evidence is insufficient, the law introduces a presumption of incorrectness concerning the factual claims.

Procedural Safeguards

The cease and desist order is a judiciary procedure and the procedural safeguards are the same as those for civil and interlocutory proceedings. However, since the violation of the cease and desist order may have, as a consequence, criminal sanctions, the Court's decision must be sufficiently precise to identify the act that was ordered to be terminated. The Presiding Judge must avoid drafting an overly general decision so that the defendant may comply with the order and identify the recurrence of the infringement.

⁴⁵ Article 128. Lorsque les faits soumis au tribunal font l'objet d'une action en cessation, il ne peut être statué sur l'action pénale qu'après qu'une décision coulée en force de chose jugée a été rendue relativement à l'action en cessation.

⁴⁴H. DE BRAUW, *Enforcement*, id. p. 235.

⁴⁶Trib Comm Liège, 10 January 1985, J.C.B, 1986, p.124, note of A. MEEUS.

To prevent unreasonable or unfounded legal actions, the Presiding Judge of the Commercial Court defines the sum the plaintiff must pay (as restoration for the execution and publication of the annulled cease and desist order) if the request for a cease and desist order is overruled in the appeal proceedings and the condemned party is discharged (Article 116(3)).

> Statute of Limitations

The action under the cease and desist order must be brought within one year of the date upon which the offending act or the unlawful practice was stopped. The LPMC expressly refers to the day the infringement ceased (Article 117 LPMC). Under accepted doctrine, this does not prevent some uncertainty on the length of time from when the infringement began. In cases of continuous infringement, the statute of limitations will not begin since the LPMC provides for cessation of the infringement. However, for a single infringement, the time limit set forth in Article 117 LPMC excludes the risk of recurrence. If the same trader commits another infringement after one year, the recurrence is excluded.

Accordingly, the applicant must not wait for another infringement to occur or else he risks the statute of limitations running out. Therefore, an action must be filed immediately to prevent the risk thereof.

Appeal Procedure and Conditions

Under Article 1050 of the Judicial Code, appealing against a cease and desist order is always possible. The appeal must be introduced within one month from the day the decision was served. Under Article 1066 of the Judicial Code, the appeal against a decision adopted by the Presiding Judge in an interlocutory proceeding is discussed immediately at the first hearing or within three months therefrom.

An unusual situation occurs when appeals are filed after a cease and desist order is temporarily enforced (astreinte). Temporary enforcement, introduced by the Benelux Convention of 26 November 1976 with Articles 1385bis to 1385nonies of the Judicial Code, constitutes an additional possibility to force infringers to comply with the Court's order.

The plaintiff requests temporary enforcement when the cease and desist order is adopted but is not yet enforceable. Consequently, the applicant bears the risk tied to temporary enforcement because if the cease and desist order is overruled in the appeal proceedings, the applicant would be required to pay the defendant the sums fixed by the Presiding Judge.

The Court of Appeal does not decide on temporary enforcement, but only on the cease and desist order, with the result that the temporary enforcement ceases if the order is annulled.

> Sanctions

The Presiding Judge of the Court cannot award damages. The only sanction provided by Article 116 LPMC is publishing an extract of the decision for a determined period of time at the request of the plaintiff. Publication is only allowed if it contributes to the cessation of the infringement or its effects.

After adopting the LPC in 1991, only an extract of the decision, not the full text, may be displayed outside and inside the infringer's business premises and published in the newspapers, or with other means of communication, at the condemned party's expense.

Follow up and monitoring compliance

If the condemned party does not comply with the cease and desist order, Article 126 provides private penalties. The Presiding Judge of the Commercial Court who issued the cease and desist order at the plaintiff's request imposes the fines. Such amount is not meant to compensate the plaintiff for any damages suffered, but merely to ensure that the infringing party complies with the order.

2.1.1.3 SELF-MANAGED ADMINISTRATIVE PROCEEDINGS

Competent National Authority

As mentioned in the Introduction, the DGCM is the competent national authority for investigations and administrative proceedings. The DGCM is also the competent national authority for cooperation under the CPC Regulation. The DGCM has the investigative powers provided by Article 4(6) of CPC Regulation, which are extensively described in Capter 1.3.

With regard to investigative powers, the LCPM contains provisions on the powers of inspectors and agents delegated by the DGCM to examine evidence, collect information, carry out inspections, issue warnings to infringers, offer the possibility of the infringer to settle the case by paying a sum, initiate the cease and desist proceedings and issue fines imposed on the infringer by the competent Court.

The DGCM has approximately 180 inspectors to carry out inspections. However, it has complete autonomy on how to handle cases: to decide if an inspection is required (usually for the most serious infringements) or if a case should be referred to a mediation centre, specifically to the ECC, which is the Belgian centre for alternative dispute resolution under the European network of Consumer Centres – ECC-net.

The Act 21 of December 2013 empowers the FSMA, the Authority on Financial Markets, to investigate infringements related to distance selling financial products. However, the Ministry and Director General are the entities empowered with requesting cease and desist orders. Moreover, the DGCM and the FSMA are required to cooperate and exchange information on infringements and investigations.

Investigative Powers

Within the framework of its powers, the DGCM, when it decides to start an investigation, has autonomy to decide on the applicable procedure and if the case needs to be referred to the Public Prosecutor. The new investigative power is reported under Book XV.

An investigation may be initiated ex officio or following a complaint.

The Book XV regulates the inspections, the acquisition of information, the seizure of goods as well as the procedural safeguards for the inspected person. The powers are applicable to all violations of the Code. .

Under Article XV, two agents appointed by the Minister are competent to search and verify alleged infringements of the provisions of the Code. Under Article XV.12 § 1er, the officials appointed by the Minister are also competent to search and verify those infringements that are not punishable with criminal sanctions and that may be subject to a cease and desist order. Under Article XV.11 § 2, when violations of consumer protection provisions concern financial services, the competent authority for the investigation is the Financial Service Authority (FSMA). FSMA inspectors have the powers provided in Book XV. The DGCM and the FSMA must mutually exchange information on violations of consumer protection provisions in financial services (Article XV. 11 § 2).

Former issues were raised with regard to the nature of the powers of the DGCM. Their nature was examined in depth in the *Citibank* case⁴⁷, which clarified both DGCM's competence *ratione materiae* and the extent of its powers. The Code has now implemented the judgement providing that the provisions of the *Code d'Instruction criminelle* are applicable to the investigation under Book XV⁴⁸.

In tracking and establishing infringements, officers are authorised to:

⁴⁷Procureur du Roi c. Citibank Belgium S.A. et S.F., Bruxelles (11^e CH), 21 Mai 2012, en *Droit Pénal de l'Entreprise* 2012/3.

⁴⁸ Article XV.1. [1 A l'exception des dispositions contraires mentionnées dans le présent Code, les dispositions du Code d'instruction criminelle sont applicables à la recherche, la constatation et la poursuite des infractions visées à l'article XV.2, § 1er.. Article XV.2. [1 § 1er. Sans préjudice des compétences des fonctionnaires de police de la police locale et fédérale, les agents commis sionnés par le ministre sont compétents pour rechercher et constater les infractions au présent Code. Ces agents peuvent uniquement exercer les compétences définies par le présent titre afin de rechercher et constater les infractions aux dispositions du présent Code et de ses arrêtés d'exécution, à l'exception de celles reprises dans le Livre IV et dans ses arrêtés d'exécution.

- Enter the workplace and premises during normal opening and work hours, if it is necessary to fulfil
 their tasks;
- Draw useful conclusions and request documents, exhibits and books and take copies thereof;
- Request information and question any persons on the issues deemed relevant to research information:
- Obtain copies of documents;
- Seize documents, exhibits and books;
- Take samples;
- Subject to prior authorisation from a magistrate, enter private homes between the hours of 5 a.m. and 20 p.m.
- Under the Code, take pictures of the places or records of telecommunication or other public communications as well as communications between the officer and the subjects (Article XV.4 §2).

Only those officials appointed by the Minister may enforce the abovementioned powers. They work under the supervision of the Public Prosecutor and may ask for police assistance in the performance of their duties.

➢ Competence Ratione Materiae

As clarified by the *Citibank* judgement, the DGCM has full competence *ratione materiae* for investigating violations of the LPMC. However, if the investigation shows infringements with legislation outside the competence of the DGCM, the file must be referred to the Public Prosecutor, under Article 29 of the Code d'Instruction Criminelle⁴⁹. This obligation exists also for infringements committed abroad.

With regard to the nature of the DGCM's powers, the Supreme Court clearly defined that, in their field, DGCM agents are more specialised than police officers due to the technical character of the legislation on consumer protection⁵⁰.

Competence Ratione Loci

The DGCM is the single authority competent for the research and investigation of infringements on all Belgian territory.

Control over the investigation

The agents are under both the authority of the DGCM and of the Public Prosecutor. Article 133(4) provides that «§ 4. Les agents commissionnés exercent les pouvoirs qui leur sont accordés par le présent article sous la surveillance du procureur général, sans préjudice de leur subordination à l'égard de leurs supérieurs dans l'administration».

Procedural Safeguards

The individual under investigation must be notified of the inspection report within 30 days (Article XV. 2 §2). The main procedural safeguard is the fact that the appointed officials in charge of investigations work under the control of the Public Prosecutor.

Under Article XV.6, appointed officials are under the control of the Public Prosecutor or the federal prosecutor in the mission of searching and verifying the infringements under the Code.

Under Article XV.7, appointed officials, in the course of their mission, may advise the inspected person on the best way to comply with the relevant legislation.

⁴⁹Article 29. Toute autorité constituée, tout fonctionnaire ou officier public, [2 ainsi que, pour ce qui concerne le secteur des prestations familiales, toute institution coopérante au sens de la loi du 11 avril 1995 visant à instituer la charte de l'assuré social]2 qui, dans l'exercice de ses fonctions, acquerra la connaissance d'un crime ou d'un délit, sera tenu d'en donner avis sur-le-champ au [procureur du Roi] près le tribunal dans le ressort duquel ce crime ou délit aura été commis ou dans lequel [l'inculpé] pourrait être trouvé, et du transmettre à ce magistrat tous les renseignements, procès-verbaux et actes qui y sont relatives).

⁵⁰C. Const., 14 Octobre 2010, arrêt n° 111/2010, Rev. dr. pén. crim., 2011, p. 70.

Burden of Proof and Standard of Proof

Under Article XV.2 §2 and Article XV.12 §1er, reports of inspections prepared by appointed agents are *prima facie* evidence to the contrary. Under Article XV.4 §3, also findings documented with photographs are evidence to the contrary, if the requirements imposed by the provision are met. Inspectors may use also images provided by third parties if they were legitimately taken (Article XV.4 §4).

DGCM inspectors may also impose the burden of proof on the trader. Under Article XV.16, the agent in charge of the inspection may ask the trader to provide evidence on the accuracy of factual claims related to a commercial practice within one month from the request. If the trader fails to provide evidence or such is considered insufficient, the commercial practice is considered contrary to the provisions of the Code and the trader risks the consequences of violating legislation. With regard to the reverse burden of proof under the former Article 103 LPMC, now Article XV.16, the doctrine considered that the limits applicable in Court, related to the lack of obligation to disclose business secrets, was not applicable to the administrative proceedings and the trader must provide all available information including confidential information and business secrets.

Opening and closing the infringement procedure

At the end of the investigation, DGCM may decide to close the investigation if there is no evidence of the infringement, refer the case to the General Director of SPF *Mediation et Control* upon which the DGCM depends to start proceedings for a cease and desist order or refer the case to the Public Prosecutor for criminal action.

The DGCM is also specifically authorised to resolve the issue with the infringer: during the course of the investigation, DGCM officials may issue a warning to the trader to stop the act or omission that constitutes the infringement. Book XV, Chapter 3, Article XV.31 regulates the "procedure d'avertissment", which is an administrative procedure with the scope to economise on further proceedings. The provision is applicable to all infringements covered by the Code.

Under Article XV.31 §1er the warning must be served on the infringer within thirty days from identifying the infringement. The warning procedure is possible only for infringements, which may constitute the object of a cease and desist order. (Depending on the kind of infringement and the outcome of the investigation, the warning may be voluntary, compulsory or unattainable).

Under the former provision of Article 124 of the LPMC, which covered unfair commercial practices, misleading advertising and distance selling, the warning was voluntary and it was up to the DGCM to decide on whether to issue a warning or proceed with a cease and desist order.

It was considered that the warning procedure was not available for all infringements under former Articles 126 and 127 LPMC, which required an immediate proceeding. The new Article XV.31 leave the decision to warn the trader to the officials' discretion. However, we consider that the former interpretation should be still in force.

Article XV.31 disciplines the contents of the warning, which must indicate:

- The act or omission and the violated provisions of the Code;
- The timeline to comply with the rules and remove the act or omission;
- The information that, for failure to comply with the warning, the following action may be started: a) DGCM will apply for a cease and desist order; b) the Public Prosecutor will be informed; c) the settlement procedure under Article XV.61 will be started; d) a fine may be imposed;
- The fact that the warning may be rendered public.

The warning procedure is not an administrative action, which may be object of an appeal or suspension before the Administrative Court. If the recipient of the warning considers that the warning was wrongfully issued, he may present his objections to the DGCM that issued the warning. If the DGCM does not accept the objections and the trader does not comply with the order, cease and desist proceedings will follow and the trader will submit his position to the Court in the cease and desist proceedings.

It is a procedure that allows a high level of autonomy to the authority in evaluating the investigative outcomes and requires a high level of responsibility.

However, from the data published by the DGCM between 2006 and 2010, it seems that the DGCM has successfully used the warning procedure frequently with a high level of compliance.

Settlement

Under Article XV.61, DGCM inspectors are authorised to propose settling the case with the infringer against payment of a fine that extinguishes the public action. The possibility to use the settlement procedure is provided for all violations of the Code.

The infringer may obtain a copy of each report that determines the infringement that is the object of the settlement proposal. A Royal Decree will define the fines and the payment⁵¹. In any case, the imposed fines may not be more than the criminal sanctions that could be imposed by the Court.

If the settlement is not accepted, the report of the infringement is transferred to the Public Prosecutor.

If the infringer pays the proposed amount in time, criminal proceedings based on the same facts may no longer be brought against him. The amount of the settlement proposal depends on the nature of the infringement. Acceptance of the settlement proposal does not imply acknowledgement of the infringement.

If the public action has already begun, a settlement is no longer possible. If a settlement has been proposed and accepted, the money paid into the public purse is returned to the infringer.

There is no formal appeal against proposing a transaction. This is justified by the fact that a transaction is not a formal administrative fine, but an opportunity for the infringer to avoid criminal proceedings. In fact, this provision was introduced in the former LPC to avoid spending unavailable resources to criminally prosecute consumer protection offences.

Decisions

Except for the warning and settlement procedures and the decision to close the investigation for lack of evidence, the DGCM is not competent to adopt any decision against the trader. It may only refer to the competent Court or to the prosecutor.

Fines

DGCM may impose fines for warnings and settlement. The possibility to impose a fine for non-compliance with a warning was introduced by the Code and is not included in the LPMC.

> Statute of Limitations

No provisions are included in the Code on the deadline to start and close investigations.

Appeal Procedure and Conditions

Except for warnings and settlements, no decisions were adopted by the DGCM, so no appeal is provided. Warnings and settlements cannot be appealed.

Exchange of information between public authorities

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⁵¹ The current application is determined by the arrêté royal du 27 avril 1993 and by the arrêté royal du 14 mai 1993.

⁵² H. DE BRAUW, *Enforcement*, id., p. 237.

Article XV.32 introduces new provisions on the exchange of information between authorities and on the possibility for the appointed officials to obtain useful information from other public administration agencies or departments without having to search elsewhere. The only limit regards information included in a judicial file that may be transmitted only with the authorisation of the Attorney General or the federal attorney of the case. The information obtained may only be used for the specific purpose of the investigation and is protected by confidentiality.

2.1.1.4 CRIMINAL OFFENCES AND PROCEEDINGS

Violations that constitute criminal offences

The former LPMC provided four categories of offences: three of progressing gravity and one specific offence. The Code adopted the same differentiation: some violations are strict liability offences, notably violations of Article VI.95 on unfair commercial practices, Article VI.100 on misleading practices and Article VI.103 on aggressive practices. These were included in the former Article 124 of the LPMC.

With regard to the moral element of violations of the former Article 102 LPMC on unfair commercial practices, it is worthwhile noting that the Belgian Court considers that there is no need for a specific *mens rea*, but only the intention to violate the provision. The *bone fide* is insufficient to discharge the infringer.

Article XV.84 provides a rule similar to the former Article 125 LPMC and considers as criminal offences all the violations of the Book VI of the Code that are committed in bad faith. Article XV.84 provides a general category of criminal offences that require a specific subjective element. In essence, all infringements of consumer protection legislation are criminal offences when committed in bad faith. This has the procedural consequence of a criminal action commencing together with a cease and desist order. However, procedural rules give cease and desist orders precedence over criminal actions. Criminalising the violation has the advantage of permitting the opening of an investigative file that may be used by the Presiding Judge of the Commercial Court in deciding on the cease and desist order.

The major inconvenience of this double procedure is that, due to the length of the civil proceedings, the criminal action may be prescribed before the end of the civil proceedings. For this reason, it must act to interrupt the statute of limitations.

Article XV.86 provides the maximum criminal sanctions, including imprisonment, for specific violations involving unfair commercial practices.

Article XV.85 introduces criminal sanctions for the infringer who does not comply with a cease and desist order. However, according to case law, the criminal action may commence only after the cease and desist order becomes *res judicata*.

Competence Ratione Materiae

Criminal proceedings for violations of the Code are brought before the Tribunal correctionnel.

Competence Ratione Persona

Under Article XV.73, companies, associations and their members may be summoned before the criminal Court for infringing the Code. Companies with legal personalities are civilly liable for damages, fines, costs, forfeitures, refunds and pecuniary sanctions pronounced against their bodies, officers and employees. The same applies to members of commercial associations without legal personality, if the infringement is made by a partner, officer or employee and is related to an act performed in relation to the activities of the association. However, a partner who is civilly liable is personally liable only for the illegal profits he obtained.

➢ Competence Ratione Loci

The general rule of Article 624 of the Judicial Code⁵³ provides the competence *ratione loci* also for criminal proceedings. The competent Court is the *Tribunal correctionnel* of the defendant.

Relationship between the cease and desist order and criminal action

Article XV.71 introduces the priority order of actions: if the infringement brought before the Criminal Court is the object of a cease and desist order, the Criminal Court may rule on the infringement only after the cease and desist order is adopted and becomes *res judicata*.

On the relationship between civil and criminal proceedings, the Criminal Court is bound by the results of the cease and desist order: if the Presiding Judge of the Commercial Court ordered the cessation of the infringement, the Criminal Court will not decide again on the existence of the infringement, which was already ascertained in Civil Court, but only on the existence of the subjective element of bad faith. The Criminal Court can decide on all aspects of the criminal offence only if the cease and desist order was not issued.

Article XV.72 introduced a new provision: for repeating the infringement after five years from the judgement having becomes *res judicata*, the sanctions (fines and imprisonment) are doubled.

Standard and burden of proof and related evidence requirements

The reports of the officers appointed by the Minister to investigate violations of the Code, which may constitute criminal offences or for which the Minister may initiate a cease and desist order, have evidential value until proof of the contrary is produced. The Court must accept the facts as established in the report as long as such facts are not proven incorrect.

If a violation of the Code is ascertained with a cease and desist order, the criminal Court is bound by the decision of the commercial Court and cannot rule once more on the infringement, but only on the existence of the elements that constitute the criminal offence.

For criminal offences that are strict liability offences under Article XV.83, the *mens rea* does not need to be proven, but only the intention to violate the LPMC. For criminal offences under Article XV.84, bad faith has to be proven. However, the defendant cannot be discharged by proving that he had acted in good faith.

The general rules are those of the *Code d'Instruction Criminelle*. Article XV.1 provides that, if not otherwise provided by the Code, the *Code d'Instruction Criminelle* applies to the research, pursuit and prosecution of the infringement of the Code. Evidence and probatory means are regulated by Part I, Chapter VI, Sec. II, Distinction II, of the *Code d'Instruction Criminelle*. The submission of evidence is based on the adversarial procedure and all kinds of evidence are generally admitted.

Under the Code, appointed agents may seize, against a receipt, the goods that are the object of the infringement, the means of production, transport which was used for the infringement, and the means for the provision of services that was used for the infringement. The Public Prosecutor must confirm the seizure within 15 days thereof. Seizure is automatically lifted if not confirmed by the Public Prosecutor, or by a definitive judgement that terminates prosecution or dismisses the case (Article XV.5).

> Standing of the competent national authorities under the CPC Regulation in criminal proceedings

⁵³Article 624. Hormis les cas où la loi détermine expressément le juge compétent pour connaître de la demande, celle-ci peut, aux choix du demandeur, être portée : 1° devant le juge du domicile du défendeur ou d'un des défendeurs;

^{2°} devant le juge du lieu dans lequel les obligations en litige ou l'une d'elles sont nées ou dans lequel elles sont, ont été ou doivent être exécutées;

^{3°} devant le juge du domicile élu pour l'exécution de l'acte;

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^{4°} devant le juge du lieu où l'huissier de justice a parlé à la personne du défendeur si celui-ci ni, le cas échéant, aucun des défendeurs n'a domicile en Belgique ou à l'étranger.

No provisions are included in the Judicial Code. Only a civil party may stand in criminal proceedings to obtain damages.

> Settlement

Under Article XV.61 §1er, settlement may also apply for criminal offences. This complies with Article 216 *Code d'Instruction Criminelle* that introduces a settlement procedure for offences that are not punished, with up to two years imprisonment. However this possibility is offered at the discretion of the agents and depends on the seriousness of the offence, whether there is significant damage and if it is a second or repeated offence.

Court Proceedings

If the investigation proves the existence of the infringement and the infringer refuses to settle by paying a sum or does not comply with a warning issued under Article XV.31, the DGCM will transfer the file to the prosecutor (*Parquet du Procureur du Roi*). When the file is transferred, the DGCM is no longer involved and ceases as a party in the proceeding.

The case will follow judiciary code rules, specifically the rules of the *Code d'Instruction Criminelle*. The right of appeal is brought before the competent Court of Appeal *ratione loci*.

It is always possible for the victim of the unfair commercial practice, while a public action brought by the prosecutor before the *Tribunal Correctionnel* is pending, to bring a civil action before the competent jurisdiction to obtain restitution of the paid amount as well as civil damages

If a civil action is filed separately, at the time of the criminal proceedings, Article 4 of the *Code d'Instruction Criminelle* provides for suspending such civil action until the end of the criminal proceedings. However, the same article includes the possibility to bring a civil action for damages before the Criminal Court where the criminal proceedings are pending.

In the past, cases of infringements brought before Criminal and/or Civil Courts are very limited. In general, infringements are settled with the cease and desist order under the former Article 110 LPMC or with administrative settlement under the former Article 123 and Article 136 of the LPMC.

As a general rule, the provisions of Book I of the Criminal Code, which relates to sanctions, repetition of offences, aggravating and mitigating circumstances, apply to infringements of the Code.

Procedural Safeguards

Under Article 182 of the *Code d'Instruction Criminelle*, the defendant must be served a subpoena or a request to participate in the proceeding, and must be informed of potential infringements.

Court Decision

The judgement of the Court may incriminate or discharge the defendant. The Court may decide over the offences, including the material element (violation of the LPMC) or, if the material infringement results in a cease and desist order, the Court's decision will only regard the existence of bad faith.

Criminal Sanctions

Criminal sanctions for violating the Code are defined in Article XV.70 and are divided into six classes according to the gravity of the infringement. Level 6 also includes up to five years imprisonment for the most serious cases, and a range of fines. The criminal sanctions are described in detail in Capter 1.3.

Appeal

Under Article 187 of the *Code d'Instruction Criminelle*, the condemned party may file an appeal against the decision within15 days from being served the decision.

> Statute of Limitations

The general statute of limitations provided by Article 21 in the preliminary provisions of the *Code d'Instruction Criminelle* is 5 years for offences qualified as crimes and 6 months for offences qualified as infractions. The statute of limitations begins on the day the crime is committed.

2.1.1.5 CIVIL PROCEEDINGS OTHER THAN CEASE AND DESIST ORDERS

Provisions of the Code may be object of a civil action or interlocutory proceedings. However, the distribution of competence introduced by the Judicial Code must be respected. Violation of the Code may constitute the basis for an action under Article 1382 of the Civil Code (responsibilities *for torts and quasi-torts*) and there is the possibility for the Judge on the Merits to decide on the violation of the LPMC.

When the infringement is not the object of a cease and desist order, the case may be brought before the Judge on the Merits who will decide on the infringements and damages. Interlocutory proceedings under the general rules are also possible. The advantage of these proceedings is that the time limit for the action is 5 years from the day the damage is discovered and within 20 years from the day the infringement is committed. This may be useful if the deadline for the cease and desist order has already expired (Article 2262bis of Civil Code).

If a cease and desist order and civil proceedings are started at the same time on the basis of the same infringement, the cease and desist order will take precedence over the civil action and the Judge on the Merits is bound by the decision of the Presiding Judge of the Commercial Court.

The action based on Article 1382 of the Civil Code requires three elements: an infringement committed by the defendant, damage suffered by the plaintiff and a causal link between the two.

The existence of damage (real and not potential) excludes, in principle, the use of the civil action by the Minister or consumers' associations.

The action may be directed at obtaining:

- Restoration of damages;
- An injunction;
- A temporary measure (astreinte).

The general provisions of the Judicial Code regulate competence. The competence *ratione loci* is based on Article 624 and the competence *ratione materiae* on Article 590 of the Judicial Code. The Justice of the Peace is competent if the value of the claim is below EUR 1,860.00. The Commercial Court is competent for all claims exceeding the aforementioned amount if the defendant is a commercial business; otherwise the Civil Court retains competence.

2.1.1.6 CONCLUSIONS

The reform did not change the structure of the Belgian system for consumer protection where the national public competent authority has broad investigative autonomy, while the Presiding Judge of a Commercial Court issues decisions as cease and desist orders after special interlocutory proceedings. The Code provides consistency with determining procedural rules and increased investigative powers of the appointed officials, including the possibility to detect an infringement with digital technologies. Violation of the consumer protection legislation remains a criminal offence. There are three categories of criminal offences and one residual category that cover all infringements committed in bad faith. Businesses that do not comply with a cease and desist order risk criminal proceedings or the investigating authority, depending on the gravity of the violations, directly refers the case to the Public Prosecutor. The law regulates interaction between different types of actions. If criminal proceedings start at the same time as a cease and desist order, criminal proceedings are suspended under law until the Criminal Court issues a decision. Some issues may arise in the interaction of different actions due to different statutes of limitations that may prevent commencing a criminal action. A safeguard clause, which has attracted the legislation covered in the Annex of the CPC

Regulation within the application of the Code, regardless of implementation, should resolve the issue of the applicable law in cross-border infringements, indicating the CPC Regulation as the applicable law. The Code also introduced provisions for national public authorities to cooperate with each other and exchange information, but no similar provisions were introduced for intra-Community infringements and cooperation under the CPC Regulation.

2.1.2 CZECH REPUBLIC

2.1.5.1 INTRODUCTION

In the Czech Republic, legislation on consumer protection is broken down into many legal provisions and laws that may render detecting the applicable law and the competent authority difficult.

The application of the CPC Regulation in the Czech Republic required adapting Czech national law in particular through Act No 160/2007, which amended certain laws on consumer protection. Under this law, necessary changes were made to seven laws so that the competent supervisory authorities have the ability to proceed in accordance with this Regulation. Furthermore, three laws were amended separately with Acts No's 36/2008, 120/2008, and 182/2008. Accordingly, ten laws in Czech legislation were amended to ensure that the competent national authorities had sufficient powers to impose corrective measures to the extent provided for by the CPC Regulation. The main powers provided by the CPC Regulation are available to the competent authorities and are contained in Act No 552/1991 on state control and in the Administrative Procedure Code.

The Ministry of Industry and Trade, which is the central government authority responsible for the protection of consumer interests, plays the role of the single liaison office in the Czech Republic.

In accordance with Article 4(1) of the Regulation, the Czech Republic nominated nine authorities that are delegated with supervising and enforcing the legislation of their competence. These competent authorities are the Czech National Bank, the Czech Trade Inspectorate, the Czech Proof House for Firearms and Ammunition, the Council for Radio and Television Broadcasting, the State Institute for Drug Control, the State Veterinary Administration, the Czech Agriculture and Food Inspection Authority, the Civil Aviation Authority and the Office for Personal Data Protection.

The authorities competent for Directive 2006/114/EC on Misleading and Comparative Advertising are the Council for Radio and Television Broadcasting, the Czech Agriculture and Food Inspection Authority, the Ministry of Health, the State Phytosanitary Administration, the Institute for State Control of Veterinary Drugs and the Office for Personal Data Protection. The competent authority differs in each case depending on the product or service advertised.

From the perspective of the CPC Regulation application, such fragmented competence may cause problems in tackling infringements.

Legislative Framework

As indicated in the introduction, there is no single authority in the Czech Republic with general powers to enforce consumer protection legislation.

The Czech Trade Inspection Authority (CTIA) is an administrative government institution that falls under the jurisdiction of the Ministry of Industry and Trade of the Czech Republic. The Minister of Industry and Trade appoints the Director General of the CTIA. The CTIA was established under Act No 64/1986 Coll., The Czech Trade Inspection Authority Act. The CTIA is a successor to the former State Trade Inspection. It consists of the Central Inspectorate and Regional Branch Inspectorates, whose headquarters are found in major regional cities.

However, when unfair commercial practices related to a sector are covered by special legislation, the enforcement is the competence of one of the sectorial authorities (see tables below).

The powers of the authorities stemming from the CPC Regulation are implemented in the Czech legislation in many different ways.

- The most frequently used Czech laws directly refer to the CPC Regulation provisions on the procedures and powers of authorities. Accordingly, a general characteristic of Czech provisions is that they rely on the direct effect of regulations in EU law.
- Secondly, in other cases some of the powers mentioned in Article 4(6) of the CPC Regulation are reproduced in Czech laws with the exact same wording (e.g. the power stipulated in Article 4 (6) letter f) of the CPC Regulation).
- A third legislative method of implementation is carried out by references to Act No. 552/1991 on State Inspection. The Act on State Inspection generally applies to the administrative authorities in terms of conducting inspections and compliance with their obligations imposed by special laws.

As an example of the implementation of the CPC Regulation, we mention the provisions related to the Czech National Bank, which is the authority competent for distance selling of financial services and for unfair commercial practices related to financial products.

Under Article 44(a) (2) of Act No 6/1993 Coll., as amended, "(2) In case of cross-border cooperation, the Czech National Bank shall perform the supervision under paragraph 1, proceeding in accordance with the relevant legal rules of the European Union (Regulation 2006/2004/EC, in footnote to the Article)".

Under Article 44(a)(3), if the Czech National Bank detects an infringement committed by a subject under its supervision in another Member State, it will intervene to prohibit the unlawful conduct and to impose remedies.

The provision does not list the investigative and enforcement powers of the Czech National Bank when enforcing consumer protection however, the powers laid down by Act No 552/1991 on state control, which mainly reflects the powers listed by the CPC Regulation, as well as those provided by the Administrative Procedure Code are available to the authority.

Powers of the Supervisory Authorities

The table below sets forth the powers for each authority citing the article of the relevant law.

Part 1 of 2	To access any relevant document	To require any person to furnish relevant information	To carry out necessary on-site inspections	To request in writing that the seller or supplier concerned cease the infringement
Czech Trade	Section 4, Act No.	Section 4, Act No.	Section 4, Act No.	Sections 3 & 7c,
Inspectorate	64/1986	64/1986	64/1986	Act No. 64/1986
Czech National	Section 44a, Act No.	Section 44a, Act No.	Section 44a, Act No.	Section 44a, Act
Bank	6/1993	6/1993	6/1993	No. 6/1993
Czech Proof				
House for	Section 20, Act No.			
Firearms and	156/2000	156/2000	156/2000	156/2000
Ammunition				
Czech Agriculture and Food Inspection	Section 3, Act No. 146/2002	Section 3, Act No. 146/2002	Section 3, Act No. 146/2002	Sections 3 & 5, Act No. 146/2002
Regional Health	Section 82, Act No.	Section 82, Act No.	Section 82, Act No.	Sections 82 & 84,
Authority	258/2000	258/2000	258/2000	Act No. 258/2000
State Institute for	Section 101, Act No.	Section 101, Act No.	Section 101, Act No.	Section 101, Act
Drug Control	378/2007	378/2007	378/2007	No. 378/2007
State Veterinary	Section 48, Act No.			
Administration	166/1999	166/1999	166/1999	166/1999
Office for Personal Data Protection	Section 10, Act No. 480/2004 on personal data protection	Section 10, Act No. 480/2004 on personal data protection	Section 10, Act No. 480/2004 on personal data protection	Section 10, Act No. 480/2004 on personal data protection

Part 2 of 2 To obtain an undertaking to cease the infringement	To require the cessation or prohibition of any infringement	To require the losing defendant to pay into the public Purse
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Czech Trade Inspectorate	No provision	Sections 3 & 7c, Act No. 64/1986	Section 9, Act No. 64/1986
Czech National Bank	No provision	Section 44a, Act No. 6/1993	Section 46a, Act No. 6/1993
Czech Proof House for Firearms and Ammunition	No provision	Section 20, Act No. 156/2000	Section 22a, Act No. 156/2000
Czech Agriculture and Food Inspection	No provision	Sections 3 & 5, Act No. 146/2002	Section 11, Act No. 146/2002
Regional Health Authority	No provision	Sections 82 & 84, Act No. 258/2000	Section 92, Act No. 258/2000
State Institute for Drug Control	No provision	Section 101, Act No. 378/2007	Sections 107 & 108, Act No. 378/2007
State Veterinary Administration	No provision	Section 48, Act No. 166/1999	Sections 71 & 72, Act No. 166/1999
Office for Personal Data Protection	No provision	Section 10, Act No. 480/2004 on personal data protection	Section 11, Act No. 480/2004 on personal data protection

Procedural Rules

The enforcement of consumer protection legislation follows the rules of administrative law. The procedure is mainly a self-managed administrative proceedings and it is common to all competent authorities. Specific administrative provisions are included in the relevant legislation regarding each authority.

The Administrative Procedure Code (Act No 500/2004) regulates the administrative procedure and the proceedings before the Administrative Courts, and the Judicial Administrative Procedure Code (Act No. 150/2002) regulates judicial review of administrative decisions.

The procedure before the competent authority consists of two instances. A higher body than the one that initially decided will hear an appeal against the decision of the first instance. The appeal has a suspensory effect, unless the decision has been declared immediately enforceable. The administrative authority can make an exemption from the obligatory suspensory effect only in certain cases, such as in the case of an overriding public interest or to prevent serious harm that is imminent to one of the parties.

If a decision has no suspensory effect and the decision imposes the duty of a performance, the decision is enforceable before it is declared final and conclusive. If a deadline to fulfil the imposed duty was provided, the decision is enforceable when the deadline expires (Article 74 of the Administrative Procedure Code).

2.1.5.2 SELF-MANAGED ADMINISTRATIVE PROCEEDINGS

Competent Authority

We will examine the CTIA since it is the national authority with the broadest competence in the area of consumer protection. All the authorities have equivalent independent administrative proceedings involving two instances of the administrative body followed by the Administrative Court's judicial review, as provided by the Administrative Procedure Code.

The CTIA monitors and inspects businesses and individuals, who supply goods to, or sell goods on, the Czech market, provide services or similar activities on the domestic market, provide consumer credit, and operate marketplaces, unless, as a result of special legislation, these activities fall under the authority of another administrative institution.

Competence Ratione Materiae

Under Article 23 of Act No 634/1992 Coll. on Consumer Protection, the general competence for the enforcement of the provisions of the Act is within the CTIA, with the exception of supervision in accordance with paragraphs 2, 3, 4, and 8 and 16 which provide the competence of the State Agriculture and Food Inspection, State Veterinary Administration, Czech Proof House for Firearms and Ammunition, and Czech Telecommunication Office for violating consumer protection within the legislation of their competence. Under

Act No 64/1986 Coll., the CTIA must inform the other authorities when, during the investigation, it emerges that the infringement is competence of another authority.

Competence Ratione Loci

The CTIA is the single competent authority empowered to research and investigate the abovementioned infringements on Czech territory. The regional departments will be in charge of the investigations in the area under their competence.

Investigative Powers

In accordance with Section 2 of Act No. 64/1986, the CTIA investigates natural and legal persons selling or supplying goods and products on the internal market, and providing services or carrying out other similar activities therein. The Act sets out the CTIA's general tasks (Section 3) as follows: exposing faults, carrying out inspections, requesting information, making analyses, declaring breaches of law, dealing with flaws and their causes, proposing remedial action and imposing fines under the law. The results of inspections are published for precautionary purposes.

The Act sets forth some provisions on the concrete powers of inspectors (Section 4 of the Act). Inspectors are authorised to request necessary documents, information and written or oral statements that may be related to alleged infringements. The rules allow inspectors to enter business premises during inspection and to seize samples for analysis (against compensation unless the goods were not approved for trading).

Within the scope of its powers, the CTIA has the autonomy to open an investigation. An investigation may be initiated by a complaint or *ex officio*.

The CTIA also has the investigative powers provided by Act No 552/1991 Coll. on state control.

Under Section 13 of Act No 64/1986, if during its control activity the CTIA detects facts requiring measures to be taken by another responsible authority, the Czech Trade Inspection shall notify it of the information.

➢ Control over the investigation

Under Article 1 of Act No 64/1986, a General Director appointed by the Ministry of Industry and Trade leads the CTIA. A director subordinated to the General Director heads the inspectorate. Inspectors have to prepare a protocol of inspections.

Under Rule 17 of the Act No 552/1991 on state control, if the subject under investigation does not agree with the contents of the protocol, he may file a complaint with the responsible department of the inspectorate, expressing disagreement with the inspection protocol. Such complaint must be filed within five days after the subject under investigation received the inspection protocol, unless the inspection official offers a longer term.

Procedural safeguards

Under Article 46 of the Administrative Procedure Code, the party or the parties involved must be notified of the start of proceedings *ex officio*. The party may also ask the administrative authority for an oral hearing in order to exercise his rights (Article 49 of the Administrative Procedure Code). If an oral hearing is requested, the authority must grant it unless the rights of other parties are at risk (Article 49(3) of the Administrative Procedure Code).

Under Article 51(2), the parties must be informed of evidence produced outside the hearing.

If the person under investigation objects to the measure imposed by the CTIA inspector, he may lodge a complaint with the director of the inspectorate. However, objections do not have a suspensory effect (e.g. Articles 7b and 7c of the Act on CTC).

Burden of Proof and Standard of Proof

The inspection is carried out *ex officio* and the inspector is required to discover all information needed to accomplish the investigation's purpose (e.g. Articles 46 and 52 of the Administrative Procedure Code).

Under Article 51 of the Administrative Procedure Code, all means deemed appropriate to ascertain the facts and that are not acquired or produced in violation of legal regulations may be used to acquire evidence. Among the means of proof indicated are public instruments (certificates, deeds) examinations or inspections, witness testimonies and expert reports. Under Article 49, the administrative authority will order an oral hearing when provided by statute and when it is necessary to the proceedings and to exercise the rights of participants.

Article 52 places an obligation on the party submitting the complaint to produce evidence supporting the allegation. This obligation is general and is placed on all parties to the proceedings for all claims and allegations submitted during the proceedings.

Under Article 50(3) and (4) of the Administrative Code, regulating the grounds for decisions, the administrative authority is obligated to ascertain all circumstances relevant for the protection of the public interest. The administrative authority is obligated, in proceedings *ex officio*, in cases where a duty is supposed to be imposed, to ascertain all decisive circumstances, whether in favour of or against the person on whom a duty is supposed to be imposed. The administrative authority weighs the sources of evidence submitted to its consideration, except where the Statute provides for a source that is binding for the administrative authority, such as with public deeds. Under Article 53 of the Administrative Procedure Code, when evidence is submitted through public deeds, the alleged event is considered true until contrary is proven.

The administrative authority has the obligation to consider all information that emerged during the proceedings including the submissions of the parties.

Opening and Closing of the Infringement Procedure

Complaints may be directly submitted by consumers through the CTIA website or in writing sent by mail. Anonymous submissions are accepted.

Czech consumers who intend to submit a complaint concerning a foreign supplier or provider may also address the complaint to the European Consumer Centre of the Czech Republic (ESC). ESC provides information on consumer rights in the European common market, free assistance and advice to consumers in their disputes with traders from other European Union countries, Norway and Iceland. The European Commission and the CTIA subsidise the ESC, which also collaborates with the CTIA. The ESC is a member of the European network of Consumer centres – ECC-net. The ECC however has no decision-making powers and is not part of the public enforcement system in the Czech Republic.

When Czech authorities receive a complaint from a foreign consumer or a request for assistance from a EU national authority to investigate the commercial practice of a Czech supplier or provider, it is handled in accordance with Czech national procedural rules (Administrative Procedure Code and Act No 64/1986).

Within the framework of its powers, the CTIA may independently decide whether to start an infringement procedure. An investigation may be initiated by a complaint or *ex officio*. Complaints do not automatically trigger the procedure, as the CTIA has discretion on whether to open the procedure or not according to Article 42 of the Administrative Procedure Code. Under Article 42, the authority is obligated, at the request of the party that made the compliant, to notify, within 30 days after receiving the complaint, its decision to start proceedings or, if the complaint is rejected, its reasons for doing so. Article 46 regulates *ex officio* administrative proceedings⁵⁴.

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⁵⁴ In order to help consumer to correctly address the complaints and in order to inform them about the cases dealt with by CTIA, there is a list, on its website, on the complaint regarding consumer violations that the CTIA may investigate. The CTIA investigate a consumer complaint when the vendor

⁻ Does not identify the goods or services offered or charges prices incorrectly;

⁻ Offers unlabelled products (such as textiles, shoes or crystal glass without labelling what the items are made of);

⁻ Offers products without instructions and without guides for proper maintenance, in the Czech language;

⁻ Offers products that seem unsafe;

Undertakings

Undertakings are not possible in the Czech Republic.

Interim measures are however possible. Under Article 61 of the Administrative Code, the administrative authority (*ex officio* or at the request of a party) may, by a decision, order an interim measure before the closing of the proceedings, if it is necessary to temporarily regulate the circumstances of the participants or if there is a concern that the performance of the final decision may be jeopardized. With the preliminary ruling, the authority may order a party to perform a duty or to abstain from an action. Interim measures do not substitute the final decision although they may anticipate its effects.

When a party requests a preliminary ruling, the authority must decide within 10 days from the request.

Decisions

The authority may decide to prohibit any act or omission that violates consumer protection legislation as provided by Act 634/1992 Coll on consumer protection, including placing and distributing goods on the market, purchasing, delivering and selling those products until their remedy. The authority may destroy goods or impound them if they are deemed unsafe.

In case of an infringement committed in the EU that harms or may harm the collective interest of consumers, the Director of Regional Inspectorate decides on prohibiting such conduct.

Under Article 150 of the Administrative Procedure Code, the administrative authority may issue an order imposing a duty on a party if it considers that the factual findings are sufficient. The issuance of an order may be the first action of the proceedings. An order may be issued also on site (during inspections) if the party is present on site and acknowledges the reasons behind the issuance of the order. In this case, the infringement is considered proven. A monetary fine (up to 10,000 CZK) may be imposed (Article 150). If the infringer does not accept the order, he may file an appeal against the order within 8 days from its notification to the authority that issued the order. If no appeal is submitted, the order becomes final and enforceable.

Administrative Fines

The Director of Regional Inspectorate is authorised to make decisions imposing fines for a maximum amount of 2 million CZK (EUR 45,000) or to confiscate the goods (Article 9 of the Act on CTIA).

Legal Deadlines

Under Article 71 of the Administrative Procedure Code, the administrative authority must adopt a decision within 30 days from the commencement of proceedings or the investigation. The time limit is suspended when it is necessary to acquire evidence. Time is added, up to 30 days, specifically for complex cases, or when additional investigations are necessary.

Statute of Limitations

- Sells fuel, which does not seem to meet the necessary quality;
- Uses unfair trade practices: for example, gives false information about a product or service provided, conceals information that could significantly affect the consumer's decision i.e. the consumer purchases a product or service that he/she would not have purchased if he/she had had this information), does take advantage of rights which he/she otherwise could have, etc. Unfair business practice also includes the sale of imitation or counterfeit goods;
- Refuses to issue a proof of purchase with all necessary data;
- Does not inform the consumer about warranty terms;
- Does not issue proof of receipt for a claim, or how the complaint will be resolved;
- Does not resolve the complaint within 30 days, or a longer period if it has been agreed to by both parties; or
- Fails to provide the consumer with assurances that a credit agreement contains all the necessary details and information.

Proceedings to impose a fine must commence no later than one year from the day the inspector learned about the infringement, and no later than two years from the day the infringement happened. The fine shall not be levied after three years from the day the infringement happened (Article 9 of the Act on CTIA).

Monitoring and Compliance

The Administrative Procedure Code regulates the general enforcement of administrative decisions. Under Article 105, the administrative authority that issued the decision is competent for enforcement. In the case of non-monetary duty, the enforcing administrative authority may issue a warrant of execution ordering the person to fulfil the non-monetary duty. The warrant of execution indicates the obligation, the procedure to carry out such obligation and the time line for the execution. In case of non-execution of the warrant, a fine is imposed (Article 112).

If it is not possible to obtain the execution, a fine up to 100,000 CZK is imposed on the infringer, which is collected by the executing administrative authority that imposed it. In case of underperformed duty, the administrative authority determines the amount of the fine for the non-executed part (Article 129).

If there is the risk that somebody will attempt to impede or obstruct the performance or the execution of an action, the administrative authority may petition the police for assistance with enforcement (Article 135).

Appeal Procedure and Conditions

The following are the appellate/review procedures: (i) administrative appeal; (ii) ex officio administrative review; and (iii) judicial review of administrative decisions.

Administrative Appeal

The administrative procedure usually has two instances. CTIA's first instance authorises inspectors of regional inspectorates to make decisions. In case of appeal the head of the authority and the CTIA headquarters with its director review the decision. Once the decision (concerning cessation or sanctions) comes into force, an administrative action may be filed within two months from serving the decision.

General rules on appeal against an administrative decision provide for a 15-day time limit for an administrative appeal from notification of the decision or a 30-day time limit if the decision is not notified (Article 83 of the Administrative Code). An admissible appeal has suspensory effect except when otherwise provided by the Statute. The authority may remove the suspensory effect if it is in the public interest, if there is risk of serious harm and if one of the parties requires that the decision is immediate enforceable. The removal of the suspensory effect of the appeal must be justified and it will be included in the appeal decision (Article 85 of the Administrative Procedure Code). If no appeal is lodged, the decision becomes final. The appeal must be lodged with the administrative authority that issued the decision (Article 86).

Ex officio Administrative Review

The Administrative Procedure Code provides for a revision procedure (Article 94). The revision may be initiated *ex officio* when a decision is enforceable and when there are well-founded doubts whether the decision complies with applicable rules and regulations. The revision procedure may be initiated even where such decision is enforceable on a preliminary basis (where the suspensory effect of an appeal was removed), but is not yet final. If an appeal is lodged at the same time as review proceedings, the proceedings are joined under the appeal. The administrative authority that is higher than the one that adopted the decision may also conduct an *ex officio* review. A review is always started *ex officio* even if one of the parties to the proceedings requests it (Article 94(1)). The scope of the review under Sub-part IX is to evaluate if the decision of the authority was rendered contrary to legal regulations (Article 95).

Judicial Review

Judicial review of an administrative decision is possible before the Administrative Court. The Administrative Court has two possibilities: (1) to confirm an administrative decision or (2) to quash a decision and refer a case back to the administrative authority of first or second instance. If the Court quashes a decision of the

second instance, the first instance decision stands but remains suspended due to pending administrative appeal. Judicial procedure may also have two instances according to the Judicial Administrative Procedure Code.

2.1.5.3 CONCLUSIONS

In view of the CPC Regulation, many different Acts were amended in the Czech Republic. Contrary to other Member States where consumer protection legislation was consolidated into a single act (e.g. a Consumer Code) covering also cross-border cooperation, the relevant provisions are fragmented among various acts and various authorities in the Czech Republic. This may create difficulties when identifying the provisions applicable to infringements as well as the authority competent to tackle them. There is an obligation for the CTIA to inform the other authorities when, it emerges that the infringement is competence of another authority during the investigation. However, no more detailed provisions seem to exist. In our opinion, a joint supervisory committee on the model of the Consumer Protection Partnership (CPP) introduced by the UK reform to coordinate the actions of various enforcers would be useful (Chapter 2.1.7.3)

All public authorities apply the Act on State Control and the Administrative Procedure Code that will grant consistency on how enforcement is approached. However, better coordination is advisable to ensure that unfair commercial practices are effectively tackled.

There are no particular provisions for the cooperation under the CPC Regulation. In some cases, the CPC Regulation was implemented with direct references to the CPC Regulation itself. The lack of national provisions regulating the powers applicable to cross-border infringements may create difficulties, for example with regard to allocation of the cases and the exchange of information between competent authorities.

2.1.3 FRANCE

2.1.3.1 INTRODUCTION

The main legislation on consumer protection in France is the *Code de la Consommation* (hereinafter "the Code"), which covers all commercial practices towards consumers. The Code implements EU legislative acts protecting consumers under a single *corpus* of rules.

The Direction générale de la concurrence, de la consommation et de la répression des fraudes (hereinafter "the DGCCRF") is the body in charge of enforcing the Code. The DGCCRF is an administrative department of the Ministry of the Economy and Finances.

The DGCCRF is competent for all EU legislative acts mentioned in the Annex to the CPC Regulation. For applicability and enforcement of 90/314/EC, the competence is shared with the *Direction du tourisme*, which is a directorate under the French Minister of Economy.

The DGCCRF has the powers set forth in the CPC Regulation. A new legislation⁵⁵ was recently adopted that modernised existing legislation by increasing consumer protection and the powers of the DGCCRF, as well as introducing the possibility for the DGCCRF to impose fines on infringers.

The Loi No 2014-344 du 17 mars 2014 extended powers to DGCCRF officials to seek and ascertain infringements to the Code, including in the field of inspections and seizures as well as injunctions and court actions.

In particular the law introduces some relevant provisions:

- New powers and sanctions available for the competent national authority;
- New competence for the DGCCRF to pursue infringements related to distance selling of financial services with a new injunction power against defaulting traders;
- New procedural rules to grant adversarial proceedings in transactions with infringers;
- New investigation powers:
- New administrative sanctions as an alternative to criminal sanctions for violating certain provisions of the Consumer Code;
- Updating and increasing criminal sanctions, whose amounts had not been updated since 1978, to ensure deterrence.

The Code contains substantive and procedural rules for enforcing consumer protection. The procedural rules are complemented by the procedural rules of the Judicial Code. The Code also introduces a simplified judicial procedure for violations, which are below a certain threshold.

The judicial procedure for violating the Consumer Code is, in some cases, governed by administrative law, while in other cases it is regulated by civil and/or criminal law.

2.1.3.2 CEASE AND DESIST ORDER

Competent Authority

Under Article L-141 VI, the DGCCRF may, after having informed the prosecutor, act before the Civil Court to obtain a cease and desist order (*pouvoir d'action en cessation*).

Infringements covered by cease and desist orders

⁵⁵ Loi n° 2014-344 du 17 mars 2014 relative à la consommation, Journal officiel n° 0065 du 18 mars 2014.

The cease and desist order may be used against infringements to all provisions of the Consumer Code. Under Article L-141 VI, the cease and desist order may be used to order the cessation of all violations to provisions of Books I, II and III of the Consumer Code. The cease and desist order may be used to suppress unfair terms.

However, according to the general policy the DGCCRF, the power of injunction and the action before the Civil Court for a cease and desist order is the preferred tool for tackling infringements. On the other hand, cases where consumer harm is assessed as particularly serious or in case of repetitive infringements, criminal law proceedings would be the privileged tool (and subject to case-by-case decision). For example, this is the case for aggressive commercial practices since, in this case, the practice must be analysed concerning the victim and with regard to a single practice ⁵⁶.

At present, the DGCCRF may apply to the Civil Court to request an order against a professional to remove unfair terms from his contracts.

The Loi 17 mars 2014 modified Article L 141-1 of the Consumer Code, by adding a new paragraph allowing the DGCCRF to request the Civil or Administrative Court, also with an injunction, to remove unfair terms in contracts and have them declared void and unwritten when drafted by the same professional, and imposing the publication of the judgement on the professional at his own expense.

Under Article L 141-1-2, the DGCCRF may request judicial cease and desist orders for all violations of the Consumer Code. Under the new formulation of the Article, provisions related to judicial cease and desist orders are applicable when another competent national authority requests the DGCCRF to provide assistance under the CPC Regulation.

Competence Ratione Materiae

Article L-141 VI provides for the competence of the Civil Courts, which will be competent according to the general provisions of the Judicial Code.

For the competence *ratione materiae*, the *juge de proximité* is competent for claims below the threshold of EUR 4,000. For claims ranging between EUR 4,000 and EUR 10,000, the Court of First Instance (*Tribunal d'Instance*) is competent. The Tribunal of Grand Instance is competent for claims exceeding EUR 10,000.

Competence Ratione Loci

Article 42 of the Code of Civil Procedure introduces the territorial competence of the jurisdiction of the defendant (*actor sequitur forum rei*). When multiple defendants are involved, the applicant may choose the jurisdiction of one of the defendants. If the domicile is unknown, the applicant may choose the jurisdiction where he resides or another at his choice.

When a defendant is a legal entity, the jurisdiction is that of the place where it has its legal office.

Article 46 provides some alternatives to Article 42, which may be relevant for consumer protection. On contracts, the applicant may choose the jurisdiction of the residence of the defendant, the jurisdiction of the place where the product was delivered or where the service was provided.

For non-contractual obligations, the jurisdiction is the place where the damage occurred or where the effects were suffered.

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⁵⁶« Le pouvoir d'injonction du V et les pouvoirs d'action devant une juridiction civile (VI) n'apparaissent pas réellement adaptées à l'infraction de la pratique commerciale agressive. Celle-ci doit en effet être appréciée in concret, en considération de la personne victime, à l'occasion d'un acte isolé. Ce sera également une infraction instantanée qui nous sera rapporté, après qu'elle aura déjà été commise. Enjoindre le professionnel de cesser la pratique aura peu de sens dans ce cas. Faire prononcer la cessation de la pratique par un juridiction civile n'aura pas davantage » DGCCRF, Note de service n° 2009-07 du 29 janvier 2009.

Burden of Proof

The Consumer Code does not contain any particular provision on the burden of proof. Consequently, the cease and desist order follows the general rules provided by Book I Section IV and Title VII of the Code of Civil Procedure.

Under Article 9, each party must provide evidence supporting their request. If the Judge deems it necessary, he will request the parties to submit evidence according to the means of proof provided by the Code of Civil Procedure. If one of the parties refuses to comply with an order of exhibition by the Court, the Judge may draw the conclusions he deems most appropriate.

Article 133 of the Judicial Code provides the possibility, for one of the parties, to request the Court to issue an order to the other party to produce relevant documents.

Concerning means of proof, the Code of Civil Procedure admits all evidence, although written evidence has priority. Under Article 1341 of the Civil Code, witness evidence is not admissible against a written document authenticated by a public notary or private deed.

However, in commercial litigation, the Civil Judicial Code is flexible concerning the hierarchy and limits to evidence, and commercial conduct and acts may be proven with all evidence unless they contradict the law (Article 109 of the Commercial Code).

Procedural Safeguards

The cease and desist order is a court proceeding. Consequently the Code of Civil Procedure protects procedural safeguards and the "equality of arms". As a main principle, Article 132 of the Code of Civil Procedure requires that each document submitted by a party must be transmitted to the other to permit the other party to reply.

> Statute of Limitations

French provisions regarding the statute of limitations for the public authority to act as regards an infringement to the legislation depend on if the infringement belongs to the criminal scope or if it is punishable with an administrative sanction. If non-compliance with legislation is punished with a criminal sanction, the deadline when the public authority may act depends on the level of the sanction.

It may vary from 1 year for the first level of fines (contraventions) to 3 years for the infractions (délits).

The new provision in the Loi 17 mars 2014 provides deadlines for administrative sanctions: the deadline is one year for fines less than EUR 3,000 for natural persons and less than EUR 15,000 for legal persons. If the fines are over those amounts (EUR 3,000 for a natural person and EUR 15,000 for a legal person), the deadline is extended to 3 years.

Proceedings

The proceeding follows the general rules of the Code of Civil Procedure. Before the *Tribunal de grande instance*, an instruction phase ("mise en état") must be conducted to prepare the case for trial, unless the case is immediately ready to be heard by the Tribunal, which is very rare. The purpose of the instruction phase is to enable the parties to exchange written briefs and evidence under the control of a Magistrate. The role of this Magistrate is to ensure that the case moves forward and that each party has had the opportunity to analyse and discuss the arguments raised and evidence produced by the other party. This magistrate is therefore empowered to settle disputes relating to the disclosing evidence, to schedule hearings for filing briefs and to issue injunctions if the preparation of the case does not move forward.

Once the case is ready for trial, a pleading hearing is scheduled. In view of this hearing, each party submits a pleading file ("dossier de plaidoirie"), which encompasses copies of all the procedural deeds (i.e. the summons, as well as all the briefs exchanged between the parties), and all evidence produced.

However, in case of particularly urgency, when it is necessary to stop the act of omission that constitutes the alleged infringement, the DGGCRF may request interlocutory proceedings (*ordonnance de référé*), pursuant to Article 484 Code of Civil Procedure

The *référé* is an interlocutory proceeding with short procedural terms. The requesting party may introduce the request in the days that are reserved for the interlocutory proceedings by the competent Court *ratione loci* (Article 485). The Court will assign the defendant a term to prepare his defence. The decision adopted by the judge is immediately enforceable, but the Court may set a caution that the plaintiff must pay if the decision is overruled in the appeal proceedings. The decision may be appealed, unless the First Presiding Judge of the Court of Appeal issued it as a "last resort" decision (Article 490). The deadline for the appeal is 15 days from when the decision is served.

The Code of Civil Procedure provides for requesting a temporary ex parte decision (*ordonnance sur requête*) when the applicant is not entitled to appeal the adverse party (Article 493 Code of Civil Procedure).

Prior to summoning the defendant, the claimant is required to file a unilateral writ called "requête" before a single Judge called "juge des requêtes" explaining the urgency and requesting an authorisation to benefit from these accelerated proceedings. When the Magistrate is satisfied with the urgency of the matter, he delivers an order ("ordonnance") allowing the claimant to serve the summons to the opposing party to appear before the Tribunal at a specific date for the hearing. Under Article 494 of the Code of Civil Procedure, the request must be motivated and must precisely indicate the evidence and the competent Court. Accordingly, since cases are supposed to be heard on specific dates, all arguments and claims must be set out in the writ of summons, to which all supporting evidence is attached, so that the defendant may examine all elements and build up a "one shot" response in view of the hearing.

The decision is immediately enforceable but the adverse party (the professional) may appeal the decision.

Appeal and Conditions for the Appeal

Article 542 of the Code of Civil Procedure regulates the appeal of the judgement issued in the first degree. All decisions may be appealed if no evidence is provided to the contrary. The appeal is presented before the jurisdiction superior to the one that decided the case in the first degree, i.e. the Court of Appeal for the decision of the *Tribunal de Grand Instance*.

As provided by Article 561 of the Code of Civil Procedure, the appeal performs a complete re-examination of the factual, as well as the legal, aspects of the case. The procedure is similar to the one that applies in first instance; the case is prepared for the trial during an instruction phase, which is conducted under the aegis of a *Conseiller de la mise en état*. The parties are only prohibited from filing new claims before the Tribunal, unless such claims relate to the same purpose. Excluding that limitation, the parties may produce new evidence and exchange written briefs until the case is ready to be heard. Then a pleading hearing is scheduled.

The appeal must be introduced within 30 days from serving the judgement.

2.1.3.3 SELF-MANAGED ADMINISTRATIVE PROCEEDINGS

Competent Authority

The DGCCRF is the competent authority for public enforcement of the Consumer Code. The DGCCRF is competent to receive consumers' first complaints. Consumers may contact the territorial department of the DGCCRF via website or in writing. The DGCCRF as a rule does not deal with individual consumer complaints unless the complaints provide a basis for initiating an investigation and subsequent follow-up to stop an infringing practice (protection of collective consumer interests).

Under the 2012 Report, the DGCCRF receives around 10,000 complaints each year. After examining a complaint, the DGCCRF may suggest that the consumer contact a mediation service to try to amicably resolve the issue.

Competence Ratione Loci, Materiae and Personae

DGGCRF has regional offices competent for the investigation of the infringement under the supervision of the central office. There are *directions régionales des entreprises, de la concurrence, de la consommation, du travail et de l'emploi-*DIRECCTE in each region, including the *outre-mer*. The DIRECCTEs are in charge of the investigation in the region of their competence. At the level of "departments", there are the Directions Départementales Interministérielles (DDI), which gather several state inspectorates among which the DGCCRF investigators.

Investigative Powers

The DGCCRF has the investigative powers provided by the Commercial Code for antitrust investigations.

Article L-141 refers to Articles from L. 450-1 to L. 450-4, L. 450-7, L. 450-8, L. 470-1 and L. 470-5 of Code of Commerce for the powers of investigative agents. L.141-1 also provides some powers to the agents.

The DGCCRF may carry out ordinary investigations (Article L 450-3) for which officials may access business premises to request copies of business documents and request information. Agents may also require the assistance of an expert in order to provide an expert opinion. Agents may also request that the professional appear at the DGCCRF offices for questioning.

Should the professional offer resistance during the inspection of the agents, the professional may be fined up to EUR 7,500 and, in the most serious cases, sentenced to six months imprisonment. It is worthwhile noting that case law has adopted a broader definition of resistance to inspections, since the French Supreme Court considered integrating the offence of resistance with the fact of hiding some parts of transmitted documents from the agents⁵⁷.

The DGCCRF may carry out judicial investigations (Article L 450-4) at business premises and at private dwellings and seize documents with a warrant obtained from the *juge de la detention et des libertés*. Inspection under warrant must be carried out in the presence of the local police.

According to Article L 141-1 II, the judicial investigation is not possible for a list of violations indicated in the second section of the Article. Unfair terms⁵⁸ are among the practices for which judicial inspections are not allowed.

Under Article L 450-2 of the Code of Commerce, officials must prepare a report of the investigation and a signed copy of the report must be left with the trader and one copy transmitted to the competent authority.

The Article 52 of the Loi 17 mars 2014 introduces modifications to Article L 450-3 1 and allows the inspectors in charge of the investigation to obtain information on the identity of controlled individuals. Should they refuse to reveal their identities, the inspectors may appeal to the competent judicial police in that territory to obtain information in compliance with the Code of Criminal Procedure.

The new Article L 450-3 2 added the possibility for inspectors to refuse to inform the infringer of their identity for the purposes of the investigation until the inspection's report is served.

The reform authorises an expert, appointed by the administration, to accompany and assist inspectors during an investigation and authorises inspectors to take information on documents and other elements without the need for the criminal police or administrative police to carry out any action.

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⁵⁷ Cf. Cass. 24 février 2009, No 08-84.10.

⁵⁸ II. Sont recherchés et constatés, dans les mêmes conditions qu'au I, à l'exception des pouvoirs d'enquête de l'article L. 450-4 du code de commerce, les infractions ou manquements prévus aux dispositions suivantes du présent code (...)4° La section 1 du chapitre II du titre III du livre Ier; (...)

Proceedings

A new Article L 141-1-1 of the Consumer Code introduced a new administrative injunction, and ceases and desist orders that the DGCCRF may use in place of the required cease and desist orders of the Civil Court.

The DGCCRF may, using adversarial proceedings, impose on the professional to comply with its obligations, and cease all illicit practices or remove the unfair term. Should the professional not comply with the order, the DGCCRF may impose a fine not exceeding EUR 1,500 for a physical person and not exceeding EUR 7,500 for a legal entity. If the infringement is a fifth-class criminal offence, it is punishable with administrative fines not exceeding EUR 3,000 for a physical person and not exceeding EUR 15,000 for a legal entity. For offences that are punished with criminal sanctions or administrative fines exceeding EUR 3,000 for a physical person and exceeding EUR 15,000 for a legal entity, the administrative fine is respectively EUR 3,000 and EUR 15,000.

Infringements that may be sanctioned with administrative fines are set out in the investigative report. Before adopting a decision, the DGCCRF informs the professional of the administrative fines against him, indicating his right to access the file and be assisted by an attorney. The trader has 60 days to submit his comments in writing to the DGCCRF and, if necessary, stand in a hearing.

Control over the investigation

According to the last paragraph of Article L 450-4, the judicial inspection and seizure may be the object of an appeal before the Court of Appeal of the district where the *juge des libertés* who issued the warrant is located. The appeal proceedings follow the rules of the Code of Criminal Procedure. The subject against whom the warrant was issued and the Public Prosecutor may file the appeal. The appeal must be introduced within 10 days from serving the inspection report and seizing inventory. The appeal does not have suspensive effects. The Presiding Judge of the Court of Appeal decides with an order that may be appealed before the Supreme Court.

Procedural Safeguards

The Code of Commerce, which disciplines the powers of the inspectors in investigating infringements of consumer protection legislation, does not provide particular procedural safeguards. In case of judicial investigation, the assessment of the judge over the request for a warrant and the presence of the local police are the main procedural safeguards for traders.

The new Article L141-1-2 – VIII introduced a new limit on the use of documents and information obtained during investigations:, documents obtained during the investigation that led to a procedure for administrative sanction can only be communicated to the person who is the recipient of the decision or his representative⁵⁹.

Burden of Proof

Under Article L 450 of the Code of Commerce, reports prepared during inspections and investigations are proof to the contrary.

According to Article L 141-1 VI, agents may not be prevented from obtaining business secrets and confidential documents during the investigation phase.

Under Article L 450 -7 of the Code of Commerce, which is also applicable in consumer protection investigations, DGCCRF officials may access information from other public services without professional secrecy preventing them from obtaining such.

Article L 141-1 3 allows the DGCCRF to transmit documents and information collected during investigations and inspections to other authorities within the context of cooperation under the CPC Regulation. This includes a wide range of information that prohibits the professional from opposing its transmission and the transmission of business secrets.

⁵⁹ VIII. — Les documents recueillis et établis à l'occasion de la recherche et de la constatation d'un manquement ayant donné lieu à une procédure de sanction administrative ne sont communicables qu'à la personne qui en fait l'objet ou à son représentant.

Opening and closing of the investigation

Once the investigative phase is closed, the DGCCRF is responsible for notifying the injunction to the trader.

> Undertakings, Commitments, Settlement

Article L 141-1 VII provides the possibility for agents in charge of the investigations to issue a warning (administrative injunction) to the infringer to comply with the obligations and cease the act or omission. No mention is made on possible undertakings offered by the trader.

The request to comply is an adversarial procedure and requires that the infringer be allowed to present his replies. The DGCCRF must give the infringer a reasonable deadline to comply with the imposed undertakings.

Decision

Under the new Article L141-1-2-IV, the administration is required to notify the professional of the proposed sanction against him in writing before taking any decision, stating that (i) the administration may examine documents, (ii) that the professional may request legal assistance of his choice, and that (iii) professional may submit, within sixty days, written observations and, where appropriate, oral observations. After this period, the administrative authority may, by reasoned decision, impose the fine. The decision issued by the administrative authority may be published.

Under the new Article L 132- 2, the injunction to remove the professional's unfair contractual terms or contractual offers may be published according to the conditions that will be determined by State Council decree.

Administrative Fines

The Consumer Code did not formerly provide for administrative fines. The Loi 17 mars 2014 introduces new administrative fines that aim to reinforce the DGCCRF's powers.

Specifically, the new legislation introduces administrative fines for violating the obligation of pre-contractual information, the obligations on advertising prices, and distance selling provisions.

In case of multiple administrative sanctions against the same infringer for the same proceedings and in case of additional penalties, the global amount cannot exceed the statutory limit for criminal sanctions. In case of additional administrative fines against the same professional for the same proceedings, the statutory maximum applies.

> Statute of Limitations

Under the new Article L 465-2 II introduced by the Loi 17 mars 2014, administrative proceedings on sanction infringements expire after three years from the day the infringement is committed if no investigation is started.

The administrative action punishing infringements with fines exceeding EUR 3,000 for physical persons and exceeding EUR 15,000 for legal entities expires 3 years from the day the infringement is committed if no investigation is started.

For infringements punishable with sanctions not exceeding EUR 3,000 for physical persons and not exceeding EUR 15,000 for legal entities, the administrative action expires one year from the day the infringement is committed if no investigation is started.

> Legal Deadlines

At present, no legal deadlines are imposed. Under the new Article L 141-1-II introduced by the Loi 17 mars 2014, the administrative decision may be adopted only sixty days after the infringer receives the communication with the results of the investigation.

Follow up and monitoring compliance

Under the new Article L 141-1-2, if the infringer does not comply with an administrative cease and desist order within the deadline set by the DGCCRF, the fine will not exceed EUR 3,000 for physical persons and EUR 15,000 for legal entities.

Appeal Procedure and Conditions

No provisions are included in the Consumer Code. At present, the decisions adopted by the DGCCRF (under L-141-1 V, "administrative injunction") may be reviewed either in a second administrative stage ("recours gracieux": i.e. review by the same authority adopting the decision) or by an Administrative Justice Court in dispute proceedings The reform will give the authority the possibility to impose fines, it being understood that the same remedies would be available. The procedure for fine collection will be regulated by a decree from the State Council.

Exchange of information under CPC Regulation

Under Article L141-3, the provisions of the Code of Criminal Procedure or those relating to professional secrets do not preclude the DGCCRF from disclosing to other competent national authorities, under the conditions and terms of CPC Regulation, the information and documents held and collected by officials authorised to investigate and ascertain violations of the provisions within the scope of the CPC Regulation⁶⁰.

2.1.3.4 CRIMINAL PROCEEDINGS

Violations that constitutes criminal offences

The main categories of criminal offences included in the Consumer Code are: misleading commercial practices (Article L 121-1) and aggressive commercial practices (from Article L 122-11 to L 122-15); door to door selling (Articles from L 121-21 to L 121-29), sweepstakes (Article L 121-36) and the general category of abuse of dominant position (Article L 122-8).

Competence Ratione Materiae

Under Article 381 of the Code of Criminal Procedure, the competence for offences punishable with criminal sanctions exceeding EUR 3,750 or with imprisonment is assigned to the *Tribunel correctionnel*.

Under Article 521 of the Code of Criminal Procedure, the *jurisidiction de proximité* is competent for the first four classes of offences.

➢ Competence Ratione Loci

Under Articles 382 and 522 -1 of the Code of Criminal Procedure, the competent Court is that of the infringer.

Burden of Proof and related evidence requirements

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⁶⁰ Article L141-3 I. Les dispositions de l'article 11 du code de procédure pénale ou celles relatives au secret professionnel ne font pas obstacle à la communication, par les agents de la concurrence, de la consommation et de la répression des fraudes, selon les conditions et modalités du règlement CE n° 2006/2004 du Parlement européen et du Conseil du 27 octobre 2004, aux autorités compétentes des Etats membres de l'Union européenne d'informations et de documents détenus et recueillis dans l'exercice de leurs missions par les agents habilités à constater et rechercher des infractions aux dispositions entrant dans le champ d'application dudit règlement.

Articles 427 to 457 of the Code of Criminal Procedure discipline the burden of proof within the context of criminal proceedings.

The main principle is that, except where the law provides otherwise, offences may be established with any mode of proof and the Judge decides according to his personal conviction.

The Judge may base his decision only on evidence submitted during the proceedings and contradictorily discussed before him (Article 427).

Under Article 429, any report has probative value if it is regular in form, if the author acted while exercising his functions and reported on a matter within his jurisdiction concerning what he had personally seen or heard. All the minutes of questioning or hearings must include the questions to be answered.

Under Article 431, police officers, judicial police officials and judicial police officers with certain functions have the power, received through a special provision of the law, to record crimes in minutes or reports, and evidence to the contrary must be documented in writing or given by witnesses.

Special laws regulate matters giving evidence until the contrary is proven (Article 433). The DGCCRF's reports are included in this category.

The remaining articles relate to the rules applicable to the hearing of witnesses.

Once a public action is brought before the Court, under Article 397-2, if the Court considers the evidence insufficient, it may refer the file to the Public Prosecutor in order to carry out more investigations.

> Standing of the competent national authorities under the CPC Regulation in criminal proceedings

No provisions are included in the legislation. The DGCCRF transmits its reports to the Public Prosecutor. The DGCCRF is not represented during the trial but can be questioned by the judge to explain the case (general law).

Settlement and Proceedings

Article L 141-2 provides the DGCCRF with the power of settlement, under the control of the Court. In case of unfair and misleading commercial practices, the DGCCRF may propose a settlement to the infringer: if the infringer complies with the imposed undertaking, no jurisdictional proceedings will be initiated against him. In case of non-compliance with the undertakings, a public action is initiated against the infringer. The settlement requires the Public Prosecutor's approval.

Settlement is possible for offences that are not punished with a maximum sentence of 2-years imprisonment and for misleading commercial practices regulated by Article L 121-1 of the Consumer Code.

Under Article R 141-3 of the Consumer Code, the DGCCRF prepares a settlement proposal and forwards it the Public Prosecutor no later than three months from when the report that found the offence is closed. This proposal details the sum that the infringer will be asked to pay to the public purse, the deadline for payment and, if applicable, other obligations resulting from accepting the transaction.

When the Public Prosecutor agrees to the settlement proposal, the administrative authority notifies the infringer. The notification includes a statement specifying that if the infringer fails to pay the sum indicated in the proposal or if he does not comply with the obligations within the deadline, the Public Prosecutor will start a proceeding against him.

The infringer is given 30 days to respond. In case of acceptance, the infringer must return a signed copy of the proposal to the administrative authority. In the event that, at the end of the given period, the infringer refuses the proposal or does not respond, the administrative authority informs the Public Prosecutor.

The Public Prosecutor is also informed if the infringer has not paid the sum indicated in the proposal within the deadline, or did not meet the imposed obligations.

Under the DGCCRF, the amount to be paid in the settlement will depend on the context and gravity of the infringement, the size of the involved business and how the prosecutors' office approaches the issue. Under the DGCCRF, the settlement, in agreement with the Public Prosecutor, should only be used for small offences with impact on national territory and when there are no claims from victims who may constitute themselves as civil parties in the criminal proceedings.

Ordinary criminal proceedings are used for important offences that cause harm to public order and to victims, and when adverse publicity of the proceedings is considered an important element⁶¹

Under Article 27 of the Loi 17 mars 2014 reforming the Consumer Code, a copy of the investigation report must be transmitted to the trader with the proposal of settlement.

In case of referral to the Public Prosecutor, the general rules of the Code of Criminal Procedure are applicable. Articles 79 and 80 regulate the investigation. Criminal proceedings may be also started on the basis of a complaint with the constitution of civil party.

Once the DGCCRF refers the case to the Public Prosecutor and after the DGCCF investigations, the Public Prosecutor may ask to the police to investigate further for additional evidence or testimonies.

When facts are brought directly before the Judge, the Judge must immediately inform the Public Prosecutor and transmit the information. The Prosecutor may either require that the judge be informed of the proceedings or he may request opening a separate investigation. If the Prosecutor requests opening a separate investigation, the causes may be joined before the same judge. The prosecutor may also decide to open a separate investigation on new findings.

The Prosecutor has exclusive jurisdiction on monitoring the progress of the investigation until it is closed. When referring to Trial Court, the matter is filed, as appropriate, before the Local Court, Police Court, Criminal Court, Juvenile Court or the original competent Criminal Court.

The judge to whom the case is referred cannot indict the persons if there is no serious and concordant evidence proving their participation, as author or accomplice, in committing the offences.

Proceedings before the *Tribunal correctionel* follow the rules under Articles 381 to 486 on evidence, testimonies, discussions, third party constitution and judgment.

Procedural Safeguards

When criminal proceedings commence, there is a pre-trial discovery phase carried out by the *juge d'instruction*. The pre-trial investigation is compulsory for crimes and voluntary for offences (Article 79, Code of Criminal Procedure). However, only the Public Prosecutor may request a pre-trial investigation (Article 80). Under penalty of nullity, the pre-trial discovery panel cannot indict individuals against whom there is serious and concordant evidence that would make it likely for such individuals to have participated as author or accomplice in committing the offences. The *juge d'instruction* can indict only after hearing the responses of the charged individual or after having placed the charged individual in a position to respond with the assistance of a lawyer or, as provided by Section 116 on the first examination, as a witness in accordance with Articles 113-1 to 113-8 of the Code of Criminal Procedure.

Under Article 394 of the Code of Criminal Procedure, the prosecutor may request the charged individual to appear before the Court within a period not inferior to ten days and not exceeding two months, unless an express waiver of the charged individual is signed in the presence of his lawyer. The Public Prosecutor will notify the allegations brought against him and the place, date and time of the hearing. He must also inform the defendant that he must appear at the hearing with proof of income and tax notice or non-taxation. This

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 $^{^{61}}$ DGCCRF, Note de service n° 2009-07 du 29 janvier 2009, p. 13.

notification mentioned in the *procès-verbal* and transmitted to the residence of the charged individual has the value of a subpoena.

Articles 85 to 91 of the *Code de procedure pénale* (Code of Criminal Procedure) regulate the constitution of the civil party.

The Prosecutor initiates public actions against infringers upon receiving a file from the DGCCRF or following a complaint submitted by a consumer jointly with civil party constitution. The plaint with joint third party constitution is only possible when the consumer already filed a complaint before the Public Prosecutor and the Public Prosecutor informed the consumer of his intention not to proceed with the case or no reply was sent to the customer within three months. If the consumer uses this option, criminal proceedings are triggered. In this case, to prevent frivolous and reckless complaints, the complaint is admissible only for refusal to prosecute or for inactivity of the prosecutor or of the police (Article 85, Code of Criminal Procedure)⁶².

For complaints with civil action, the plaintiff must precisely set out the facts and the violation of the Code by the professional. The complaint must be filed with the Presiding Judge of the *Tribunal de Grand Instance* of the place of the professional. The Presiding Judge will refer the complaint to the competent *judge d'instruction*. The Judge in charge of the complaint will transmit it to the Prosecutor so that the necessary investigations may be carried out (Article 86 Code of Criminal Procedure).

The *judge d'instruction* requires the plaintiff to deposit a sum of money as a guarantee for the action. If the plaintiff requires legal aid, the deposit is not due (Article 88, Code of Criminal Procedure). The deposit of the sum is intended to prevent non-justified complaints and any abuse of rights. The deposit is returned to the plaintiff at the end of the proceedings only if the professional is found guilty. The deposit is a condition of effectiveness for the complaint, and the complaint becomes inadmissible when the deposit order is not complied with.

Court Decision

Following the police investigations requested by the prosecutor and the level of evidence in the proceedings, the professional may be found guilty or discharged.

Before adopting a decision, the Court refers to the Public Prosecutor in order to present an opinion (Article 469).

Sanctions

Criminal sanctions are indicated in Article L 213-1 for misleading commercial practices, L 122-12, L 122-13, L 122-14, and L 122-15 for aggressive commercial practices. Furthermore, there are many criminal sanctions in Book I and III of the Consumer Code.

Criminal sanctions are described in Capter 1.3.

Appeal

The decision of the *tribunal correctionnel* may be appealed before the competent Court of Appeal *ratione loci*.

⁶² Article 85 Code of Criminal Procedure « Toutefois, la plainte avec constitution de partie civile n'est recevable qu'à condition que la personne justifie soit que le procureur de la République lui a fait connaître, à la suite d'une plainte déposée devant lui ou un service de police judiciaire, qu'il n'engagera pas lui-même des poursuites, soit qu'un délai de trois mois s'est écoulé depuis qu'elle a déposé plainte devant ce magistrat, contre récépissé ou par lettre recommandée avec demande d'avis de réception, ou depuis qu'elle a adressé, selon les mêmes modalités, copie à ce magistrat de sa plainte déposée devant un service de police judiciaire.

Under Article 498 of the Code of Criminal Procedure, the appeal must be filed within 10 days from the public hearing if the defendant was present or from when the judgement is served if the defendant was absent.

Legal Deadlines

No express provisions are included in the Code. In criminal proceedings, the Court provides the deadlines for the parties.

Statute of Limitations

Under Article 8 of the Code of Criminal Procedure, the statute of limitations for offences that are punishable with imprisonment is three years (those qualified as "délits"), and one year for offences punishable only with fines (those qualified as "contraventions"). Definitions are set for each type of unfair commercial practice. Misleading commercial practices under Article L-121 (which implements the list in Annex I of Directive 2005/29/EC) are punished with a maximum fine of EUR 300,000 and up to two years' imprisonment, and are thus qualified as délits (Article L 121-6). The statue of limitations for sanctions due to criminal offences is five years from the day the sanction is pronounced when the offences is qualified as "délits" and three year when is qualified as "contraventions". The Consumer Code sets out the qualifications for each violation of consumer protection.

2.1.3.5 CONCLUSIONS

French legislation on consumer protection is characterised by the criminalisation of Consumer Code violations and by civil and criminal proceedings. The Loi 17 mars 2014 increased the power of the authority that can now impose administrative sanctions following an administrative injunction when infringements are verified without any submission to the Court. Civil and criminal proceedings remain a pillar of consumer protection in France and the DGCCRF remains competent for investigations, undertakings and settlements. The cease and desist order or the applicability of sanctions remains the competence of Civil and Criminal Courts. Both civil and criminal law proceedings rely on DGCCRF investigations and reports submitted by the authority have higher evidence value. The fact that, in principle, most proceedings initiated to enforce consumer protection laws are either criminal or civil law proceedings, and may last longer before the infringement is tackled to reduce the deterrence. The length of the proceedings and the fact that sanctions are not applicable until the decision is *res judicata* reduce the deterrence even if sanctions are higher than in administrative proceedings. It is in the light of the foregoing that the reform under adoption seeks to provide wider range of alternative options in terms of proceedings, which would enable the competent national authority to tackle more efficiently infringements by reducing the instance of retort to court proceedings.

The DGCCRF has extensive powers to investigate and stop infringements. However, resorting to criminal law proceedings remains relevant for an important number of areas. In this context, the various steps of the authority's actions are generally subject to judicial review (and in exceptional cases *ex ante* judicial authorisation): this may slow down the time lag between discovering an infringement and applying sanctions. On the other hand, it generally ensures the legitimacy of procedures and the possibility for the professional to submit his position in an adversarial procedure.

The new powers conferred by the reform on DGCCRF to impose fines within a very short period, will likely increase deterrence.

2.1.4 GERMANY

2.1.4.1 INTRODUCTION

Germany has an important tradition of enforcing consumer law through consumer civil law claims (i.e. private enforcement where consumer bodies play a major role).

The CPC Regulation takes into account the existence of national systems relying on decentralised private enforcement. In particular, Article 4(2) of the CPC Regulation provides for the possibility of designating bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements and Article 8(3) of the CPC Regulation allows competent authorities to instruct such bodies to take action on their behalf for the follow up to a cross-border enforcement request⁶³. These bodies can include private collective bodies such as qualified consumer organisations under national law.

The German system relies heavily on this mechanism of designation and the implementation law provides for an explicit provision by which designation is the default procedure. The competent authorities thereby take on a residual role, and become active only in the second line.

A designated party will not discharge all requests, as some may be incompatible with the designation criteria, such as effectiveness requirements. The BVL becomes active in second line when the action is divided into two stages. In a first administrative stage, the BVL makes decisions. Complaints against this decision can be brought in judicial proceedings.

Germany is therefore a hybrid enforcement system in the sense that a private body, such as a consumer organisation, becomes entrusted with the 'public' mandate received by the competent authority.

The designated private enforcement bodies may carry out cease and desist claims under the *Unterlassungsklagengesetz* (UKlaG) and the *Gesetz gegen den unlauteren Wettbewerb* (UWG).

The CPC Regulation is implemented through the EC Consumer Protection Enforcement Act (*EG-Verbraucherschutzdurchsetzungsgesetz* (VSchDG))⁶⁴. Germany's single liaison office for the purposes of Article 3 d) of the CPC Regulation is the Federal Office for Consumer Protection and Food Safety (*Bundesamt für Verbraucherschutz und Lebensmittelsicherheit* (BLV)). The BLV operates within the competence of the *Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz* (BMELV).

2.1.4.2 SELF-MANAGED ADMINISTRATIVE PROCEEDINGS

Competent Authority (to request and to issue the order)

Depending on the subject area at issue, different public authorities are appointed as competent authority within the meaning of Article 4 of the CPC Regulation. For the five Directives under scrutiny in the study ⁶⁵, the BLV is also the competent authority (§2 sentence 1 Nr. 1. a) VSchDG). Other competent authorities are designated for other directives within the scope of Regulation 2006/2004/EC.

The competent authority acts at the request of a competent authority from another Member State under Article 6 (request for exchange of information) or Article 8 (enforcement request) of the CPC Regulation, or in

⁶³Provided the conditions of Article 8.4 are complied with.

⁶⁴EG-Verbraucherschutzdurchsetzungsgesetz (VSchDG) of 21 December 2006, BGBl. I S. 3367. See also the preparatory legislative debate Drucksache 16/2930.

⁶⁵Directive 2005/29/EC on Unfair commercial practices; Directive 2000/31/EC on electronic commerce; Directive 97/7/EC on distance contracts Directive 90/314/EEC on travel, package holidays and package tours; and Directive 2002/65/EC on distance marketing of consumer financial services.

order to fulfil its tasks under Article 7 (exchange of information) and Article 9 (cooperation) of the CPC Regulation (see § 4 VSchDG).

Infringements that may be addressed and that are addressed through cease and desist orders

The powers of the competent authorities are enumerated in § 5 VSchDG. The competent authority shall take the measures necessary to establish, eliminate or prevent future intra-Community infringements of laws to protect the interests of consumers (§ 5 I 1 VSchDG).

The competent authority may require the responsible seller or supplier within the meaning of Article 3h) of Regulation EC No 2006/2004 to refrain from existing or future intra-Community infringements. (§ 5 I 2 Nr 1 VSchDG). This is the cease-and-desist order.

Next to the cease-and-desist order, the competent authority can take other decisions as well: it can oblige the seller or supplier to provide all the necessary information within a suitable period of time to be laid down (§ 5 I 2 Nr 2 VSchDG). Further it can require postal, telecommunications and media services to provide the name and address of a user (§ 5 I 2 Nr 3 VSchDG) and printouts of electronically stored data to be provided (§ 5 I 2 Nr 4 VSchDG). Generally, the competent authority is able to make executive orders required to enforce its powers under § 5 II (§ 5 I Nr 5 VSchDG).

The competent authorities' staff can examine any necessary methods of data retention belonging to the seller or supplier, and make ,copies, extracts or printouts or require that such be made (§ 5 II 1 Nr 1 VSchDG). It may further enter the premises, establishments and associated business premises of the seller or supplier during normal operating or business hours in as far as this is necessary to enforce its powers (§ 5 II 1 Nr 2 VSchDG).

Procedural Safeguards

At the administrative stage, duties of cooperation in providing information are set in § 5 and § 6 VSchDG. A safeguard against self-incrimination according to § 383 ZPO is recognised in § 5(3) VSchDG. Furthermore, some privacy requirements are set to protect traders in case of the publication of decisions of the competent authorities (§ 5 (4) VSchDG).

Time Frame/Legal Deadlines

There are no time frames provided for the actions of the competent authority. This is one of the reasons for which under certain conditions the delegation to a 'designated body' can be rejected. The statutory time limits for the proceedings under which designated bodies enforce the consumer protection legislation were seen as a risk to preclude a claim. In such circumstances, the competent authority would be expected to act on its own.

> Sanctions for Non-compliance

Regular decisions under (§ 5 I 2 Nr 2-4 VSchDG) can be subject to a fine under § 9 VSchDG, of up to EUR 10,000.

Under § 10 VSchDG, the enforcement of cease and desist orders are to be taken according to the regular rules for administrative actions. There is a maximal enforcement penalty of EUR 250,000.

Follow up and monitoring of compliance

Cease and desist orders under § 5 I 2 Nr 1 VSchDG may be published within three months in the *e-/Bundesanzeiger* (§ 5 (4) VSchDG).

Complaint Procedure and Conditions+

According to § 13 VSchDG, a complaint (*Beschwerde*) can be filed against measures undertaken by the competent authorities under § 5 § 1 sent 2 Nr. 1 (cease and desist order), § 4 (decision to publish) or 5 (correction of publication) or § 10 or § 11 (enforcement penalty and administrative fees).

Competence Ratione Materiae and Competence Ratione Loci of the complaint/appeal procedure

According to the motivation for the legislative draft, Civil Courts are competent because decisions according to §5 § 1 sent 2 Nr. 1 VSchDG are meant to sanction violations of civil law. The civil jurisdiction thus ensures that the substantive competence of the Ordinary Courts in those subject matters is used⁶⁶. The competence for complaints lies with the Ordinary Courts at the regional level (*Landgericht*) of the seat of the competent authority (§ 13 (4) VSchDG).

▶ Time Frame/Legal Deadlines

Time limits and formal requirements for complaints are laid down in § 15 VSchDG. The complaint must be filed in writing with the competent authority within one month and within the time limit the Court of Appeal must receive the appeal. Generally, a complaint has suspensive effect, although exceptions can be granted. (§ 14 VSchDG).

Procedural Safeguards

Parties to the proceedings are the appellant, the competent authority, and persons and associations whose interests are significantly affected (§ 16 VSchDG). There is a statutory requirement of legal representation (§ 17). The decision must be reasoned (§ 20). § 21 grants access to records to the appellant and the competent authority, which, however, can be limited, for example, on the grounds of the confidential nature of documents.

Burden of Proof

The decision is taken in oral proceedings (§ 18), in which the Court explores the merits of the case *ex-officio* (§ 19). The Court decides on the basis of a free valuation of evidence. The decision can only be based on evidence on which the parties had the opportunity to be heard. The decision on the complaint is taken in compliance with § 113 and 114 of the Verwaltungsgerichtsordnung.

Appeal Procedure and Conditions

An appeal of law to the federal Court of Justice against decisions taken by the Regional Court is possible under the conditions of § 24 VSchDG. The appeal must be based on points of law within a time period of one month (§ 26 VSchDG).

2.1.4.3 JUDICIAL PROCEEDINGS BY DESIGNATED BODY

Competent Authorities

As outlined in § 3.4.1, Germany uses the possibility granted in Article 8(3) CPC of "instructing a body designated in accordance with the second sentence of Article 4(2) as having a legitimate interest in the cessation or prohibition of intra-Community infringements to take all necessary enforcement measures available to it under national law to bring about the cessation or prohibition of the intra-Community infringement on behalf of the requested authority."

The designated private enforcement parties can effect cease and desist claims under the *Unterlassungsklagengesetz* (UKlaG) and the *Gesetz gegen den unlauteren Wettbewerb* (UWG). According to § 7 para 1 VSchDG, the competent authority, prior to taking a measure according to § 5 para 1 sent 2 Nr 1

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⁶⁶ See Drucksache 16/2930, ,Begründung zu § 13', p 24.

VSchDG, shall instruct a "beauftragter Dritter/designated third party" named in § 3 para 1 sent 1 Nr 1–3 UKlaG or § 8 para 3 Nr 2-4 of the UWG, to effect a cessation of the cross-border infringement pursuant to § 4a UKlaG, also in conjunction with § 8 para 5 sent 2 UWG. The two bases for claims under UKlaG and the UWG are seen to be parallel actions, so that one does not preclude the other⁶⁷.

The conditions for instruction of private enforcement bodies are detailed in § 7 para 2 VSchDG. It must be ensured that the tasks are duly fulfilled (Nr. 1) and that the designated third party agrees (Nr. 2).

The competent authorities can conclude framework agreements that institute a general instruction (§ 7 para 3 VSchDG). Such a framework agreement was concluded between the BVL, the Federation of German Consumer Organisations (vzbv) and the Centre for Protection against Unfair Competition (Wettbewerbszentrale)⁶⁸. The vzbv is the umbrella organisation of 42 consumer organisations. The Centre for Protection against Unfair Competition is Germany's largest association of companies and trade associations from all sectors of industry.

Under the framework agreement, the BVL provides the designated third party with the information by electronic means (§ 3). If a request is rejected, the rejection must be reasoned and undertaken within two working days (§ 4). The designated third party keeps the BVL informed of all the measures it intends to undertake (§ 5). Designated third parties warrant that they will duly fulfil the tasks incumbent on them; a designation is only admissible if the cease and desist order can be effected in an equally efficient way as if it were undertaken by the competent authority (§ 6). § 7 lays down data protection requirements.

Private third parties who have been instructed according to Article 4(2) and Article 8(3) of the CPC Regulation do not have the same enforcement powers as the competent authorities under § 5 VSchDG⁶⁹. They do not have their own investigative powers⁷⁰.

They exclusively rely on the powers conferred upon them in the *Unterlassungsklagengesetz* and the *Gesetz gegen den unlauteren Wettbewerb*.

2.1.4.4 CEASE AND DESIST ORDERS FROM DESIGNATED THIRD PARTIES

Designated third parties effect cease and desist claims under the *Unterlassungsklagengesetz* (UKlaG) and/or the *Gesetz gegen den unlauteren Wettbewerb* (UWG).

2.1.4.4.1 The Injunctions Act (Unterlassungsklagengesetz, UKlaG)⁷¹

Under the Injunctions Act, actions for injunctions or retractions (*Unterlassungs- und Widerrufsklagen*) are regulated.

Competent Authority (to request and to issue the order)

According to § 3 I 1 Nr 1–3 UKlaG, actions for injunctions or retractions are available for 'qualified entities' (Nr. 1) 72 , Wirtschaftsverbände (Nr. 2) 73 , and Industrie- und Handelskammern und Handwerkskammern (Nr.

Köhler, Köhler/Bornkamm, UWG 31. Auflage 2013 ,UWG § 12 Anspruchsdurchsetzung, Veröffentlichungsbefugnis, Streitwertminderung, n 7.13.

⁶⁷ Micklitz, Münchener Kommentar zur ZPO 4. Auflage 2013, Rn 1-6.

⁶⁸ BAnz Ausgabe Nr 90 v 19.6.2008, S 2145.

⁶⁹ See Drucksache 16/2930 p 21.

⁷¹ Where still up to date, the translations of the provisions are based on http://www.eu-consumer-law.org/legislation117_en.pdf.

3)^{74.} This enumeration is exhaustive, yet the number of potentially entitled claimants is indefinite as long as they belong to these categories. The relationship of the claimants' respective claims relative to each other is not regulated⁷⁵.

The persons entitled to such claim are those cited in § 3 I 1 Nr 1–3 UKlaG. This list of entities is identical to the one of the UWG. In 2011, the *Kammergericht*⁷⁶ held that the procedural standing (*Prozessführungsbefugnis*) was to be determined on the basis of the criteria listed in § 3 I 1 UKlaG. The Court found that an instruction by the BVL on the basis of §7 (1) VSchDG was not sufficient to establish the procedural standing of the claimant, but rather that the conditions laid down in the article had to be tested. Effective from 14. 2. 2012⁷⁷, a new addition to §4a now clarifies that parties instructed according to § 7 (1) VSchDG have an irrefutable presumption of being a party entitled to pursue injunction claims⁷⁸.

Infringements that may be addressed and that are addressed through cease and desist orders

§ 4a UKlaG⁷⁹ regulates the claims for injunctive relief based on intra-Community infringements of consumer protection laws as enumerated in Article 3 of the CPC regulation. It grants a right of injunctive relief, provided that it is not an abuse of rights (para 1).

The conditions⁸⁰ are the following. There must be a violation against one of the legal acts named in the CPC Regulation. Secondly, there must be a cross-border violation. The violation does not need to be fault-based, but the collective interest of consumers must be damaged. This requires an element of collectivity, although violations against a single consumer may be sufficient if characterised by repetition. A single contractual partner of a supplier is not sufficient⁸¹. In addition, there must be the danger of repetition or of a first commission of a violation⁸². The question whether there is a cross-border violation is assessed under the applicable law, a question determined through the relevant qualification under international private law qualification.

According to § 5 UKlaG, apart from specifically regulated issues, the general rules of the Code of Civil Procedure are applicable, as well as § 12 paras 1, 2, 4 and 5 UWG (i.e. notice requirements, and conditions for lowering the value of the dispute).

⁷³ 2. rechtsfähigen Verbänden zur Förderung gewerblicher oder selbständiger beruflicher Interessen, soweit sie insbesondere nach ihrer personellen, sachlichen und finanziellen Ausstattung imstande sind, ihre satzungsgemäßen Aufgaben der Verfolgung gewerblicher oder selbständiger beruflicher Interessen tatsächlich wahrzunehmen, und, bei Klagen nach § 2, soweit ihnen eine erhebliche Zahl von Unternehmern angehört, die Waren oder Dienstleistungen gleicher oder verwandter Art auf demselben Markt vertreiben und der Anspruch eine Handlung betrifft, die Interessen ihrer Mitglieder berührt und die geeignet ist, den Wettbewerb nicht unerheblich zu verfälschen,

⁷⁴ 3.den Industrie- und Handelskammern oder den Handwerkskammern.

⁷⁵ Köhler/Bornkamm, UWG, 31. Auflage 2013 Rn 1-6.

⁷⁶ KG, Decision of 01.06.2011, 24 U 111/10.

⁷⁷ Inserted by law of 6. 2. 2012 (BGBI. I S. 146).

⁷⁸ As also noted by the BVL: "Infolge einer Ergänzung von § 4a des Unterlassungsklagen Gesetzes (UKlaG) konnten Schwierigkeiten bei der privaten Rechtsdurchsetzung behoben werden. Die Anspruchsberechtigung von vom BVL nach § 7 Abs. 1 VSchDG beauftragten Dritten wird nunmehr unwiderleglich vermutet. Rechtsfähige Verbände zur Förderung gewerblicher oder selbständiger beruflicher Interessen, die vom BVL nach § 7 Abs. 1 VSchDG beauftragt sind, müssen also nicht mehr nachweisen, dass ihnen eine erhebliche Zahl von Unternehmen angehört, die Waren oder Dienstleistungen gleicher oder verwandter Art auf demselben Markt vertreiben und der Anspruch eine Handlung betrifft, die Interessen ihrer Mitglieder berührt und geeignet ist, den Wettbewerb zu verfälschen. BVL, Berichte zum Wirtschaftlichen Verbraucherschutz 2011/2012", See http://www.bvl.bund.de/SharedDocs/Downloads/091 WVS/WVS Bericht 2011 2012.pdf? blob=publicationFile&v=2, p 24.

⁷⁹ Inserted into the UKlaG by Gesetze über die Durchsetzung der Verbraucherschutzgesetze bei innergemeinschaftlichen Verstößen of 21.12.2006.

⁸⁰ See Köhler/Bornkamm, UWG, 31. Auflage 2013 rn 4.

⁸¹ BT-Drucksache 16/2930 p 26.

⁸² See Köhler/Bornkamm, UWG, 31. Auflage 2013 rn 5.

▶ Competence Ratione Materiae and Competence Ratione Loci

The competent Courts are laid down in § 6 UKlaG. The Regional Court in whose district the defendant has his place of business or domicile has exclusive competence for actions under the Act. If the defendant has neither a place of business or a domicile in Germany, the Court at the place of stay in Germany shall be competent or, failing that, the Court in (Nr. 1) whose district the provisions of standard contract terms that are void under §§ 307 to 309 of the Civil Code were used, (Nr. 2) infringements of consumer protection laws committed, or (Nr. 3) § 95b para 1 of the Copyright Law was violated.

An important judgment was rendered in KG, judgment of 01.06.2011 - 24 U 111/10, appeal of LG Berlin, judgment of 01.06.2010 – LG BERLIN Aktenzeichen 16O52508 16 O 525/08.

The injunctive claim under §4a UKlaG was held to contain both material and procedural elements. German Courts follow the *lex fori* principle in applying national procedural law, even where according to the principles of international private law, foreign law would be the applicable material law. In this judgment the Court held that the standing of the private enforcement bodies entitled to claims was a question of the procedural power to claim (*Prozessführungsbefugnis*) and therefore to be determined according to national criteria.

The practical relevance has now been limited due to the presumption of procedural power to claim for designated third enforcement bodies inserted in §4a UKlaG.

Burden of Proof

The general rules of the Civil Procedure Code (ZPO) apply. The procedure will be subject to the principles of party disposition and presentation.

Procedural Safeguards

The general rules of the Civil Procedure Code (ZPO) apply. Special provisions are added in relation to the request of information. § 13 UKlaG regulates the right of eligible bodies to information by providing that bodies and fair trading associations eligible under § 3(1)(1 and 3) can request postal, telecommunications, television or media services to provide them with the name and address for service of a party involved in such operations if it declares in writing that this information is necessary to assert a right under § 1 or § 2 and cannot be obtained elsewhere. This provision mirrors the right to information of the competent authority under § 5 VSchDG.

Statute of Limitations

The statute of limitation is determined under § 195 BGB and the time limit is set at three years. According to § 199 BGB, it starts to run with the end of the year in which the claim arose or the claimant did or would have had to obtain knowledge thereof.

Appeal Procedure and Conditions

The rules for appeal are contained in ZPO Book 3 section 1 on Appeal (§§ 511-541 ZPO). Appeal requires that the value of the claim exceeds EUR 600 and must satisfy the condition that a decision on appeal is necessary for purposes of unity and development of the law. The revision is regulated in Book 3 section 2 (§§ ZPO 542-566 ZPO).

Sanctions for Non-compliance

No special rules apply; the rules of the ZPO apply. § 890 ZPO establishes a maximum enforcement penalty of EUR 250,000 and imprisonment for up to two years.

Follow-up and Monitoring of Compliance

§ 7 UKlaG grants a publishing authorisation to the applicant who may, on request, be authorised to publish the operative part of the judgment, identifying the defendant against whom judgment was given.

2.1.4.4.2 Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG)

In addition to the available actions under the Injunctions Act, claims for elimination, cessation and desistance (*Beseitigung und Unterlassung*) may be possible under the Act Against Unfair Competition where the latter is deemed to be pertinent. This means that the UWG provides for both an injunction against future violations (*Unterlassung*, i.e. cease and desist) as well as claims for violations that already occurred (*Beseitigung*, i.e. elimination).

Competent Authority (to request and to issue the order)

The parties eligible for instruction under § 7 (1) for the purposes of the UWG are listed in § 8 para 3 Nr 2-4 UWG. UWG claims under subsection § 8 para (1) vest in competitors (Nr. 1) and – like the UKlaG – in 'qualified entities' (Nr. 2), Wirtschaftsverbände (Nr. 3), and Chambers of Industry and Commerce or Craft Chambers. (Nr. 4).

Infringements that may be addressed and that are addressed through cease and desist orders

§ 8 (1) UWG on elimination, cessation and desistance reads (*Beseitigung und Unterlassung*): "Whoever uses an illegal commercial practice pursuant to § 3 or § 7 can be sued for elimination, and in the event of the risk of recurrence, for cessation and desistance. The cessation and desistance (injunction) claim shall already pertain in the event of the risk of an infraction against § 3 or § 7"83.

The prohibitions of unfair commercial practices in § 3 UWG comprise (1) Unfair commercial practices suited to tangible impairment of the interests of competitors, consumers or other market participants. (2) Commercial practices towards consumers where they do not conform to the professional diligence required of the entrepreneur concerned and are suited to tangible impairment of the consumers ability to make an information-based decision. (3) The commercial practices towards consumers, listed in the Annex to the UWG. § 7 prohibits commercial practices that unconscionably pester a market participant.

▶ Competence Ratione Materiae and Competence Ratione Loci

The material competence is governed by § 13 UWG. The Regional Courts (*Landgerichte*) are competent for all civil disputes in which an action based on the UWG is claimed. The competence *ratione loci* is governed by § 14 UWG. It provides:

- For court actions brought by virtue of this Act, jurisdiction shall lay with the Court in whose districts the defendant has their commercial place of business or independent professional place of business, or in the absence thereof, his or its place of residence. The defendant's domestic place of abode shall be the decisive point of reference in a case where the defendant also does not have a place of residence.
- Moreover, for court actions brought by virtue of this Act, jurisdiction shall lie solely with the Court in whose district the act was committed. The first sentence shall apply to court actions brought by those entitled to assert a cessation and desistance claim, pursuant to Section 8 subsection (3), numbers 2 to 4, only if the defendant has neither a domestic commercial, or independent professional, place of business nor a place of residence84.

Burden of Proof

⁸³ Translation from http://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#UWGengl_000P14.

⁸⁴ Translation from http://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#UWGengl_000P14.

A special rule is contained in § 12 (2) UWG for interim injunction procedures. They can be used to secure a cease and desist claim, even without substantiation as is ordinarily required under §§ 935 and 940 ZPO. The presumption may, however, be reversed, in particular through inaction on behalf of a claimant.

Procedural Safeguards

According to § 12 UWG, § (1) the parties entitled to assert a cease and desist claim should give a warning notice to the debtor prior to initiating court proceedings. The notice is not an absolute precondition for a cease and desist claim, but in practice it is almost always given.85

> Statute of Limitations

According to § 11 UWG § (1), claims under §§ 8, 9 and 12 subsection (1) second sentence become statute-barred after six months. (2) The statute-barred limitation period starts when (Nr. 1) the claim arises and (Nr. 2) the creditor obtains knowledge, or should, without being grossly negligent, have obtained knowledge of the circumstances giving rise to the claim and of the debtor's identity.

Arguably, it is possible that due to the definition of knowledge under § 166 BGB, already the knowledge of the BVL as competent authority could result in the starting point of the time periods ⁸⁶. The UKlaG time period, on the other hand, is three years under § 195 BGB. It may prove problematic that the UKlaG and UWG injunctions have differing time limits. Claims for injunctions under the UKlaG are not subject to the shorter time limit under § 11 UWG⁸⁷.

Appeal Procedure and Conditions

For a cease and desist order granted in an interim injunction procedure, the claimant may file a complaint against the decision not to grant an interim injunction (§ 567 ZPO). In case of an injunction, the defendant can object (§§ 936, 924 ZPO). The decision on the objection will amount to a judgment that can be appealed (§ 511 ZPO). It does not benefit from the possibility of a revision by the Bundesgerichtshof (§ 542 Abs. 2 S. 1 ZPO).

For cease and desist orders in regular procedures, the rules for appeal are contained in ZPO Book 3 section 1 on Appeal (§§ 511-541 ZPO). Appeal requires that the value of the claim exceeds EUR 600 and it must satisfy the condition that a decision on appeal is necessary for the purposes of unity and development of the law. The revision is regulated in Book 3 section 2 (§§ ZPO 542-566 ZPO).

Sanctions for Non-compliance

Cease and desist orders are enforced by the enforcement mechanisms according to § 890 ZPO at up to EUR 250,000 or 2 years imprisonment. The Court of First Instance in the main action is competent to fix the enforcement penalty (enforcement fine or imprisonment) in a decision.

Follow up and monitoring of compliance

§ 12 UWG regulates aspects of the enforcement of a claim, authorisation to publish a judgment and reducing the value of a claim.

For acts brought by virtue of the UWG, the Court can authorise the publication of the judgment if the prevailing party demonstrates a legitimate interest (§ 12 (3) UWG). The reduction of the value of a claim is regulated in § 12 (4) and (5) UWG.

⁸⁵ Bornkamm, UWG § 12 Anspruchsdurchsetzung, Veröffentlichungsbefugnis, Streitwertminderung', Köhler/Bornkamm, UWG, 31. Auflage 2013.

⁸⁶ See in particular the interpretation of BGH, I ZR 139/09, BIO TABAK case.

⁸⁷ LG Berlin, 6 March 2012, 16 O 551/10, rn 93, Köhler in Köhler/Bornkamm, UWG, 28. Aufl, § 1 UKlaG Rn 1.14.

2.1.4.5 CONCLUSIONS

The German public enforcement system strongly relies on delegated third parties. The BVL is competent only for cross-border cases under the CPC Regulation. It is not competent for enforcing domestic cases. For complicated issues that require investigative powers, enforcement by the competent national authority would in our view be more appropriate.

Consumer protection associations provide the BVL with a taxonomy of cases in which an instruction under § 7 VSchDG is not recommended. These constitute an exception to the general system of instructing third parties, for example because the requirements on evidence are too burdensome. In such cases, it would be the BVL itself to take on a given case, also to be able to exercise its investigation powers under § 5 VSchDG⁸⁸.

Procedural issues have arisen with regard to the third parties delegation. For instance, in the course of the instruction of a third party, in isolated cases the request for information took more than 6 months, so that an instruction of a third party was no longer possible due to the short time limits under the UWG. The report on § 7 recommended to examine the time limits for claims under the UWG where these are brought in the framework of an instruction under § 7 VSchDG. The time limit of 6 months proves rather short.

The instruction of private third parties was discussed in a report of the German Federal Government published in 2012⁸⁹. Regarding the cooperation between the BVL, vzbv and the Wettbewerbszentrale under §7 VSchDG, the abovementioned issues were identified. With respect to legal questions, it identified time limits and the application of international private law as particularly problematic areas.

⁸⁹ Bericht der Bundesregierung zur Wirksamkeit von § 7 des EG-Verbraucherschutzdurchsetzungsgesetzes, Drucksache 17/8982 of 09.03.2012.

⁸⁸ Bericht der Bundesregierung zur Wirksamkeit von § 7 des EG-Verbraucherschutzdurchsetzungsgesetzes, Drucksache 17/8982 of 09.03.2012, p 5.

2.1.5 ITALY

2.1.5.1 INTRODUCTION

The main Italian piece of legislation protecting consumers is Legislative Decree No 206 of 6 September 2005, known as the "Consumer Code" ("the Code").

The Consumer Code covers unfair commercial practices, unfair terms, misleading advertising, distance selling, electronic commerce, and distance marketing of financial services. It is the main instrument for the implementation of European Directives on consumer protection including all the Directives listed in the Annex of CPC Regulation. The Consumer Code contains both substantial and procedural rules.

The competent national authority for the public enforcement of the Consumer Code is the national competition authority, *Autorità Italiana della Concorrenza e del Mercato* (AGCM). The 2014 legislative reform of the Consumer Code⁹⁰, necessary to implement Directive 2011/83/EC and to remove some inconsistencies, has enlarged the competence of the AGCM to other directives, including distance selling. The reform does not change the enforcement powers entrusted to the AGCM by the Consumer Code, but extends the perimeter of AGCM's competences. Under the reform, the AGCM will be the only competent authority to deal with domestic and cross-border infringements of unfair commercial practices. When unfair commercial practices affect regulated sectors, such as telecommunication and financial services, the legal opinion of the sectorial supervisory authority must be obtained before adopting the decision.

With regard to CPC Regulation, AGCM is the only competent national authority for transnational cooperation.

Italian public enforcement is exclusively an administrative procedure characterised by self-managed administrative proceedings and jurisdictional controls by the Administrative Court.

The procedural rules for public enforcement are contained in the Consumer Code and in the AGCM's "Regulation on the procedures for investigating unfair commercial practices, unfair terms and misleading advertising" updated in August 2012.

The enforcement powers of the AGCM are mainly based on competition procedural rules and powers.

2.1.5.2 SELF-MANAGED ADMINISTRATIVE PROCEEDING

Competent Authority

AGCM is the main competent national authority in charge of enforcing consumer protection in Italy. It has exclusive competence for enforcement under the CPC Regulation.

Competence Ratione Materiae

Article 27 § 1 of the Consumer Code provides that the AGCM has the competence for violations of Consumer Code provisions also when requested by the competent national authority of another Member State on the basis of the CPC Regulation.

The new Article 27 § 1-bis, as modified by Legislative Decree 21/2014, provides that "Even in sectors regulated under Article 19, paragraph 3, the power to intervene in respect of the conduct of the professionals that constitutes an unfair commercial practice, subject to compliance with the regulation in force, it is, exclusively, of the AGCM and it is exercised in accordance with the powers referred to in this article, after having obtained the opinion of the regulatory authority. The sectorial authorities retain the competence to exercise their powers in cases of violations of the sectorial regulation that do not constitutes an unfair

⁹⁰ Legislative Decree of 21 February 2014 No 21, in Italian Official Journal of 11 March 2104 No 58.

commercial practice. The Authorities may regulate with Memoranda of Understanding the substantive and procedural aspects of the mutual cooperation, within the framework of their respective competences".

Competence Ratione Loci

The competence ratione loci of AGCM covers the whole national territory.

Investigative Powers

Under Article 27 § 2, the AGCM has all the investigative powers provided by the CPC Regulation.

The AGCM's Regulation disciplines administrative proceedings and investigative powers.

Article 3 provides for a person in charge of the procedure to manage the competent AGCM unit. The person in charge of the procedure evaluates the complaints and the evidence submitted. If deemed necessary, he may ask the complainant or any other subject to provide information.

Article 5 of the Regulation regulates the pre-investigative phase. The pre-investigative phase may be closed for the following reasons:

- The complaint is manifestly inadmissible or it misses the factual elements necessary to justify indepth investigations;
- The infringer removed the unfair commercial practice:
- The advertising does not harm the consumer and it has limited impact (de minimis);
- The request for authority intervention covers isolated practices or practices that are not a relevant priority for AGCM intervention.

The pre-investigative phase is closed with a dismissal; the AGCM may open a new investigation if more evidence on the same practice is brought to its attention.

If the AGCM decides to open an investigation, the decision is sent to the complainant and to other interested parties who made the request. When there is a significant number of parties, the decision to open the investigation is published in the authority's Bulletin.

Articles 12 and 14 of the Regulation describe investigative powers. According to Article 12, the responsible party for the proceeding may obtain all elements that are necessary to the investigation.

The individual responsible for the proceedings may authorise the hearing of the parties or third parties when essential to the investigation. Each party will be heard separately and may request legal assistance. The hearing is based on an adversarial procedure. The minutes of the hearing will be signed by the individual responsible for the proceedings and by the parties who received a copy of the minutes. The hearing may be registered for the purpose of correctly drafting the minutes.

Article 14 regulates inspections. The AGCM agents may

- Enter the business premises and workplaces with the exception of private dwellings;
- Inspect all relevant documents on every kind of support, including internal and informal acts which were used for the business's activity;
- Obtain a copy of the documents;
- Require information and oral explanations.

In case of urgency, the Authority may impose the trader to remove the advertising or the unfair commercial practice. The proceedings are adversarial with a short term, 5 days, for the parties to present their position and documents. The trader must immediately implement the decision of the authority (Article 8).

In case of unfair terms, Article 21 of the Regulation provides that the provisions of the Regulation on public enforcement are applicable where compatible. Two special proceedings are provided: if the individual responsible for the proceedings considers that the terms are unfair, he may, after informing the Board of Commissioners, inform the professional thereof in writing. The purpose is to try to persuade the professional to remove the terms (*moral suasion*).

In administrative proceedings directed at declaring certain terms unfair, the competent national authority initiates a public consultation within 30 days from opening the investigation. The consultation is published on the AGCM's website. The notice of the consultation contains information about the terms, the interested economic sector and all the necessary information for consultation. The consultation is mainly directed at business associations and chambers of commerce, but the consumers' association may respond if it is qualified at a national level.

The individual responsible for the proceedings may also ask opinions on the terms from the national supervisory authority of the relevant economic sector.

Once the public consultation is closed and the competent supervisory authority has issued an opinion, if requested, the individual responsible for the proceedings will transmit the results to the Board of Commissioners.

Burden of Proof

Article 15 of the Regulation gives the AGCM the possibility to reverse the burden of proof: the authority may request the trader to provide evidence on the accuracy of factual claims on a commercial practice. When the AGCM decides to use this option, it must inform the parties indicating what evidence is required and the terms for submission.

Concerning distance marketing of financial services, 67-vices semel provides for an ex-lege reverse burden of proof. The business must prove that it provided all requested information and that the consumers' agreement was present at the conclusion of the contract. It must also prove that the contract was executed and that the obligations arising from the contract were fulfilled.

Otherwise, the general procedural rules on the burden of the proof apply. Consumers filing an action against a trader must prove that Code provisions were violated.

Under Article 13, the AGCM, if necessary, may require an expert statistical and financial analysis. If the authority decides to require such expertise, it must notify its intention to the parties: the parties may provide their experts on the same facts, since the submission of this type of information is based on adversarial proceedings.

Legal Deadlines

The Authority must open the investigation no later than 180 days from the request of intervention (Article 6 of Regulation). The term to close the investigation is 120 days, 180 days if the trader resides abroad. The term is 150 days if it is necessary to request an opinion from the authority for telecommunications (AGCOM). If the trader is abroad and an opinion from the AGCOM is required, the term is 210 days.

The AGCM may extend the legal terms for a maximum of 60 days for the purposes of investigation or if the defendant presents undertakings and the authority needs to make an assessment.

If it is necessary to obtain an opinion from other authorities, the legal deadlines are extended for 30 days.

For investigations concerning unfair terms, the legal deadline is 150 days.

Control over the Investigation

There is no specific control over AGCM's investigative powers. According to Article 8 of the Regulation, some acts, such as the temporary suspension of practices order, may be appealed before the Administrative Court. However, the appeal does not suspend the enforcement.

Opening and Closing of the Investigation

Article 16 provides that the individual responsible for the proceedings, once he considers that he has sufficient evidence, informs the parties on the closing of the investigations and provides a deadline (10 days) to submit additional information.

At the end of the investigation, the individual responsible for the proceedings submits the acts to the College of AGCM's Commissioners in order to adopt the final decision.

According to Article 17, the College may adopt the following decisions:

- Non violation of the provisions on unfair commercial practices or misleading and comparative
- Violation of the relevant provisions on consumer protection:
- Acceptance of the undertakings.

The decision is transmitted to the parties and is published, within 20 days from the adoption, in the Bulletin and on the authority's website. The decision sets forth the Court competent for the appeal and the statute of limitations for the appeal.

If the infringement consists in misleading or illicit advertising, or unfair commercial practices, the trader, within the deadline indicated in the decision, is required to provide the authority with detailed information on his compliance with the cease and desist order.

The costs of publication of the decision are borne by the trader.

Undertakings

The trader may submit, within 45 days from the beginning of the investigation, undertakings directed at removing misleading advertising or unfair commercial practices (Article 9). The undertakings must be submitted using the appropriate form that is annexed to the Regulation. If the AGCM considers the undertakings appropriate, it adopts a decision and the trader must comply with it. If the AGCM does not consider the undertakings appropriate, it may set a time limit to integrate the undertaking. It may also reject the undertakings for serious infringements, particular urgency or if it considers them inadequate.

If the undertakings are accepted but the trader does not comply with them, the authority may re-open the proceeding against the trader.

During the investigation, entities having a (public or private) legitimate interest and the consumers' association may intervene in the proceedings (Article 10).

Administrative Fines

Articles 32, 62, 67-decies of the Consumer Code set out, and describe in Capter 1.3, the level of administrative fines that the AGCM may impose.

A particular aspect clarified by case law is the possibility to increase the level of administrative fines for multiple and continuous offences, the legally linked "administrative continued offence".

The Supreme Administrative Court, in 200791, clarified that the provision of Law No 689 of 24 November 1991 on criminal offences that are punishable with administrative fines, which refers to the possibility of accumulating fines for continued or repeated offences, is also applicable to violations of Consumer Code provisions.

Article 27 § 13 of the Consumer Code provides for payment of the fine no later than 30 days from the decision.

Follow up and monitoring compliance

⁹¹ State Council, Section. VI, 10 January 2007, No 26.

Under Article 27, § 12 of the Consumer Code, an additional fine of up to EUR 150,000 is imposed on the trader for non-compliance with the authority decision. Additionally, the authority may order the closing of the business for a maximum of 30 days.

Procedural Safeguards

The proceedings carried out by the AGCM are administrative and are subject to the guarantees required by Law 241/1990 on proceedings brought before the public administration.

A particular procedural safeguard introduced by the AGCM Regulation is the access to files granted to all parties to the investigation (Article11).

For documents that contain personal, industrial and financial information on professional or private persons involved in investigations, access is limited to information that is strictly necessary.

Business secrets are confidential information and access is either denied or restricted. If the parties intend to protect the confidentiality of their documents and business secrets, they must submit a request to have the confidential nature of those documents maintained indicating the parts to which access should be denied and the reasons for such denial.

Under Article 331 of the Code of Criminal Procedure, information contained in the investigative file cannot be transmitted to other authorities except when the infringement constitutes a criminal offence, and the file must be transferred to the Public Prosecutor.

However, an important exception to the non-transferability of the file included in the last sentence of Article 11 is the obligation to cooperate with other competent national authorities under the CPC Regulation. In this case, the file may be transferred to other competent national authorities.

Appeal Procedure and Conditions

Under Article 135, §1; b) the exclusive competence *ratione loci* and *ratione materia* for the appeal against the AGCM's decision is assigned to the Administrative Court of the Lazio Region (TAR Lazio) in Rome.

Under Article 39 of Annex I of the Code of the Administrative Procedure, the subject to whom the decision is directed may file an appeal within 60 days from the day the decision is served.

The scope of the appeal is to ask the Administrative Court to have the authority's decision (annullamento) declared void.

Within 60 days from serving the appeal, the parties may present their positions to the Court. In the administrative proceedings, the parties are bound to the ordinary burden of proof, but the Court may obtain information and documents from the parties or third persons.

Against the judgment of the Administrative Court, an appeal may be lodged before the State Council, the Italian Supreme Administrative Court, no later than 60 days from having been served the judgement (Article 100 of the Code of Administrative Procedure).

A particular form of appeal against the AGCM decision is the extraordinary appeal before the President of the Republic provided by Article 8 of Presidential Decree No 1199 of 24 November 1971. An extraordinary appeal is based on the grounds of legitimacy while the appeal before the Administrative Court is an appeal on the merits.

The extraordinary appeal is an alternative procedure to the general appeal before the Administrative Court. If a general appeal has been lodged, an extraordinary appeal cannot be introduced.

The term for the extraordinary appeal is 120 days from serving the AGCM decision.

2.1.5.3 CONCLUSIONS

The Italian public enforcement system is characterised by self-managed administrative proceedings with extensive investigative and decisional powers of the AGCM. The Consumer Code, which has consolidated the substantive and procedural rules on consumer protection, assigns to AGCM the role of tackling domestic and intra-Community infringements. However, when a particular sector is concerned, such as financial services, the other authorities competent in the sector have to provide a legal opinion to the AGCM before a decision is adopted

The administrative proceedings are characterised by a defined procedure with deadlines for both parties under the strict judicial review of the Administrative Court. It is worth mentioning the special proceedings, unique among the examined Member States, to remove unfair terms that require a prior consultation with business organisations and consumer associations if proven that they have interests.

2.1.6 LATVIA

2.1.6.1 INTRODUCTION

In Latvia, the Consumer Rights Protection Law (hereinafter, "CRPL") is the main protection for consumers. This law covers relations between businesses and consumers, sets principles of consumer protection, defines functions and powers of the Consumer Rights Protection Centre (hereinafter, "CRPC").

CRPL is supplemented by Regulation No 632 of the Cabinet of Ministers of 1 August 2006 "By-laws of the Consumer Rights Protection Centre" (hereinafter, Regulation No 632). These regulations further explain the rights and powers of CRPC officials to perform certain investigative and enforcement duties. Another law that is more relevant with regard to the European Directive (EC) 2005/29/EC is the Unfair Commercial Practice Prohibition Law (hereinafter, "UCPPL") that has a dual purpose: on the one hand, it tends to ensure fair competition in trade relations and, on the other, it ensures consumer protection and sufficient and adequate information therein.

The CRPL is also the main instrument for the implementation of European directives aimed at protecting consumers. The CRPL regulates and supervises areas as varied as distance contracts, appropriate indication of price and quantity, contracts concluded outside of business premises, misleading advertising and unfair commercial practices, forced purchases, and unfair contractual terms.

When there is an infringement of consumer rights within the monitoring and supervision authority of the CRPC, with some exceptions, they are mainly administrative proceedings. The CRPC as a public body operates under the Administrative Procedure Law and, as such, it is authorised to make binding decisions. Those decisions may later be appealed before the Administrative Courts.

With regard to cross-border cooperation under the CPC Regulation, the CRPC each year issues/receives requests for mutual assistance to/from other Member States. However, the majority of these requests are alerts and are comprised of information requests or enforcement requests in only a few instances. ⁹² The CRPC together with Estonian and Lithuanian consumer protection and market surveillance institutions have two cooperation agreements in the field of market surveillance, as well as in terms of CPC Regulation.

2.1.6.2 CEASE AND DESIST ORDERS

Under Section 25 of the CRPL, if a competent authority determines a violation of consumer rights, which affects the collective interests of consumers and which may cause losses or harm to consumers or to a particular consumer, it is empowered to decide on applying provisional measures, by which the manufacturer, trader or service provider is required to cease the violation, and to perform specific activities to rectify the impact. Section 15(8)2 and Section 15(8)3 of the UCPPL reaffirm the same principle for unfair commercial practice.

Competent Authority

Section 24 of the CRPL and Section 14 of the UCPPL cite the CRPC as the competent authority to issue cease and desist orders after careful evaluation of the nature and essence of the violation, as well as other relevant aspects. If the demands of the CRPC are ignored, it may file a request to the Administrative Court that, in turn, may issue a cease and desist order before ruling on the merits of the violation itself.

Infringements that may be addressed and that are addressed by cease and desist order

Any violation of consumer rights provided in the CRPL, the UCPPL and other consumer rights protection-related regulations that are supervised by the CRPC might require cease and desist orders. Cease and

⁹² European Commission, Report on cooperation in enforcing consumer protection laws, Brussels, 12.3.2012, COM (2012) 100 final, Accessible at: http://ec.europa.eu/consumers/enforcement/docs/comm_biennial_report_2011_en.pdf

desist orders may also be implemented for other violations of consumer rights that are under the supervision of other authorities (in the field of health sciences and veterinary medicine).

Competence Ratione Materiae and Ratione Loci

The competence of the CRPC covers the whole CRPL, UCPPL and other subsidiary regulations. The material competence is determined by the complaint received and following the findings in a particular investigation. If the request is filed with the Administrative Court, then the Court may decide only within the scope of the claim.

Competence *ratione loci* is determined by the general rules of jurisdiction of Civil Law⁹³ and Civil Procedure Law⁹⁴, meaning the competence of the Court of the defendant where the infringement was committed or where it has its effects.

Burden of Proof

Under Section 26(9) of the CRPL, the CRPC investigates only those complaints with evidence included on the existence of the dispute and its object.

Any evidence proving infringement may be useful for the investigation of the case (print screens, video captured evidence, inspections, company registration documents, consumer complaints etc.), but, if in the case of intra-Community infringement, the evidence provides information in languages other than English, the CRPC requires, at least, an English translation.

If the CRPC deems the evidence *prima facie* sufficient, it will require explanations from the producer, manufacturer or trader. If those explanations are insufficient, then it will initiate further investigations. As Administrative Procedure Law regulates this procedure, the institution bears the burden of proof.

Procedural Safeguards and Appeal Procedure

The CRPC as a competent authority acts within the framework of Administrative Procedure Law. As the cease and desist order is a binding decision, procedural safeguards exist.

The Administrative Courts verify the legality of CRPC decisions. The recipient of the decision has the right to appeal it according to the procedures and time limits specified in law. In some cases, for example, regarding unfair contract terms and unfair commercial practice, the appeal of the decision will not suspend its application.

Legal Deadlines

If the CRPC decides on issuing a cease and desist order, this decision may be appealed at the Administrative Court no later than 10 days after its coming into the force. The Court will decide on this matter within 14 days in written proceedings.

2.1.6.3 SELF-MANAGED ADMINISTRATIVE PROCEEDINGS

Competent Authority

Section 24 of the CRPL and Section 14 of the UCPPL cite the CRPC as the competent authority for consumer rights protection.

The CRPC is also the single liaison office for the CPC Regulation and is responsible for the control of the following acts and their corresponding national legislation:

⁹³ Civil Law, Accessible at: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The_Civil_Law.doc>

⁹⁴ Civil Procedure Law, Accessible at: http://www.vvc.gov.lv/advantagecms/docs/LRTA/Likumi/Civil_Procedure_Law.doc>

- Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States on misleading advertising;
- Directive 97/55/EC amending Directive 84/450/EEC on misleading advertising so as to include comparative advertising;
- Directive 85/577/EEC to protect the consumer with contracts negotiated away from business premises;
- Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC;
- Directive 90/314/EEC on package travel, package holidays and package tours;
- Directive 93/13/EEC on unfair terms in consumer contracts;
- Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on consumer protection with certain aspects of timeshares, long-term holiday products, resale and exchange contracts;
- Directive 97/7/EC on consumer protection with distance contracts;
- Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers;
- Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees;
- Directive 2000/31/EC on certain legal aspects of company information services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce);
- Directive 2002/65/EC concerning the distance marketing of consumer financial services;
- Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to air passengers in the event of denied boarding, flight cancellations or extended flight delays;
- Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC;
- Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive").

Competence Ratione Materiae, Ratione Personae and Ratione Loci

The competence of the CRPC covers the whole CRPL, the UCPPL and other subsidiary regulations. The material competence is determined by received complaints and following findings in particular investigations. If the request is filed with the Administrative Court, then the Court may only decide within the scope of the claim. The CRPC is the single authority competent for researching and investigating infringements in Latvia.

In Latvia, only natural persons are regarded as consumers under law. Accordingly, legal persons cannot submit complaints, except when they are consumer rights protection associations. If there is any doubt on whether a natural person acted as a consumer or as a professional, the CRPC may require additional information.

Control over the investigation

The CRPC has broad control over investigations that may be challenged in the Administrative Court when the final decision is made.

Investigative Powers

The central procedure for monitoring, investigating and enforcing consumer rights protection in Latvia is regulated by the CRPL. This law is also supplemented by provisions of Regulation No 632 of the Cabinet of Ministers "By-laws of the Consumer Rights Protection Centre" Advertising Law 64, Unfair Commercial

⁹⁵ Regulations No. 632 of the Cabinet of Ministers "By-law of the Consumer Rights Protection Centre" of 1 August 2006, Accessible at: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/MK Noteikumi/Cab. Reg. No. 632 - By-law_of_the_Consumer_Rights_Protection_Centre.doc>

⁹⁶ Advertising Law of the Republic of Latvia, Accessible at: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Advertising Law.doc

Practice Prohibition Law⁹⁷ and the Law on Company Information Services⁹⁸ where relevant directives have been implemented. In those laws there are general provisions about inquisitive and investigative powers of the competent authority, which by designation is the CRPC. The CRPL and Regulation No 632 provide more detailed explanations of the functions and duties of the competent authority to monitor and supervise the market with regard to consumer protection.

If the CRPC acting ex officio suspects non-conformity or it receives a complaint, information or submission either by a consumer, the consumer rights' protection association or the competent authority from another Member State, the CRPC is required, as the competent authority, to initiate an investigation. If necessary, the CRPC must make decisions in accordance with laws. However, the law states that the CRPC must examine complaints or submissions from consumers when they concern resolving disputes with a manufacturer, trader or service provider only when two conditions are observed:

- When the consumer first turned to the manufacturer, trader or service provider with the complaint or submission and attempted to resolve the dispute via reconciliation; and
- When written material and other proof substantiating the existence of the dispute and subject of the dispute are annexed to the complaint or submission.

Section 26 of the CRPL governs in detail how possible infringements must be examined.

Consumers may directly submit a complaint to the CRPC, or directly on the website of the ECC Latvia for intra-Community infringements. When Latvian authorities receive a complaint from a foreign consumer or a request of assistance from a EU national authority to investigate a commercial practice of a Latvian trader, manufacturer or supplier, it deals with it according to its national procedural rules as regulated by the law.

Upon receiving a submission of a dispute with a manufacturer, trader or service provider from a consumer, the CRPC, depending on the circumstances referred to in the submission, will provide information and consultation on consumer rights and the necessary activities or, where necessary, provide assistance to the consumer in resolving the dispute by negotiating with the manufacturer, trader or service provider or performing other activities specified under law.

If the dispute concerns unfair contract terms, the CRPC will prepare a reply in which its opinion will be expressed on compliance of the relevant provisions with the requirements of regulatory enactments.

The CRPC must answer and provide assistance no later than four months from the day of receiving the submission if the consumer specifically requested assistance therein with resolving the dispute with the manufacturer, trader or service provider, or requested information or advice on the need to perform additional activities. The CRPC initiates such activities no later than one month from the day of receiving the submission, performs such activities within four months from the day of receiving the submission, after confirming its receipt thereof to the consumer. If observing the time period of four months is impossible, this period may be extended up to one year.

Burden of Proof

Under Section 26(9) of CPRL, the CRPC, only those complaints that include evidence on the existence of the dispute and its object will be investigated. If the CRPC deems the evidence *prima facie* sufficient, it demands explanations from the producer, manufacturer or trader. If those explanations are insufficient, then it will initiate further investigations. As Administrative Procedure Law regulates this procedure, the institution bears the burden of proof.

Statute of Limitations

Under Section 27 of the CRPL, consumers are entitled to submit claims against the manufacturer, producer, trader or service provider on the non-conformity of goods or services and on the provisions of a contract no

Unfair Commercial **Practice** Prohibition Law of the Republic of Latvia, Accessible at: http://www.vvc.gov.lv/export/sites/default/do s/LRTA/Likumi/Unfair Commercial Practice Prohibition Law.doc>

⁹⁸ Law on Information Society Services of the Republic of Latvia, Accessible at: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Law On Information Society Services.doc

later than two years from the date of purchasing the goods or receiving services, or no later than the end of the warranty period if the warranty exceeds two years. Moreover, the reference date is the date of the supply of goods, when the manufacturer or trader delivered the goods or when the consumer received the relevant goods. Based upon this claim, the CRPC may issue a decision requiring certain actions. The CRPC is authorised to apply administrative penalties for breaching provisions of the Administrative Violations Code within six months from the day of infringement. Non-compliance with abovementioned CRPC decision counts as a violation the Administrative Violations Code.

If the discovery of infringement and the investigation is started by the initiative of CRPC, then Section 37 of Administrative Violations Code provides that the administrative decision must be made within six months from the infringement.

Procedural Safeguards and Appeal Procedure

The CRPC as a competent authority acts within the framework of Administrative Procedure Law. As a cease and desist order is a binding decision, procedural safeguards exist.

Administrative Courts supervise the legality of the CRPC decisions. The recipient of the decision has a right to appeal it according to the procedures and time limits specified in law. In some cases, for example, regarding unfair contract terms and unfair commercial practices, the appeal of the decision will not suspend the application thereof.

In Latvia there is a three level court system: First Instance Courts, Appellate Courts and the Supreme Court.

The average duration of case adjudication in the first and the second court instances is approximately 18 months, for the third – the highest instance – approximately six months.

Recipients may appeal some decisions by the competent authority when it is not the CRPC (for example, by the Health Inspectorate, the Food and Veterinary Service) before a higher institution (i.e. the relevant Ministry). In those cases, the appeal proceedings may last up to four months. Furthermore, the decision of the Ministry can be appealed before the Court.

Undertakings and Commitments

Section 25(8) of the CRPL governs the procedure for cessation of consumer rights infringements.

The CRPC has the following powers to bring about the cessation of consumer rights infringements and to propose that the infringer:

- Ensures conformity with requirements of regulatory enactments within specified timeframes;
- Undertakes in writing an obligation to eliminate the determined breach within a specified time period.

Regarding voluntary undertakings, the CRPL authorises the authority, observing the character and nature of a commercial practice as well as other aspects, to propose that the trader:

- Ensures conformity of commercial practices with the requirements of regulatory enactments within a specified time period would; and
- Undertakes in writing to eliminate the determined breach within a specified time period.

If within the time period specified, the trader's commercial practice does not conform to or does not ensure the requirements of regulatory enactments, the CRPC may take one or several decisions (which are binding).

If the trader undertakes in writing to eliminate the breach within a specified time period, the authority will not take a course of action. Upon signing the written undertaking, the trader acknowledges their guilt in the determined breach. If the undertaking is not fulfilled, the authority is entitled to take one or several courses of action and the trader will be held liable in accordance with regulatory enactments.

In the decision of the Supreme Court of 11 May 2010 in case No SKA-412/2010⁹⁹ regarding the legal status of written undertakings to eliminate consumer rights' violations, the Supreme Court explained the difference between the administrative act in the form of the CRPC's legally binding decision and infringer's written undertaking to eliminate the violation.

The case concerned the trader SIA "Key Promotions" that filed an application with the CRPC to obtain explanations on how the Unfair Commercial Practice Prohibition Law should be interpreted concerning their contract provisions. The CRPC found that one of their contract clauses violated consumer protection regulations and proposed that SIA "Key Promotions" submit a written undertaking to eliminate the determined violation within a certain period.

SIA "Key Productions" appealed this decision. Moreover, the Court found that the decision to have the trader submit a written undertaking under Section 25(8)1 of the CRPL was not an administrative act, as it did not create binding legal consequences. Therefore, the Court had no right to exercise control over legality. However, if the CRPL had required SIA "Key Productions" to cease the infringement and had taken certain actions under Section 25 (8) 2 of the CRPL, then it would have been a binding administrative act.

Administrative Fines

The amount of sanctions/penalties depends on the type of infringement and the regulatory enactment infringed. All penalties and their amounts can be found in the Latvian Administrative Violations Code Chapter Twelve "b" - Administrative Violations in Consumer Rights Protection. The sanctions vary from a warning up to a maximum of EUR 14,000.

Decisions

If, upon receiving a consumer complaint, no infringement is found, then the CRPC closes the investigation and notifies the consumer. It is not an official decision that may be appealed.

If there is an infringement, the CRPC first proposes or requires the infringer to rectify the situation, and secondly, to undertake a written obligation to cease the infringement within a certain time. There are no sanctions imposed and no appeal possibilities.

Appeal and Conditions

The CPRC decision may be appealed only in the Administrative Courts. However, this is a judicial and not an administrative remedy, since the CRPL does not provide administrative review.

Monitoring and Follow-up

Under Section 25(10) of the CRPL, before of the end of a specified time period, the manufacturer, trader or service provider must inform the CRPC regarding the implementation of the specified activities. Failure to inform or implement the undertaken obligations will result in the CRPC applying the administrative penalty provided for the relevant violation issued as a decision and published in the Official Journal *Latvijas Vēstnesis* and on the home page of the CRPC. Those decisions may be appealed in Court in accordance with the procedures specified in Administrative Procedure Law.

Failure to comply with the decisions of the CRPC entitles the CRPC to initiate proceedings before the Administrative Court. This decision then may be appealed at the regional Administrative Court and then at the Supreme Court.

The amount of sanctions/penalties depends on the type of infringement and the regulatory enactment infringed, the previous conduct of the infringer and the CRPC imposed fine. All penalties and their amounts can be found in the Latvian Administrative Violations Code Chapter Twelve "b" - Administrative Violations in Consumer Rights Protection. The sanctions vary from a warning up to maximum of EUR 14,000.

⁹⁹ Supreme Court decision of 11 May 2010 in case No. SKA- 412/2010 Accessible at:

http://at.gov.lv/files/uploads/files/archive/department3/2010/ska-412.doc

If there is continuous non-compliance with official decisions of the CRPC and it may result in significant harm or there is non-compliance with the decision of the Administrative Court, the case may be transferred for criminal proceedings. If the case is transferred to the State Prosecutor who initiates criminal investigations, the Prosecutor alone will be responsible for all further actions and the CRPC is no longer involved. However, there are no recorded criminal cases regarding breaches of consumers' rights.

2.1.6.4 CONCLUSIONS

The list of minimum investigation and enforcement powers under Section 4(6) of the CPC Regulation is considered to be sufficient. The Latvian CRPC in most cases proposes a mild approach and informal means of communicating, quite often serving as a mediator between the trader and the consumer.

The CRPC has broad autonomy in deciding which infringement to pursue and what procedural steps to take and has broad investigation powers

2.1.7 THE UNITED KINGDOM

2.1.7.1 INTRODUCTION

The United Kingdom's model of enforcement is based on a division between criminal and administrative sanctions and the division of the role between public and private enforcement. Public enforcement is not only characterised by different proceedings, but it presents a division of competence between central and local authorities.

A number of bodies across central and local governments are responsible for enforcing consumer law. The Department for Business, Innovation and Skills has overall policy responsibility for consumer issues. The Office of Fair Trading does not have any policy responsibility, but it is the national consumer protection body responsible for enforcement at the national level. The 197 Local Authority Trading Standards Services (TSS) carries out the majority of consumer law enforcement in Great Britain, while the Department of Enterprise, Trade and Investment is competent for Northern Ireland (Section 213 Part 8).

TSS has exclusive jurisdiction to enforce consumer protection at a local level in Great Britain while the former OFT had jurisdiction over enforcement at the national level 100. However, concerns about inconsistency and the need for coordination in enforcement between the local and national agency has brought various reforms to improve coordination.

From 1 April 2014, the Competition & Markets Authority (CMA) has taken the role of the OFT, which was abolished. The OFT's functions of running the Consumer Code Approval Scheme, the Consumer Direct advice service, and the national leadership role on consumer education were transferred in April 2013 to the Citizens Advice Service and Citizens Advice Scotland (Citizens Advice Services) and the Trading Standards Institute (TSI).

Local authority Trading Standards Services (TSS) took on a new role as the primary national enforcer of consumer protection law, with the CMA national enforcement role focusing more on systemic problems in markets¹⁰¹

The CMA has the power to enforce the violations of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs), the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), the Consumer Protection (Distance Selling) Regulations 1999 (DSRs). Under the Distance Marketing Directive Instrument 2004, competence for consumer protection in the distance selling of financial services are entrusted to the new Financial Conduct Authority (except for consumer credit that remains within the CMA). Communication Act 2003 has entrusted responsibility for unfair commercial practices for telecommunication to the Ofcom. PhonepayPlus, the independent body for phone premium service, is the delegated third party under Article 8(3) of the CPC Regulation under the control of Ofcom.

¹⁰⁰ I. RAMSAY, *Consumer Law and Policy*, Oxford 2012, p.214.

¹⁰¹ The reform has followed various studies that emphasised the difficulties linked to such a complex model. The Davidson Review (2006), which examined how EU Directives are implemented in the UK, highlighted consumer law as an area where the implementation had caused additional complexity, by overlaying EU law on top of the existing domestic regime.

In 2008 the Government established, under the Regulatory Enforcement and Sanction Act 2008, a Better Local Regulation Office that would be responsible for establishing national priorities to achieve consistency across authorities, while maintaining flexibility for local authorities and retaining the "home authority" principle. In this context, the OFT would have a central role in acting as a champion for trading standards departments in government. After the 2011 Report of the National Audit Office indicated "The system for enforcing consumer law is not delivering value for money because the architecture in place to bring together what is a very fragmented delivery landscape is not functioning properly, and the Department has few levers to directly influence policy delivery" In 2012 the Government established a National Trading Standard Board (NTSB) with the responsibility of prioritising national and cross-local authority boundary enforcement in England and Wales. The NTSB will establish a system to ensure effective intelligence can be used to set enforcement priorities for the Trading Standard teams, appoint specialist lead authorities focusing on a particular area of legislation or policy and support those authorities and others to act on larger and more complex cases in the national interest. In this context, it is expected that the OFT will cease most of its work on pure consumer cases.

All the authorities, including the TSS, have the enforcement powers under Part 8 of the Enterprise Act 2002¹⁰².

The reform introduced the Consumer Protection Partnership (CPP). The CPP was set up to ensure coherent and strategic delivery of enforcement, information provision and education across the consumer landscape. "The group works together to share intelligence, identify current or future issues that are likely to adversely affect consumers and agree priorities for work to resolve or mitigate such problems. In essence, the role of the CPP is to ensure that partners work together effectively and important issues are tackled and do not fall between partners in the consumer landscape due to differing accountabilities" 103

Together with the administrative reform, the government published, in June 2013, a Draft Consumer Bill to clarify and simplify the Consumer Law. The Draft Bill came in response to criticism that the consumer law in the United Kingdom comes from a variety of Acts and regulations that make it complex and confusing. In January 2014, the Government published the Statement on Policy Reform and Responses to Pre-Legislative Scrutiny to report on the consultation ¹⁰⁴.

The Draft Bill contains provisions on the enforcement of consumer rights, by removing bureaucratic legislative restrictions that prevent Trading Standards Services from operating in an efficient and cost effective way, including the possibility to apply directly before a Court. A secondary legislation was drafted to provide new rights of redress for consumers who have been victims of a misleading or aggressive practice.

2.1.7.2 CEASE AND DESIST ORDERS

Competent Authority

Enforcers may take a civil enforcement action for any breach of the CPRs as Community infringements under Part 8 of the Enterprise Act 2002 (Section 217). Under Part 8 of the Enterprise Act 2002, TSS, the CMA and other bodies responsible for consumer law enforcement have stronger powers to seek court orders against businesses that breach certain consumer protection laws.

The TSS may refer the case to the Court but, while they can represent themselves in criminal cases before the Magistrate Court, they cannot to do so in civil cases before the County Court, where they must hire an external lawyer to represent them (Section 222 of Local Government Act 1972). In Scotland, the matter must always be referred to the Procurator Fiscal in order to institute legal proceedings.

As a general rule, all enforcers who are not the CMA and who apply for an enforcement order must notify the CMA of the results of the application (Section 215(9)).

Infringements that may be addressed and that are addressed through cease and desist orders.

Under Section 211 of Part 8, enforcement orders may be used for all domestic or Community infringements that constitute harm to the "collective interests" of consumers. Enforcement orders may also be used for infringements that may constitute a criminal offence.

The type of infringement against which action can be taken differs according to the category of the enforcer: the general enforcer and the enforcer designated for all infringements can apply for an order for all the infringements detailed in Part 8. Designated enforcers with a limited designation may make an application for an order only with respect to those infringements for which they are designated. Community enforcers may make an application for an order only with respect to those infringements for which are designated.

¹⁰³ CMA, Consumer Protection, Guidance on the CMA's approach to use of its consumer powers, id., p.12.

http://www.legislation.gov.uk/ukpga/2002/40/contents

Consumer Rights Bill: statement on policy reform and responses to pre-legislative scrutiny, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274912/bis-14-566-consumer-rights-bill-statement-on-policy-reform-and-responses-to-pre-legislative-scrutiny.pdf

Competence Ratione Materiae

Section 215(5) provides that the following Courts have jurisdiction to make an enforcement order: a) the High Court or a County Court if the person against whom the order is sought carries out his business or has a place of business in England and Wales or Northern Ireland; b) the Court of Session or the sheriff if the person against whom the order is sought carries out business or has a place of business in Scotland.

Competence Ratione Loci

Section 215(5) also provides for the competence *ratione loci* of the Court where the person against whom the order is sought "*carries out his business or has its place of business*".

Burden of Proof

The Regulations do not contain any provision related to the submission of evidence to the Court. Therefore, general rules on court actions will apply. A Court can order a trader to produce evidence to substantiate a factual claim made in a commercial practice.

The Section 228 of Part 8 of the Enterprise Act 2002 provides that proceedings under Part 8 are civil proceedings for the purpose of Section 11 of the Civil Evidence Act 1968 that provides that convictions are admissible as evidence in civil proceedings. Likewise, for proceedings under Part 8, any finding by a Court in civil proceedings that a breach of contract or of a non-contractual duty and of any act or omission enforceable in a Court has occurred as well as any infringement that contrives a listed Directive, "is admissible evidence that the act or omission occurred and, unless the contrary is proved, is sufficient evidence that the act or omission occurred".

The level of the evidence required for an enforcement order was clarified by the case law *MB Design*¹⁰⁵. The OFT sought an interim enforcement order against a home-improvement company, MB design, and the case provided an opportunity for judicial consideration of several issues related to Part 8. With regard to the burden of proof and evidence required to support an order under Section 217 or 218, Lord Drummond stated that the use of affidavit was appropriate for these kinds of proceedings, since they were "backed up by documentation relating to individual complaints about defective products or services supplied by the first respondent".

Moreover, with regard to the applicability of the stricter national procedural rules on interdicts to the enforcement order under Part 8, Lord Drummond considered that an order under Part 8 should not be constructed as an interim order under national law. "Part 8 should rather be construed in a manner calculated to give effect to its underlying purposes, in particular the purposes disclosed in the Injunctions Directive. It follows that orders pronounced under ss 217 and 218 should be regarded as sui generis, and not as an example of interdicts or interim interdicts in Scots law". According to Lord Drummond, the standard of proof and the burden of proof required for interdicts under general procedural rules is not applicable to an enforcement order, which has the purpose of protecting consumers, and must not render the exercise of their rights excessively difficult or too burdensome.

It must be recalled that in the MB case, the enforcers took three years to gather evidence when the average time, according the former OFT, is between two and three months.

In general, Part 32 of the Rules and Practices Directions of the Civil Procedure Rules are applicable to enforcement orders. Part. 32.1 provides that the "Court may control the evidence by giving directions as to: (a) the issues on which it requires evidence; (b) the nature of the evidence which it requires to decide those

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 $^{^{\}rm 105}\,\rm OFT\,v.$ MB Design, Court of Session, 29 June 2005

Opinion of Lord Drummond in the Petition of the Office of Fair Trading against MB Design, p. 15 http://www.scotcourts.gov.uk/opinions/2005csoh85.html

issues; and (c) the way in which the evidence is to be placed before the Court. The Court may use its power under this rule to exclude evidence that would otherwise be admissible".

Procedural Safeguards

Section 214 requires that before taking steps to seek an order, the CMA and other enforcers have to consult with the business, unless there are circumstances that necessitate immediate action. A minimum of 14 days must be allowed for consultation with the business. If the enforcer wishes to apply for an interim order, a minimum of seven days must be allowed for the consultation.

The consultation's purpose is to achieve the cessation of the infringement in cases where an infringement is present, ensuring that there will be no repetition of the infringement in a case where the infringement has occurred and ensuring that the infringement does not take place in the case of a Community infringement, which the enforcer believes is likely to take place.

Section 215 (1) requires that an application for an enforcement order must name the person the enforcer thinks has engaged or is engaging in conduct which constitutes a domestic or Community infringement or is likely to engage in conduct which constitutes Community infringement.

Section 215(5) provides that if an application for an enforcement order is made by a Community enforcer, the Court may examine whether the purpose of the enforcer justifies its making the application.

Proceedings

Enforcers will normally seek to stop an infringement through consultation with the trader before applying to the Court for an enforcement order. Rather than seeking an order, they may accept undertakings from the trader not to engage in or repeat the conduct constituting an infringement.

Before taking steps to seek an order, the CMA and other enforcers must consult with the business, unless there are circumstances that necessitate immediate action. A minimum 14 days must be allowed for consultation with the business. If the enforcer wishes to apply for an interim order, a minimum of seven days must be allowed for the consultation.

An enforcer may accept an undertaking from any business against which proceedings could be brought. The undertaking would be from a business that has engaged or is engaging in conduct that constitutes an infringement or, with reference to a Community infringement, is likely to do so (Section 219).

When a claim in a Civil Court is disputed, the Court will instruct the parties on how they are to prepare the case. The instructions are known as "directions". The directions' purpose is to clarify which parts of the case are disputed and which are not. Only the disputed parts will need a Judge's decision. Once decided, the Court may make suitable arrangements for the hearing, allowing enough time for it and selecting the right level of Judge.

The directions for application notice to the Court are applicable. Under Section 23.6, the notice must be served as soon as practicable once it is filed; and

- "(b) Except where another time limit is specified in these Rules or a practice direction, must in any event be served at least 3 days before the Court is to deal with the application.
- (2) If a copy of the application notice is to be served by the Court, the applicant must, when he files the application notice, file a copy of any written evidence in support.
- (3) When a copy of an application notice is served it must be accompanied by -
- (a) A copy of any written evidence in support; and"
- (b) A copy of any draft order that the applicant has attached to his application.

In general, a hearing of the parties is held. Section 217(4) provides that in considering whether to make an enforcement order, the Court must have regarded whether the person named in the application gave an undertaking under Section 219 for the conduct mentioned in the application and/or if he failed to comply with the undertaking.

> Legal Deadlines

No particular legal deadlines are provided when the enforcer seeks an enforcement order except for the term of 14 days (7 days in case of interim order) between the notice to the trader that the enforcer is seeking an enforcement order and filing of the notice at the Court.

Decision

Under Section 217(5), + an enforcement order must indicate the nature of the conduct to which the order relates and direct the person to comply with the order.

Sections 8.1 and 8.2 of the *Practice Direction 40B- Judgement and Orders*, provide that "An order which requires an act to be done (other than a judgment or order for the payment of an amount of money) must specify the time within which the act should be done. 8.2 The consequences of failure to do an act within the time specified may be set out in the order".

The Court may take an interim enforcement order. This is a temporary order made to continue until the Court finally determines whether or not make an enforcement order. One of the conditions to grant an interim enforcement order is "that if the application has been an application for an enforcement order it would be likely to be granted".

The Court may also accept undertakings according to Section 219 of Part 8 instead of making an enforcement order. As a part of the undertaking to the Court, the business may be required to publish, in a manner that the Court considers appropriate, the terms of the undertaking, in full or in part and a corrective statement.

If the Court makes an order or an interim order against a corporate body, the Court may direct that the order is binding upon all the other members of any group of interconnected companies of which it is a member. If the company that is subject to an order, or interim order, becomes a member of a group of interconnected companies after the order is made, or an existing group of which it is a member is enlarged, the enforcer has the power to apply to the Court for the order to be binding on all the other members including the new ones (Section 223).

An enforcement order or an interim enforcement order may be made against an accessory for an infringement whether or not such an order is made against the corporate body. An accessory is a person who has a special relationship with the corporate body; the consent or connivance is also conduct that constitutes the infringement (Section 222(1)).

An order made in a Court in one jurisdiction of the United Kingdom has effect in any other jurisdiction as if a Court in that jurisdiction made it.

Appeal Procedure and Conditions

Section 52 of the Civil Procedure Rules applies to the appeal from a County Court or High Court. The Court of Appeal is the main Appellate Court in the United Kingdom. The civil division is competent for the appeal from the County Court or the High Courts, such as for the case of the enforcement orders. The Court of Session of Inner House is the competent court in Scotland for appeal against the Court of Session enforcement orders.

The appeal is not an absolute right of the defendant, except in the case of statutory appeal (where the Court cannot refuse the right of appeal) but he must seek permission of the Court. The permission must be asked from the Lower Court, or, if the Lower Court refuses permission, from the Appeal Court.

After the Lower Court gives its judgement, there are 21 days from the date of the judgement to lodge an appeal, but the Court may set a shorter deadline.

No statutory appeal is provided for enforcement orders under Part 8, so general rules of Section 52.3 on the need to obtain permission to appeal are applicable. Section 52.3 4(B) provides that "Permission to appeal

may be given only where (a) the Court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard".

As for the hearing of the appeals, Section 52.11 provides that every appeal will be limited to a review of the decision of the Lower Court unless "a) a practice direction makes different provisions for a particular category of appeal; or (b) the Court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing. Unless it orders otherwise, the Appeal Court will not receive oral evidence; or evidence which was not before the lower Court".

The appeal is possible also for interim orders, such as interim enforcement orders under Section 218 of Part 8.

Sanctions

No sanctions may be imposed with an enforcement order. Only the PhonepayPlus, as delegated enforcer under Part 8 of the 2002 Enterprise Act may impose fines.

Follow up and monitoring compliance

If the enforcement application is settled with a court undertaking, in case of non-compliance, the OFT has the right to apply to the Court. An application to the Court for failure to comply with an undertaking may include an application for an enforcement order or interim enforcement order. In this case, no prior consultation with the trader is required.

Failure to comply with an enforcement order could be found by a Court to be in contempt that leads to a fine or imprisonment.

Statute of Limitations

No provisions are included in Part 8 or in the Civil Procedure Rules.

2.1.7.3 SELF-MANAGED ADMINISTRATIVE PROCEEDINGS

Competent Authority

Part 8 Section 213 makes a distinction between the general enforcers and designated enforcers. General enforcers are the OFT, every local weight and measure authority in Great Britain, and the Department of Enterprise, Trade and Investments in Northern Ireland. The designated enforcer is any person or body "which the Secretary of State thinks has one of its purposes as the protection of the collective interest of the consumers, and designates by order".

There are around 200 TSS in the United Kingdom that are competent for investigation and enforcement of the consumers' legislation in their area of competence. Their activities and competence is regulated by the Local Government Act 1972. There is a strict territorial competence for investigations for each TSS. They have all enforcement powers indicated in Part 8 of the Enterprise Act but, if they do not decide to open an investigation, they are not obliged to motivate their denial.

➢ Competence Ratione Loci

The Local Government Act 1972 defines the territorial competence for the action of the TSS. From the reform, the CMA will investigate the cases which have ah higher impact or that may constitute a determination for the future.

It is possible for one TSS to delegate another TSS to enforce and prosecute an infringement in its local area. For some kinds of unfair trading practices, the TSS created teams comprised of local TSS representatives to enforce legislation in various areas. An example is the Trading Standards Scrambuster and Illegal Money Lending team that operates on a regional or national level with other enforcement bodies tackling a variety of

threats to the fair trading system. However, the teams are often unable to carry out enforcement work within another local authority without specific authorisation to do so, unless accompanied by a TSS official from the local area. The Scrambuster teams typically work through one local authority, the Trading Standard Service, in the region taking lead responsibility for the operation of the team ¹⁰⁷.

Competence Ratione Materiae

Part 8 gives the OFT lead enforcement responsibility for actions taken in the UK for either type of infringement, including the responsibility for the coordination of actions by all enforcers. The OFT is also required to publish advice and information on how the consumer protection provisions of the Act will work.

The OFT is competent for all violations of consumer protection, including the Consumer Protection Act 1987, Consumer Transaction (Restriction on Statement) Order 1976, Control of Misleading Advertisement Regulations 1988, Sales of Good Act 1979, Unfair Contract Terms Act 1977, and Electronic Commerce (EC Directive) Regulations 2002. The TSSs are competent for enforcing the Trade Descriptions Act 1968 which prohibits "misdescriptions of goods, services, accommodation and facilities provided in the course of trade; to prohibit false or misleading indications as to the price of goods; to confer power to require information on instructions relating to goods to be marked on or to accompany the goods or to be included in advertisements; to prohibit the unauthorised use of devices or emblems signifying royal awards; to enable the Parliament of Northern Ireland to make laws relating to merchandise marks; and for purposes connected with those matters" (Chapter 29).

The OFT also retains the lead role for enforcing the Unfair Terms in Consumer Contracts Regulations 1999, although the Trading Standards Services will have equal enforcement powers.

With regard to Community infringements, the OFT is the competent authority that cooperates with Community enforcers and must be consulted by any enforcer who wants to apply for an Enforcement Order in the UK. The delegated enforcer must inform the OFT when carrying out an investigation or accepting an undertaking.

The most appropriate body will file proceedings with proper regard for other statutory regulatory means and for non-statutory mechanisms, and with regard to the application of the "*Home Authority Principle*". This principle is an informal agreement between local authorities that tries to correct the inevitable problems that arise from cross-boundary issues in trading standards and food. The principle requires local authorities to pay particular attention to goods and services originating in their area that are distributed or sold in different local authority areas¹⁰⁸.

Investigative powers including evidence requirements

The Statutory Instrument 2006 has amended Part 8 of the Enterprise Act 2002 introducing new powers to make necessary on-site inspections that, before the implementation of the CPC Regulation, were not available to the OFT in relation to its role in enforcing consumer law, although the OFT had the possibility to exercise these powers under the Competition Act 1998.

The Statutory Instrument introduced inspection powers required under the CPC not only for infringements across borders, but also infringements of the relevant Directives by UK traders that harm UK consumers (i.e. even where no referral from another MS is necessary or received).

Specifically, Part 8 actions may be taken against unfair contract terms by reference to the UTCCRs, and against unfair commercial practices by reference to the CPRs. In addition, certain acts or omissions (including most infringements of the CPRs) may constitute criminal offences, raising the possibility of criminal

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¹⁰⁷ National Audit Office, *Protecting consumers – the system for enforcing consumer law,* 15 June 2011 http://www.nao.org.uk/report/protecting-consumers-the-system-for-enforcing-consumer-law/

¹⁰⁸ I. RAMSAY, Consumer law and Policy, id, p.215.

proceedings. In such circumstances, the OFT and its enforcement partners will have a choice of enforcement mechanisms, and will decide on a case-by-case basis which is most appropriate. In deciding on the most appropriate enforcement tool to employ, the OFT will, where appropriate, take account of its policy on the criminal enforcement of CPRs.

The enforcement powers of the OFT and of the other enforcers are laid down by Part 8 of the Enterprise Act 2002 as amended in 2006.

As clarified by the Guidance in Part 8 of the Enterprise Act, Part 8 is not a means of pursuing individual redress. It applies only to infringements that harm the collective interests of consumers. Accordingly, the breach must generally affect, or have the potential to affect, consumers or a group of consumers. The evidence gathered by the enforcer must establish this. The evidence must demonstrate how a particular infringement has or may, in the future, have an adverse effect on consumers. It may include an assessment of the importance of the practice or provision in question or of the prevalence and likely impact of the infringement. Some isolated breaches may not be harmful to the collective interest of consumers. However, examples of individual consumer harm may be used as evidence. There is no obligation to establish a specific number of individual consumer complaints or incident of infringements.

The OFT may obtain information about individuals, business, agreements and markets at any time through formal enquiries. Such enquiries, which may be made at meetings, by correspondence, in a telephone conversation or during the course of a voluntary interview may be made in addition to, or instead of, using the formal investigation powers set out in the Enterprise Act. However, the OFT cannot compel any individual or business to respond to an informal enquiry which is not backed by statutory powers.

When using the power under Part 8 of Enterprise Act 2002, the OFT may obtain information through a formal enquiry. Under Section 222, the OFT, other general enforcers and designated enforcers that are public bodies and CPC enforcers have statutory power to require information (including documents) by means of a notice served on any person. These enforcers are able to request this information for the purpose of enabling them to consider whether to exercise their functions under this Part (section 224(2)(a) and section 225(3)(a)). This may be the case, for example, where it is not possible, on the basis of *ad hoc* complaints from consumers, to determine whether the cause of complaint is the result of an error or part of a deliberate pattern of unlawful conduct (e.g. mail order companies sending out goods different from those that were ordered).

Under Section 226, the notice must be in writing and specify the purpose of the request for information. When the notice is served to determine whether to exercise a function under the Enterprise Act 2002 or is served by another enforcer, it must specify the function concerned. The notice may specify the time frame and procedures needed for compliance, and it may require producing documents.

If the business fails to comply with a notice, an action may be required by the Court that may issue an order requiring compliance. The Court may require the recipient of the notice to do what the Court considers reasonable to ensure compliance with the notice.

OFT and CPC enforcers may carry out inspections at the trader's premises without a warrant. The power of entry for enforcers of the CPC Regulation allows them to enter any premises to investigate whether there has been or is likely to be an infringement or whether there is reasonable suspicion of infringement (Section 227A). A CPC enforcer must give appropriate notice to the occupier of the premises before entry. Officers are required to give at least two days notice to the occupant and set out why entry is necessary.

A CPC enforcer may obtain entry with a warrant from the Justice of the Peace if the CPC enforcer reasonably suspects the existence of a Community infringement (Section 227C) and admission to the premises was or is likely to be refused. The warrant may be required without giving notice of the intention to apply therefor, as advance notice would defeat the purpose of the entry.

If a person fails to comply with a notice, the enforcer who gave the notice may apply to the Court competent for an enforcement order. If appears to the Court that the person to whom the notice was given has failed to comply with the notice the Court may make an order (Section 227).

Control over the investigations

There are no specific rules related to the control over the investigative phase. Only in the case of application for a warrant, the Justice of the Peace verifies the existence of "reasonable grounds" for believing that the conditions for the warrant exist. Moreover, the warrant is issued on information given under oath by an enforcer's officer.

However, Part 8 gives the OFT (now NTSB) a central coordination role to ensure that action is taken by the most appropriate body to prevent duplication. If more than one enforcer contemplates bringing proceedings, the OFT may direct which body may bring proceedings by Part 8 and make appropriate arrangements with other enforcers.

Procedural Safeguards

Under Section 227B, a CPC enforcer officer may take copies of, or extract from any document to which he has access during the inspections. This power precludes access to documents that may be considered "privileged": no action may be taken "in relation to anything that in proceedings in the High Court, a person would be entitled to refuse to produce on the ground of legal professional privilege" (Section 227 B(4))¹⁰⁹.

The documents seized during an inspection may not be retained for more than three months (Section 227F).

The Practice Direction - Application for a warrant under the Part 8 of the Enterprise Act 2002, clarifies that "a person may not be required to disclose any information or produce any document which he would be entitled to refuse to disclose or produce on grounds of privilege in proceedings in the High Court. However, a lawyer may be required to provide the name and address of his client as part of an investigation being conducted under the powers in the Act. Privilege does not apply to communications made with the intention of furthering a criminal purpose (whether the lawyer is acting unwittingly or culpably).

The Act also provides a safeguard for confidential banking information. A person may not be required to disclose any information or produce any document for which he owes an obligation of confidence by virtue of carrying on any banking business, unless the person to whom the obligation of confidence is owed consents to the disclosure or production or the OFT has authorised the making of the requirement."

Opening and Closing of Investigation

No express provisions are included in Part 8 related to the outcomes of the investigations, but the enforcer may decide not to proceed, to accept an undertaking or to apply for an enforcement order or, if the infringement constitutes a criminal offence, apply for an indictment.

Opening and closing of infringement procedure

No provisions are included in Part 8 related to the opening or closing of the infringement procedure.

Undertakings, Commitments and Settlement

¹⁰⁹ A privilege is a right given by law to a person that allows him to resist compulsory disclosure of information. Privilege is absolute, in the sense that once it is established, it may not be weighed against any other countervailing public interest factor but may only be overridden expressly by statute. The UK legal privilege system, which makes distinctions between the legal advice privilege and the legal proceedings privileges is well clarify in the *Three Rivers District Council & Others v The Governor and Company of the Bank of England* [2004] UKHL 48. Part 31, Disclosure and Inspections of documents, of the Rules and Practice Direction of the Code of Civil Procedure provides 31.6 Standard disclosure requires a party to disclose only: (a) the documents on which he relies; and (b) the documents which –(i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case; and (c) the documents which he is required to disclose by a relevant practice direction.

Enforcers will normally seek to prevent an infringement by consulting with the trader before applying to the Court for an enforcement order. Instead that seeking an order, they may accept undertaking from the trader not to engage in or repeat the conduct constituting an infringement.

Before to taking steps to seek for an order, the OFT and other enforcers have to consult with business, unless there are circumstances which necessitate immediate action. Minimum 14 days must be allowed for the consultation with the business. If the enforcer wishes to apply for an interim order, a minimum of 7 days must be allowed for the consultation.

An enforcer may accept an undertaking from any business against which proceedings could be brought. The undertaking would be from a business that has engaged or is engaging in conduct that constitutes an infringement or, with reference to a Community infringement, is likely to do so (Section 219).

The undertaking, whether to an enforcer or to the Court, must require that the business does not continue or repeat the conduct, does not engage in the conduct in the course of his business or another business and does not consent or connive in the carrying out such conduct with a body corporate with which he has a special relationship.

Decisions

No particular provisions exist regarding the decisions of the enforcer. The enforcer, as said above, may accept undertakings or apply for an enforcement order.

Sanctions

The enforcers may impose no administrative fines. In case of undertakings to the OFT where no infringement is necessarily admitted, the OFT may still publishing the undertakings. Publicity will not be given to cases where the OFT considers that no breach could properly be established and where no undertakings where obtained by the business.

Statute of Limitations

No statute of limitations is provided by the legislation for the investigation procedure.

> Timeframe/Legal Deadlines

No time frame and legal deadlines are provided.

Follow-up and Monitoring Compliance

In case of non-compliance with an enforcement order or breach of terms, the enforcement may apply for an indictment in magistrate Court to convict the infringer and impose penalties.

Appeal Procedure and Conditions

No appeal is provided against an enforcement order.

2.1.7.4 PHONEPAYPLUS SELF-MANAGED ADMINISTRATIVE PROCEEDINGS

PhonepayPlus regulates the UK premium rate services (PRS) market, which includes services ranging from directory enquiries to apps that use digital micropayments. PhonepayPlus Code of Practice regulates the self-administrative proceedings in case of violations of provisions of the Code by a service provider. It also covers some premium services provided under the Directive 2000/31/EC.

PhonepayPlus, ad delegated third party, only has its own enforcing powers which, in any case, are quite extensive. In order to grant the accountability and the transparency, the self-managed administrative proceedings is carried out at three levels: PhonepayPlus is in charge of for the investigative phase, the

Tribunal of the adjudication and the Independent Appellate Body (IAB) for the appeal against adjudications. It is a self-managed administrative proceedings.

Rule 2.5.1 provides that "premium rate services must not cause or be likely to cause harm or unreasonable offence to consumer or to the general public". Providers of the services are divided into two categories: Level 1 providers (which form part of a premium rate value chain) and Level 2 providers (the end provider of the service).

Consumer may submit a complaint to PhonepayPlus only after having submitted a complaint to the service provider and the complaint has been dealt with in unsatisfactory way.

Investigative powers including evidence requirements

According Rule 4.2.1 PhonepayPlus will consider, and where appropriate investigates, all the complaints that it receives, provided the complaint is made within a reasonable time from when it arose. According to Rule 4.2.2, it may initiate an investigation ex officio where it appears that there is a breach of the Code. It may require to any provider to disclose any relevant information or copies of documents.

Opening and closing of infringement procedure

Rule 4.3 provides that, in appropriate case where an apparent breach of the Code has caused little or no consumer harm, PhonepayPlus may use Track 1 procedure. Under Track 1 procedure the relevant party will be contacted an informed of the apparent breach. PhonepayPlus will propose a set of action that believes necessary to remedy the breach and prevent the repetition of the actions. It the action plan is accepted and the service provider demonstrates to have complied with it in the deadline, the infringement is close. If the plan is not accepted, an agreement on the plan is not found or the service provider do not comply within the deadline, then Track 2 procedure is applied.

Under Track 2 procedure (Rule 4.2), the party will be provided with all the relevant information on the alleged breaches of the Code. The party is given a reasonable period of time to reply and provide the requested information. The deadline may not be longer than 15 working days. PhonepayPlus will prepare a report of its allegations and investigation including the response of the relevant party, together with relevant supporting evidence that will be placed before the Tribunal to adjudicate on the matter.

Undertakings

Rule 4.3.1 provides that PhonepayPlus, in case the infringement has caused a little or no harm, provides to the party a set of relevant actions which it believes is necessary to remedy the breach and prevent repetition together with a deadline for action ("the action plan"). Undertakings are possible only when the procedure is under Track 1 and it is managed by PhonepayPlus before being submitted before of the Tribunal. In case the plan is accepted, the provider must prove the compliance and may be invoiced the administrative cost of the procedure. In case of non-acceptance of the action plan and/or non-compliance, PhonepayPlus will submit the case to the Tribunal

Adjudication by the Tribunal

The Tribunal is an administrative body (not judicial) made up of three members of chosen between the Code Compliance Panel (CCP)^{110.} The Tribunal will make a decision as to whether the Code has been breached or the basis of the evidence presented. The adjudication of the Tribunal will be transmitted to the parties and will indicate the possibility to apply for a review or an oral hearing. The decision of the Tribunal is published.

The Tribunal may

Issue a reprimand and/or warning;

¹¹⁰ The Code Compliance Panel is responsible for PhonepayPlus' adjudicatory function. The CCP is made up of nine people from which three members are drawn to form PhonepayPlus' bi-weekly Tribunals, which hear and adjudicate on cases against premium rate providers that PhonepayPlus suspects to be in breach of its Code of Practice. While three PhonepayPlus non-industry Board members sit on the CCP, the CCP's decision-making process is independent of PhonepayPlus, with the other six members (being appointed for their specialist legal and adjudicatory experience.

- Order to give refunds to consumers;
- Impose fine up to a maximum of £250,000 per rule broken;
- Bar the access to the service;
- Require the provider to obtain compliance advice or permission to run the service; or
- Ban the provider from running some or all premium rate services.

Appeal

The parties may require a review of the decision to the Tribunal (Rule 4.7.3). If the review must raise new issue of fact or law that was not reasonably available at the time of the decision. If the Chairman of the CCP considers that the review is grounded, the Tribunal will carry out the review within reasonable time. The review does not suspend the enforceability of sanctions.

Level 1 and Level 2 providers may, after an oral hearing under Rule 4.11.2 to require permission for the appeal, submit an appeal to the Independent Appellate Body (IAB). Appeals may be made on the following grounds:

- The disputed decision was based on error or fact;
- The disputed decision was wrong in law;
- The Tribunal exercised its discretion incorrectly in reaching its decision.

Deadlines

No particular deadlines are provided in the Code. The proceedings have to be carried out within reasonable time. From the Annual Report, it has resulted that the proceedings are quite fast, with an average length of 10 days for Track 1 and one month for Track 2.

Emergency Procedure

In appropriate case, where apparent breach of the Code has taken place that is serious and requires urgent remedy, PhonepayPlus will use the emergency procedure (Rule 4.5.1). In this case PhonepayPlus will carry on immediate preliminary investigation and will notify the findings to three members of CCP. The three people notified will decide if the situation is urgent and requires the use of the emergency procedure. In affirmative case, PhonepayPlus will suspend the service and other activities such as the suspension of the payments to the infringer from the other member of the network. Once the activity has been stopped, the relevant information, including any response from the party under investigation, will be place before the Tribunal "as soon as it is reasonably practicable" (Rule 4.5.1 (f)).

2.1.7.5 CRIMINAL PROCEEDINGS

Violations constituting criminal offences

According to Consumer Protection from Unfair Trading Regulation 2008 (hereinafter "the Regulation"), regs 8 to 12, a trader is guilty of an offence if he commits ¹¹¹:

^{111 8 (1)} A trader is guilty of an offence if—

⁽a) He knowingly or recklessly engages in a commercial practice which contravenes the requirements of professional diligence under regulation 3(3)(a); and

⁽b) The practice materially distorts or is likely to materially distort the economic conduct of the average consumer with regard to the product under regulation 3(3)(b).

⁽²⁾ For the purposes of § (1)(a) a trader who engages in a commercial practice without regard to whether the practice contravenes the requirements of professional diligence shall be deemed recklessly to engage in the practice, whether or not the trader has reason for believing that the practice might contravene those requirements.

^{9.} A trader is guilty of an offence if he engages in a commercial practice which is a misleading action under regulation 5 otherwise than by reason of the commercial practice satisfying the condition in regulation 5(3)(b)

^{10.} A trader is guilty of an offence if he engages in a commercial practice which is a misleading omission under regulation 6

^{11.} A trader is guilty of an offence if he engages in a commercial practice that is aggressive under regulation 7.

^{12.} A trader is guilty of an offence if he engages in a commercial practice set out in any of §§ 1 to 10, 12 to 27 and 29 to 31 of Schedule 1.

- Contravention of requirements of the general prohibition;
- Misleading actions except 5(3)b which concerns the failure by a trader to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with;
- Misleading omissions (including the omission of specified information in invitation to purchase);
- Aggressive practices;
- Specified unfair commercial practices indicated in Schedule 1 points from 11 to 28: i.e. specified blacklisted practices.

Reg. 8 offence requires proof of knowledge of the recklessness .The offences from regs 9 to 12 are strict liability offences, which means that proof that there was a prohibited act or omission must be shown but not proof of *mens rea* subject to statutory defence (reg.17) or innocent publication of offensive advertising (reg. 18)¹¹².

In case of a prosecution for contravening the general prohibition, the mental element only need to be shown in relation to contravention of the "requirement of professional diligence". It does not need to be shown in relation to the effect on average consumer assessed against the material distortion and transactional decision concepts.

Competence Ratione Materiae

In England, Wales and Northern Ireland prosecutions will generally be conducted by:

- The OFT, now CMA;
- Local authority Trading Standards Services;
- The Department of Enterprise, Trade and Investment in Northern Ireland;
- The Crown Office and Procurator Fiscal Service on behalf of the Lord Advocate in Scotland.

Part 4 of the Regulation governs the duties and power of the investigation and enforcement.

In England and Wales, the prosecution of a criminal offence starts before the Magistrate Court, which is the lower Court for criminal proceedings (Part 37 of The Criminal Procedure Rules 2013). The Magistrate Court may decide either summarily or upon indictment and conviction.

Competence Ratione Loci

Proceedings should be filed in a Court that has competence in the area where the defendant resides or carries out business or in a Court that has competence where the action giving rise to the proceedings occurred.

Competence Ratione Personae

Where a body corporate commits an offence with the consent or connivance of an officer of that body, both the officer and the body corporate can be prosecuted and punished. The same applies if the offence is attributable to neglect on the part of the officer (Section 15 CPRs).

Burden of Proof

The criminal proceedings are subject to the general procedural rules in term of evidences. The legal burden of proving any fact in relation to the prosecution case relies upon the prosecution and remains with the prosecution throughout the trial. There is the "Implied Statutory Exception". Section 101 of the Magistrates' Court Act 1980 provides: "Where the defendant to an information or complaint relies for his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception ... shall be on him; and this notwithstanding that the information or complaint contains an allegation negating the exception".

¹¹² D. C. ORMEROD, *Blackstone's Criminal Practice* 2012, Oxford 2012, p. 506.

According to Rule 37.3 (d) the court legal adviser informs the defendant of the possibility to submit evidence and the risk of not doing so. The prosecutor, by the defendant or a party may introduce evidence. The Court evaluates the evidence and rules on its admissibility.

The general rule for magistrate Court is that the prosecution will not be able to call evidence about any previous convictions or other past misconduct of the defendant unless the prosecution makes a written application, on notice to the defendant, stating how the evidence is relevant to the new case and how the exception that prosecution wants to rely on to call the evidence applies.

With regard to the standard of proof, the evidence must pass the Evidential Test defined in the Guidelines for Crown Prosecutors¹¹³. The Evidential test has two stages: (i) the evidential stage, followed by (ii) the public interest stage. Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case that does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be. In every case where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest. The Guidelines contains a series of questions to which the prosecutors have to reply in order to identify the existence of the public interest.

Standing of the competent national authorities under the CPC Regulation in criminal

No provision is included in the Part 8 or in the Code of Criminal procedure.

Proceedings

The proceedings mainly start with an indictment. The indictment is a document produced by the Public Prosecutor who charges the defendant with the offences. An indictment must be in one of the forms set out in the Practice Direction and must contain, in a paragraph called a 'count' (a) a statement of the offence charged (b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.

The draft indictment is served to the Court at least 28 days after having obtained permission from the Crown Court and after having served the indictment to the defendant.

Both in the Magistrate Court's trial and in the Crown Court trial there is the plea and direction hearing introduced to ensure that all the necessary steps have been taken and the Court is provided with sufficient information to fix a trial date. During the hearing which, in principle, is public, the Court ask to the defendant how he pleas the charges. If the defendant pleads guilty, the judge will sentence him immediately, if possible. In case of indictment, the following step is submitting to the parties a questionnaire with enquiries for both the parties.

In case of trial in the magistrate Court, the prosecutor may summarise the prosecution case, identifying the relevant law and facts and he must introduce the evidence on which the prosecution case relies. The defendant is invited to presents its own evidences.

Procedural Safeguards

Rule 37.12 of the Code of Criminal Procedure provides that A party who introduces a document in evidence, or who otherwise uses a document in presenting that party's case, must provide a copy for (a) each other party; (b) any witness that party wants to refer to that document; (c) the Court; and (d) the justices' legal adviser.

¹¹³ http://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html

Under Criminal Procedure Investigation Act 1996 the prosecution and the defence must disclose certain material to each other. The defendant must give a defence statement to the Court and prosecutor who states in general terms the nature of the defence.

Many local authorities have prosecutorial guidelines. The significance of these guidelines fro prosecution

> Statutory Defence

Breach of most of the prohibitions contained in CPRs means that an offence may have been committed, unless one of the due diligence or innocent publication may be demonstrated. To be able to demonstrate the due diligence, for offences under CPRs the person must prove that the commission of the offence was due to a mistake, reliance on information given by another person, the act or default of another, an accident, or another cause beyond his control, and, in addition, that he took all the reasonable precautions and exercised all due diligence to prevent committing the offence or to prevent someone under his control committing it.

In case the due diligence defence is based on information given by another person or act or default of another, the defence cannot be invoked if the person has not given a written notice of the defence based on third party to the enforcer prosecuting the offence. The notice must be served to the prosecutor at least seven clear days before the date of the hearing (Section 17 CPRs).

When the offence is related to misleading and aggressive advertising, the person prosecuted for the offence may invoke the defence based on innocent publication of advertisement defence: the person must prove that he is a person whose business is to publish and arrange publication of advertisements, that he received the advertisement in the ordinary course of business and that he did not know and had no reason to suspect that the publication would amount to an offence (Section 18 CPRs).

Court Decision

Rule 37.3 of the Code of Criminal procedure provides that, at the conclusion of the prosecution case, on the defendant's application or on its own initiative, the Court may acquit on the ground that the prosecution evidence is insufficient for any reasonable Court properly to convict, but must not do so unless the prosecutor has had an opportunity to make representations.

The Court may convict the defendant, or if the Court acquits the defendant, it may (a) give an explanation of its decision and (b) exercise any power it has to make: (i) a civil conduct order, (ii) a costs order.

Sanctions

Penalties for offences under CPRs are:

- On summary conviction, to a fine not exceeding the statutory maximum; or
- On conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both (reg. 13 CPR).

The criminal sanctions are extensively described in Capter 1.3.

Appeal

The magistrate Court decision may be appealed within 14 days from the judgment before the High Court.

Time Frame/Legal Deadlines

No time frame and statutory legal deadlines are provided for the trial before the magistrate Court. The Court at the first hearing provides the deadlines.

Statute of Limitations

The statute of limitations for prosecutions are either within three years of the offence taking place, or within one year of the prosecutor discovering the offence, whichever is first (Section 14 CPRs).

2.1.7.6 CONCLUSIONS

The United Kingdom consumer protection enforcement, also after the recent reform, is characterized by a high level of decentralisation and of litigation in the Courts. Centralised enforcement may have the advantages for enforcement directed towards national businesses and may have the advantage of the economies of scale in producing and collecting certain information. If mainly small local operator commits consumer offences the local authorities have comparative advantage in terms of enforcement costs.

Breaches of consumer law can be enforced with a civil and injunctive action, or by criminal prosecution, which means enforcers have a variety of enforcement tools available to them. However, enforcers generally try to resolve the matter with businesses without applying to the Court, due to higher costs and the level of evidence required. Negotiations with business, backed up by the threat of court action if a business refuses to comply, have proven to be very effective. Criminal prosecutions are reserved for rogue traders or for repeated offences.

A quite unique position is that of the delegated third party under Article 8(3) of CPC Regulation, PhonepayPlus that is in charge of the enforcement of consumer protection for premium services. The body, which is under supervision of the Ofcom, has a self-managed administrative proceedings with a wide range of enforcement powers and fast track proceedings that provide to be very useful in context of services with high developing and constant changing products.

3.1 OVERVIEW OF THE NATIONAL PROCEDURAL RULES IN DOMESTIC CONTEXT

2.2.1 INTRODUCTION

This chapter intends to provide an overview of the main national procedural elements emerged from the national reports, as required under Deliverable 4. The comparative grid at the end of the chapter provides a synthesis of the elements analysed and the results for each of the selected Member States.

Even if some common aspects have emerged, the national procedural rules that are applicable to domestic infringements of consumer protection legislation are quite different.

From the information gathered in the national reports, there are three different models of public enforcement in the examined Member States:

- The model relying only on administrative procedure (Czech Republic, Italy, Latvia);
- The model relying on administrative and civil justice system to obtain sanctions and remedies (Germany); and
- The model relying on administrative, civil and criminal justice systems (Belgium, France, the United Kingdom).

Germany and the United Kingdom have used the possibility to delegate the enforcement to bodies having a legitimate interest according to Article 8(3) of CPC Regulation.

2.2.2 COMPETENT AUTHORITIES

In the majority of the Member States examined, the competent national authority for consumer protection is the national competition authority. The exceptions are the Czech, German and Latvian systems. In Germany there is a competent national authority but the public enforcement is mainly assigned to the consumers' organizations delegated by the public authority as third party under Article 8(3) of the CPC Regulation.

A similar system exist in the United Kingdom, where the Part 8 gives the OFT (now CMA) a central coordination role to ensure that action is taken by the most appropriate body and, in general, decides to tackle the infringements that have particular relevance. The domestic local and national public enforcement is mainly left to the local agencies TSS on the principle of the "home authority".

In France, the DGCCRF is the main competent authority for the public enforcement of consumer protection; however, the regional and local departments of the authority, the DIRECCTE, carry out the investigations. Also the Czech CTIA has a central Inspectorate and regional branch inspectorates, whose headquarters are found in major regional cities.

The comparative advantage of local agencies opposed to national agency may be viewed in the light of:

- Enforcement costs;
- Diversity versus uniformity; and
- Citizens' responsiveness¹

Centralized enforcement may have the advantage for enforcement towards national businesses. Moreover, it is considered that the national agencies may have more power vis-à-vis national businesses and use economies of scale in producing and collecting certain information. On the other side, local agencies may be more responsive to interests of local consumers and business interests. However, some inconsistencies and lack of coordination may arise from the fragmentation of the competence, as already discussed in Chapter 1, especially with regard to Spain and the United Kingdom.

¹¹⁴ I. RAMSAY, Consumer Law and Policy, id., p. 214.

In Germany, the third parties may only enforce according to the instructions that they received from the competent national authority and within the limit of the powers delegated case-by-case. In the United Kingdom, the TSS have a limited power of representation before the Court and they may only enforce the with respect to those infringements for which they have been designated. Moreover, the territorial competence of each TSS is very strict, which has created difficulties in infringements involving different regions and departments. The United Kingdom delegated third party, PhonepayPlus, stands in a unique way, with its own enforcement powers and fast track proceedings.

2.2.3 CEASE AND DESIST ORDERS

All the examined Member States have adopted cease and desist orders modelled on the injunctions order from the Injunction Directive.

Cease and desist orders are court proceedings except in Czech Republic, Italy, Latvia where the public enforcement is based on self-managed administrative proceedings. In this case, the cease and desist orders are issued by the authority under the from of an order to cease or remove the unfair act or omission. In France, the competent national authority may order the cessation of the action or omission or require to the civil Court to order to the trader to cease and desist from the act or omission. In Germany the system is mixed with the competent national authority that may issue a cease and desist order under self-managed administrative proceedings or designate a private enforcement body to require a cease and desist order under judicial proceedings.

Competence Ratione Materiae

The general rule applicable to the court proceedings is that the competence of the Courts is determined by the subject matter and by the value of the claims. An exception is Belgium where there is the statutory competence of the Presiding Judge of the Commercial Court independently from the committed offence and/or the value of the claims.

Competence Ratione Loci

All the examined Member States have adopted, as competence *ratione loci*, the general competence of the place of the defendant. The competence *ratione loci* is applicable only where the cease and desist order is a civil proceedings. In Czech Republic, France, Italy and Latvia, where it is a self-managed administrative proceedings, the competence of the national authority covers all the territory.

Violations Covered by Cease and Desist Orders

In general, the cease and desist orders may be used against all the violations of the consumer's protection legislation, including criminal offences. For Member States with criminal proceedings, such as Belgium, France and the United Kingdom, it constitutes an alternative to the criminal prosecution. For this reason, the Public Prosecutor must be informed of the intention of the competent authority to proceed with a cease and desist order. In Belgium, in case both proceedings (cease and desist order and criminal proceedings) are initiated at the same time, it is explicitly provided that the cease and desist order takes precedence over the criminal proceedings, which is suspended until the decision of the commercial Court. Moreover, the decision of the Presiding Judge of the Commercial Court is binding for the criminal Court, which cannot decide again on the infringement, but only on the existence of the elements that qualifies the criminal offence.

In France, general policy considers the cease and desist order not suitable to tackle some serious infringements, notably aggressive practices since the practice must be evaluated in relation to the victim and on a case-by-case basis.

The cease and desist orders are used also to obtain the removal of unfair terms from the contracts of the defendant.

Burden of Proof and Standard of Proof

The rules on the burden of proof follow the general rules on the provisions of the evidence to the Court. The general rule, applicable in all the examined Member States is that the party who asserts the matter must prove it. The burden of proof is said to act frequently as a burden of persuasion: although the law indicates who should prove what, the reality is that "either by virtue of case law or by virtue of legislation, the rules on the burden of proof are standard for the allocation, between the parties, of the negative effects of the final lack of proof of material facts" 115. There are two burdens of proof: the legal (or fixed) burden of proof, and the evidential (or tactical) burden of proof. The criminal proceedings are characterized by the legal or fixed burden of proof: it rests on the prosecution and never changes though the trial 116. In the civil proceedings the burden of proof is evidential and shifts between the enforcer and the defendant. The moot point is where the burden shifts 117.

In Belgium and France the Court may reverse the burden of proof to the defendant. The failure to provide the requested evidence may be seen as rebuttable presumption of incorrectness of factual claims according Directive 2005/29/EC. In Italy there is the same possibility to reverse the burden of proof on the business but since the cease and desist order is a self-managed administrative proceedings, the decision and the evaluation lies with the competent national authority.

In general, the legislation does not require a particular level of evidence for cease and desist orders, especially in the cases where the cease and desist order is issued in interlocutory proceedings, such as Belgium and in the United Kingdom. For the interlocutory proceedings, the evidence of the right and of the threat and the Court's consideration of the application involve a considerably smaller degree of care and accuracy than in ordinary proceedings: all that is required is 'prima facie' evidence and the finding is a summary one. It is worth to mention the approach of the United Kingdom Courts that the standard of proof for an enforcement order has to be consistent but not so high as in the criminal proceedings, since the enforcement order has to pursue the objectives set by the Injunction Directive. According Lord Drummond "the interpretation of Part 8 (of the UK Enterprise Act) should aim at ensuring a uniform approach through the European Union. That interpretation should not be constrained by the detailed rules of procedure of any domestic legal system 118".

With regard to the standard of proof, the cease and desist order follows the general rules of the national civil procedure. A distinction has to be made between common law Member States and civil law Member State. Common law distinguishes two standards of proof applicable in civil and criminal matters respectively. The criminal standard of "beyond reasonable doubt" is much higher than the "preponderance of the evidence" standard used in civil cases, which is closer to a balance of probabilities. Cease and desist order as civil proceedings in the United Kingdom apply the standard of proof of the "preponderance of evidence".

The tactical or provisional burden of proof signify the fact that, if party A has satisfied his evidential burden of proof, if party B does not adduce any evidence in rebuttal, B runs the risk that the Court will find against him on that issue. R. Munday, *Evidence*, Oxford 2013, p. 60-64.

¹¹⁵ CASTILLO DE LA TORRE, *Evidence, Proof and Judicial Review in Cartel Cases*, European Competition Law Annual: Evaluation of Evidence and its Judicial Review in Competition Cases, Oxford and Portland, 2010 p.13.

¹¹⁶ This approach is consolidated by the case law of the European Court of Human Rights. In the case *Telfner v. Austria*, the guiding principle was enunciated as follows: "The Court recalls that, as a general rule, it is for the national Courts to assess the evidence before them, while it is for the Court to ascertain that the proceedings considered as a whole were fair, which in case of criminal proceedings includes the observance of the presumption of innocence. Article 6 § 2 requires, inter alia, that when carrying out their duties, the members of a Court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused (...) Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence "Application No 33501/96, Telfner v. Austria, 20 March 2001, p. 15

¹¹⁷ In criminal cases, the legal burden of proof rests on the public prosecution who has to prove the accused guilty beyond any reasonable doubt. In the civil cases, the party bearing the legal burden of proof need only to establish his case on the balance of probabilities, demonstrating that the existence or non existence of a particular fact or facts in issue is more probably than not. While the legal burden of proof is a burden of proof in the true sense, the evidential is simply the obligation borne by a party to show to the Court that there is a sufficient evidence to raise an issue. It has been said that the evidential burden of proof is the duty of "passing the judge". This expression shows that there are two different dynamics at work, according to whether the burden is legal or evidential. The evidential burden refers to the initial hurdle that a party faces of adducing enough evidence to prevent the judge from withdrawing an issue from the Court consideration. The legal burden, in contrast, refers to a party obligation to prove the existence or non-existence of a fact in issue to the requisite standard to the satisfaction of the trier of facts.

¹¹⁸ Opinion of Lord Drummond in the Petition of the Office of Fair Trading against MB Design, id.

European civil law recognized only the standard of "full conviction" applicable to both criminal and civil cases 119.

All the Member States have introduced a hierarchy of evidence with the written evidence having higher value. With particular regard to the evidence collected by the national authorities during the investigations, Belgium and France legislation expressly provide a higher standard of proof for the evidence collected by the competent national authorities during the investigations: the reports from the inspectors are evidence to the contrary. No similar provision has been found for other examined Member States.

A limit to the possibility for the Courts to order the defendant to disclose information is the protection of the business and professional secret. The defendant may not be imposed to disclose in the Court information that constitute a business secret or professional secret. In some cases the Court may order a closed hearing to discuss sensitive information. With regard to documents that are legally privileged, Part 31 – Disclosure and Inspection of documents of the United Kingdom Code of Civil procedure, provides that documents that are covered by the legal privilege cannot be inspected or used.

Procedural Safeguards

In the Member States where the cease and desist order is a civil proceedings the procedural safeguards are provided by the codes and rules of civil procedure which are always directed to ensure the equality of the arms. The defendant has to be served the request for a cease and desist order, has the right to be heard and to submit evidence. In the United Kingdom, the OFT, before seeking an enforcement order has the statutory obligation to inform the trader and leave him 14 days to propose undertakings in order to avoid the proceedings.

The decision adopted by the Court may always be appealed before a higher Court.

Procedural safeguards are particularly important in those Member States where the cease and desist order is issued by the competent national authority as a public enforcer (the Czech Republic, Italy and Latvia). Here, the authority competent for the investigation is also the one adopting the decision and more procedural safeguards have to be provided in order to guarantee due process and rights of defence.

In this context procedural safeguards are important in relation to balance the information advantage of the public authorities, collected through their investigative powers. Procedural safeguards may refer to the investigation, such as in the Czech Republic where, if the business does not agree with the measures imposed by the competent national authority, has the right to submit objections to the director of the inspectorate. In Italy the defendant may also submit an appeal to the Administrative Court against an interim decision adopted by the authority while the investigation is still pending.

A particular form of procedural safeguard related to the use of information classified as business and/or professional secrets. While the disclosing this kind of evidence is not possible in the Court, except when disclose in close hearings, the competent national authority may acquire them during the investigation (the business secret is not opposable to the competent authority) and it may use them in order to support their decision but it cannot disclose the content of the information to the public or third parties.

In Italy the defendant has the right to access the investigative file in order to be informed about the evidence against him. Third parties may ask to be authorised to the access, but the evidence classified as confidential information (including business and professional secrets) may not be disclosed. The action is modelled according to the access to file rules for antitrust investigations.

Legal Deadlines

Legal deadlines refer to the deadlines applicable to the procedure. Where the cease and desist order is issued in a judicial procedure, no particular deadlines apply since the act are submitted to the statutory deadlines laid down by the Court. For Belgium, France and the United Kingdom, which rely on civil

¹¹⁹ M. Schweizer, *The civil standard of proof –what is actually*? Max Planck Institute for Research on Collective Goods, July 2013

proceedings for cease and desist orders, the competent Court lays down the legal deadlines for submitting documents thereto at the beginning of the proceedings.

Legal deadlines are provided for self-managed administrative proceedings. In Italy, for example, the enforcer has to open the investigation within 180 days from the request (it means that the pre-investigative phase in order to evaluate the request is no longer than 180 days) and close the proceedings in 120 days from the opening of the investigation, except where provided for an extension (in the cases provided by the Authority's regulations or for the need of the investigations). In France, the decision has to be adopted within 60 days from the closing of the investigation.

Statute of Limitations

Statute of limitations applies to the offence. It may be objective, indicating an absolute period of time after which the investigation and punishment are precluded, or subjective, applying from the moment from where the authority learns about the infringements. In the examined Member States we have found a mix of both. In some cases, the statute of limitation is objective (Belgium, France), in Germany is subjective. German statute of limitations under the Unfair Competition Act is particularly short, since the action is statute barred after six months from the knowledge of the infringement.

In Czech Republic it is both subjective and objective: self-managed administrative proceedings for a cease and desist order must be started within one year from the day the inspector learned about the infringement but not later than two years from the day the infringement happened.

In Italy, the United Kingdom, Latvia there is not statute of limitations in order to start cease and desist order. In France the new statute of limitations has been introduced by the reform and it depends from the seriousness of the infringement.

Among the countries that have objective statute of limitations in order to initiate an action for the cease and deist order, we have detected two opposite situations: in Belgium there is a short term (one year) starting from the day the infringement has ceased, in France the term varies between one and three years starting from the day the infringement has been committed.

Proceedings

Belgium and the United Kingdom introduced specific procedural rules for cease and desist orders that shorten the length of normal civil proceedings to allow the Court to issue an order within a short time. In France there is the possibility to ask to the Court for an interlocutory proceedings but the action may also follow the ordinary civil proceedings.

Decision

The decision on a cease and desist order, both in the civil and administrative proceedings, takes the form of an order (or decision containing an order) that must be sufficiently clear to identify the nature of the conduct to which the order relates and the person to comply with the order. The clear identification of the act or omission is important to permit to the defendant to comply correctly with the order as well as to identify the recurrence of the infringement. The clear description of the obligations imposed on the defendant is important especially in Belgium, France and the United Kingdom where the non-compliance with the order has criminal consequences.

Appeal

All the cease and desist orders are subject to appeal before the competent jurisdictions. In general the appeal does not have suspensory effect except in Czech Republic. In the United Kingdom where there is no a statutory right to appeal an enforcement order but the defendant must seek for the authorization of the Court in order to be able to submit the appeal.

Administrative Penalties

Administrative penalties may refer to two situations: the imposition of civil penalty by an administrative tribunal and the ability of an agency to impose a penalty without a Court order but subject to appeal by the infringer¹²⁰.

In the Czech Republic, Italy, and Latvia the authorities may impose administrative fines. In Germany, the sanctions may be imposed by the competent national authority when adopting a decision or by the Court in a cease and desist order under third party enforcement.

The new French reform introduces the possibility for the DGCCRF to imposed administrative fines.

Belgium the Belgian Court may impose fine for non-compliance or delays within the compliance (astreinte) of the order.

In all the Member States is possible the publication of the authority or court decision as adverse publicity.

2.2.4 SELF-MANAGED ADMINISTRATIVE PROCEEDINGS

In all the examined Member States the administrative authorities carry out the monitoring and investigation activity. In the Czech Republic, Italy, Latvia and Germany the competent national authority is in charge of all the proceedings and adopts a decision concerning the infringement. In Belgium, France and the United Kingdom, where their infringer may be prosecuted for criminal offences, the competent national authority carries out investigations also in the view of the criminal proceedings.

Except for the Czech Republic, Germany and Latvia, the competent national authorities for consumer protections are the national competition authorities. However, they have adopted a separate body of procedural rules for the administrative proceedings on consumer protection.

Investigations

The investigative powers are reported in details in Capter 1.3 and will be examined in Task 5. Here we report on some characteristics and procedural safeguards applicable to the investigative powers. All the national legislations have, introduced the minimum powers provided by the Article 4(6) of CPC Regulation. Some Member States had already conferred high investigative powers to the national authorities competent for consumer protection enforcement, while other Member States have modified the previous legislation in order to take into consideration the new powers conferred by the CPC Regulation. However, inconsistencies emerge especially in the Member States where enforcement of the consumer protection is fragmented among different authorities, such as the Czech Republic (the Czech Republic and Slovakia).

As indicated in § 3.2, the Czech legislation contains, in various acts, direct references to the CPC Regulation. However, these national rules directly referring to the CPC Regulation do not indicate the investigative powers that the authority may use for the investigation under the CPC Regulation in a cross-border infringement, with the consequence that the national authority may prefer to rely on the investigative powers provided by the national legislation in order to prevent risk of due process violation and uncertainty.

The national investigative powers provides a wide range of instruments to detect infringements, including the possibility to obtain information and documents from the inspected person, to inspect business premises and to seize documents and goods.

With regard to the standard of proof and evidence requirements needed to start an investigation, there is no particular level that needs to be satisfied. The competent national authorities have the discretion to start an investigation: the only requirement is that the level of evidence must be enough to demonstrate the harm to the "consumers' interest". However, the standard has to be sufficient to defend the decision before the Court, in case it is challenged.

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 $^{^{\}rm 120}$ I. Ramsay, Consumer Law and Policy, id, p. 252.

The difficulty with having a single definition for conduct and a quantification of the level of breaches that may constitute harm to the collective interest of consumers is found in the United Kingdom's jurisprudence. In the OFT v Miller¹²¹ concerning the application from contempt of an order made under the SNOR (replaced by the Enterprise Act 2002), Lady Justice Arden considered that "it must depend on the facts. A Community infringement is committed when harm is caused to the collective interest of consumers. It may be possible that a single supply might be enough, as where a supplier puts on the market a large consignment of beverage stated to be a healthy drink for a baby that is wholly unsuitable for this purpose. For this reason, I do not consider that the expression "Community infringement" requires a course of conduct". On the contrary, Lord Drummond, in the OFT V. MB Design, considered that "more than one instance of a defective supply is required before there can be a breach of an order (...)". The interpretation will depend on the specific circumstances of the case, which may create uncertainty.

It is widely accepted that the competent national authorities have discretion in deciding if they open an investigation and well as proceedings "Consumer agencies regularly structure their discretionary decision in accordance with definite criteria, although these are largely unwritten, sometimes unstated, and occasionally non recognized officially (...) In general, the consumer agencies much prefer straight forward and successful prosecution...straightforward cases are beneficial in conserving scarce resources which can be utilized in a variety of other ways to protect consumers. Successful cases maintain the prestige consumer agencies and their offices and minimize the costs of controlling business wrongdoing 122".

The competent national authorities need to demonstrate that the "consumers' interest" element is present in order to start proceedings. However, as largely discussed by the doctrine, the concept is rather vague. The public enforcement is directed to remedy to the information problem and the risk of under-enforcement as well as to minimize economic and physical harm caused by unfair marketing practices, unfair standard contract terms or unsafe or poor quality products.

In general, the national provisions require that there is a "reasonable suspicion" that the infringement has been committed. In the United Kingdom, the TSS use a risk-assessment methodology for enforcement that rates business as high, medium, and low risk "by reference to score reflecting key variables, including for example the probability of the risk occurring, the complexity of the activity, the number of consumers potentially affected and local history management".

It is worth to mention that the UK Hampton review, requested by the Chancellor of Exchequer "to consider the scope for reducing administrative burdens by promoting more efficient approaches to regulatory inspection and enforcement, without compromising regulatory standards or outcomes", it recommended that "comprehensive risk assessment" should be the foundation of all regulators' enforcement programmes. The risk assessment should 1) be open to scrutiny; 2) be balanced in including past performance and potential future risks; 3) use all available quality data; 4) be implemented uniformly and impartially; 5) be expressed simply, preferably mathematically; 6) be dynamic not static; 7) be carried though funding decision; 8) incorporate deterrent effect; 9) always include a small element of random inspection 124.

In Italy, the competent national authority has to open the pre-investigative phase where it evaluates the consumers' complaints and the evident seriousness and incorrectness of the practice. According to AGCM Reports, gravity and inaccuracies are found when there is a high number of involved consumers, grievous economic harm has happened or may happen, and the practice is directed towards a category of consumers deemed "weak" Where these requirements exist, the competent national authority will open the investigative phase.

¹²¹ Office of Fair Trading v Miller, Court of Appeal (Civil Division), 3 February 2009, [2009] EWCA Civ 34.

¹²² R. Cranston, *Regulating Business; Law and Consumer Agencies*, McMillan 1979, p.107.

¹²³ I. RAMSAY, Consumer Law and Policy, id, p. 241.

¹²⁴ P. HAMPTON, 'Reducing administrative burdens: effective inspection and enforcement', 2005, http://www.bis.gov.uk/files/file22988.pdf

¹²⁵ G. GHIDINI, B. LIBONATI, P. MARCHETTI, F. GHEZZI, *Concorrenza e Mercato*, 2010, Milano, p. 242.

In the Czech Republic, t§ 50 of Administrative Procedure Code, a set of general rules for all the administrative authorities, sets the obligation to ascertain all circumstances relevant to the protection of the public interest. "The administrative authority is obliged, in proceedings ex officio where a duty is supposed to be imposed, to ascertain (also without a petition) all the decisive circumstances evidencing in favour of, as well as weighting against the person on whom a duty is supposed to be imposed".

The Administrative Procedure Code provides that the administrative authority has to weigh the sources, particularly evidence, under its consideration except when the statute provides that a source, such a public deed, is binding for the administrative authority; at the same time the administrative authority carefully takes into consideration everything that transpired in the course of the proceedings including what was brought by the parties.

Procedural Safeguards

With regard to the procedural safeguards in the self-managed administrative proceedings, they may be classified into:

- Right of defence during the procedure;
- Access to file during the procedure;
- Legal and professional privilege.

Right of Defence

Right of defence refers to the obligation to inform the parties about investigative measures in advance; obligation to publish a notice about the opening of the proceedings and the rights to challenge investigative measures such as inspections and administrative fines.

In Italy, the notice on the opening of the investigation must be notified to the trader and to the interested parties. When the number of involved parties is very high, the competent national authority may publish the notice on its Bulletin.

The Italian procedure is adversarial and the trader may submit his position to the authority in order to defend himself.

In the United Kingdom, the competent national authority has to send to the trader a notice of the inspections. Moreover, it has to inform the trader of the intention to ask for an Enforcement order and to leave to the party 14 days to propose undertakings.

Other Member States do not provide particular safeguards related to the investigative phase. The Czech legislation provides for the possibility for the inspected person to comply before the director of the inspectorate for the inspections. In France, the trader may only oppose to the investigation when it is carried out under warrant.

On the contrary, the Supreme Court¹²⁶ in Belgium clarified that when the competent national authority carries out investigations in matters within its statutory competence, it has wider powers than those of the judicial police.

In France, under the legislative reform, the competent national authority has to provide the trader with the copy of the report of the investigation when the authority proposes a settlement to the trader.

Access to File

Among the examined Member States, only in Italy the law expressly provides the rights of the interested parties to access to file upon request. The Czech Administrative Procedure Code lays down general rules for the parties to request the access to file in the administrative proceedings.

¹²⁶ C. Const., 14 octobre 2010, (...) id.

Business secrets and legal and professional privilege

During the investigative phase, the investigated parties cannot oppose the investigation on the ground of professional or business secrets during the investigation. As a general rule, it is only required that the authority does not disclose the obtained information to the third parties. The resistance or an attempt to hide information or document by the investigated subject may be fined.

The Belgian, French and Italian legislation provide that no business secrets may be opposed to the authority in the course of an inspection. However, the business secrets may be opposed to the other parties of the proceedings. Article 38 (6) of the Czech Administrative Procedure Code provides that the access to file is denied for the parts covered by the business secrets. However, this does not apply to the investigation, since the business secrets may be acquired by the investigative authority and inserted in the file.

A new provision introduced in the Code under Article L141-1-2 – VIII, provides that the documents obtained during the investigation, which led to a procedure for administrative sanction, can only be communicated to the person who is the recipient of the decision or his representative. In this context, it seems, that while the exchange of information is possible between the competent national authorities, no access to file is provided for other parties involved in the investigation and enforcement proceedings.

No provisions have been found in the other analysed legal systems.

The United Kingdom legislation does not include any reference to the business secrets but contains special provisions for the legal privileged documents. Section 227 B(4) of Part 8 of the 2002 Enterprise Act provides no action may be taken in relation to anything that in the High Court a person would be entitled to refuse to produce on the ground of legal professional privilege ¹²⁷.

Undertakings

Voluntary compliance, administrative resolutions ¹²⁸ or undertakings are appropriate in situation where the infringer has been inadvertent, the infraction has not resulted in irreparable consumer detriment, and where the company has detected the infraction and moved quickly to compensate the affected consumer.

In general, all the legislation provides the possibility for the infringer to accept voluntary undertaking to remove the infringement and avoid an administrative or court proceedings. The fact that the majority of the undertakings are backed by high fines or by court proceedings (in some cases criminal) has contributed to their effectiveness.

With the exception of the Czech Republic and Slovakia, where the legislation has not expressly introduced undertakings, all the examined Member States expressly provide an opportunity for the infringer to comply with the legislation, thus avoiding proceedings. The United Kingdom is the only Member States that has a legal obligation to contact the business and to propose him to submit undertakings within a timeframe. The Italian competent national authority has published, on its website, a form to submit undertakings in order to ensure consistency with the legislative requirements.

The Czech and Slovak legislation does not contain any provision with regard to undertakings, as regulated by Article 4(6) (e) of the CPC Regulation. In this context, the authorities are deprived of an efficient instrument to remove unfair commercial practice at the early stage of investigation, without adopting a decision on the infringement that requires higher level of evidence due to the fact that it may be challenged in before a Court.

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¹²⁷ For the notion of legal privilege in the United Kingdom, please see footnote 83.

Administrative resolutions, depending from circumstances, can range from a commitment by a trader in correspondence to a signed agreement between the authority and a trader setting out detailed terms and conditions of the resolution. Administrative resolutions generally involve the trader agreeing to stop the conduct and compensate those who have suffered a detriment because of it, and to take other measures necessary to ensure that the conduct does not recur. Australian Competition and Consumer Commission-ACCC, Compliance & enforcement policy, http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy.

Settlement

Belgium and France have introduced settlement procedures. Settlement procedures belong to the criminal proceedings and are a way to avoid it with the acceptance of the settlement and the payment of a fine. It has been clarified that the settlement does not imply the not imply acknowledgement of the infringement and it is not a form of *plea-bargaining*. If during the investigations the findings are sufficient for the authority to open an infringement procedure, the authority may propose to the business to settle the investigation with the payment of a fine and the compliance with the legislation in order to avoid the court proceedings. The authority has a large discretion to use the settlement. In France, as indicated in paragraph 4.3.3, the settlement is possible only when the offences are not punished with imprisonment and it should only be used for small offences with impact on the national territory and when there are no claims from victims that may constitute themselves civil parties in the criminal proceedings. In Belgium, the settlement is possible for all the offences included in Code.

The settlement is not a plea of guilty and does not imply the recognition of the infringement but constitutes, for the authority, an easy and low cost mean to dealing with infringements of the consumer legislation. The authority has the discretion to decide when to recur to this possibility. According to the OECD 2006 Report, which had analysed the Belgian settlement procedure, "this procedure is perceived not as an administrative fine, but rather as an instrument for avoiding criminal prosecution" 129.

Decisions

In general, at the end of the investigation the competent authorities may take the following decisions:

- To close the case for lack of evidence;
- To close the case for lack of infringement;
- To accept undertakings from the trader (in all the examined Member States. For the Czech Republic it seems possible but the legislation is silent on the issue);
- To issue a decision against the trader (Italy, the Czech Republic, Latvia);
- To refer the case to the Civil Court (Belgium, France, the United Kingdom);
- To refer the case to the Criminal Court (Belgium, France, the United Kingdom).

In Belgium, France and the United Kingdom the competent national authority does not have the power to adopt a formal decision. If the investigation phase is not closed with a settlement or undertaking, the competent national authority, if it decides to open the infringement case, it files an application with the competent Court for a cease and desist order or refers the file to the Public Prosecutor for criminal procedure.

When the competent national authority (the Czech Republic, Germany, Italy, Latvia) adopts a decision against the infringer, the recipient of the decision may appeal before the competent Court according to the general procedural rules (administrative justice). The appeal does not suspend the enforcement of the decision.

In the Czech self-managed administrative proceedings, as explained in paragraph 3.2.2, the recipient of the decision has the possibility to submit a request for review to the head of CTI against the decision adopted by the CTI inspectors (and this appeal has suspensory effect) and, in case the decision is confirmed by the CTI, it may submit an appeal to the Administrative Court (with no suspensory effect).

Administrative fines

At present, competent national authorities may impose administrative fines in Czech Republic, Germany, Italy and Latvia. The French reform will allow the DGCCRF to impose administrative fine from its entry into force. The enforcer authorised to impose administrative fines may also order the publication of the decision as adverse publicity. The Belgian reform has provided the possibility for the competent national authority to impose administrative fine for non compliance with a warning.

¹²⁹ OECD, Best Practices for consumer policy: report on the effectiveness of enforcement regimes, DSTI/CP (2006) of 20 December 2006.

> Follow-up and monitoring of compliance

All the examined Member States provide for ex post monitoring and compliance with the administrative decisions. In general, non-compliance may lead to the imposition of a fine or to administrative proceedings in Court. In the Czech Republic, Italy, Germany, Latvia, the competent national authority may fine the trader for non-compliance with the authority decision. In the United Kingdom, non-compliance with the undertakings may lead to a court enforcement order. In Belgium, the competent national authority adopts no decision and no monitoring compliance exists. In France, non-compliance with the administrative decision may lead to civil or criminal proceedings.

2.2.5 CRIMINAL PROCEEDINGS

In Belgium, France and the United Kingdom criminal proceedings are relied upon to sanction the violations to the consumer legislation. In these Member States the enforcement of the law on unfair commercial practices has traditionally been through the use of criminal sanctions.

The 2006 OECD Report considered "the principal enforcement function of the criminal justice system in relation to the consumer protection legislation to be deploy as ultimate set of sanctions appropriate for those traders that have not been, or will not be deterred by other instruments"¹³⁰.

The decision to refer the case to the criminal justice system and to apply criminal sanctions include the level of individual consumer detriment associated with the conduct; whether the conduct and the detriment was widespread; whether the conduct was deliberate or particularly negligent; the level of cooperation by the defendant with the investigation. The new CMA's Guidelines provides that for the CMA "the action may be appropriate where it has determined that breaches of law point to systemic failures in a market, where changing a behaviour of one business would set a precedent or have another market-wide implications, where there is an opportunity to set an important legal precedent or where there is strong need of deterrence or to secure compensation for consumers, the CMA will make strategic choices about the cases it takes and apply its prioritisations principles" 131.

The three examined Member States provides for rules in order to prevent that administrative and criminal proceedings are carried out together. As explained in section 4.1.4, the Belgian legislation provides for the suspension of the criminal proceedings in case it is started together with a cease and desist order and the criminal Court is bound by the decision of the presiding judge of the commercial Court. In France, the Public Prosecutor must be informed of the intention of the competent national authority to apply before the civil court to seek for a cease and desist order. In the United Kingdom, as reported in section 4.7.4, the national enforcers under Part 8 act as Public Prosecutor in criminal proceedings and they are entitled to apply before the criminal Court. The fact that they are in charge of the pre-trial stage should prevent any risk of double jeopardy.

▶ Violations constituting criminal offences

The criminal offences in consumer protection are "strict-liability offences". The characteristics of these offences are "over-inclusive statutory standards enforced by sanctions of strict criminal liability, generally tempered by statutory defences. The primary sanction is a fine rather than imprisonment" 132. The over-inclusive standards do not require finding of wrongful intent, as mens rea: the intention to violate the provision is sufficient in order to commit the offence.

Belgian legislation explicitly provides that all violations of consumer protection legislation committed in "bad faith" are criminal offences. This is a peculiar provision, in that, as the academic literature has extensively

¹³⁰ OECD, Best Practices for consumer policy, id. p. 53.

¹³¹ CMA, Consumer Protection, Guidance on the CMA's approach to use of its consumer powers, id. p. 47-48.

¹³² I. RAMSAY, Consumer Law and Policy, id, p. 221.

discussed, the bad faith does not coincide with the *mens rea* of the criminal law and it is difficult to detect this kind of moral element ¹³³.

Criminal offences include misleading actions/omissions and misleading advertising, aggressive practices and unfair commercial practices included in the "black list".

Finally, in these Member States, the non-compliance with undertakings or with a cease and desist order is a criminal offence.

Competence Ratione Materiae and Ratione Loci

In all of the three Member States, the proceedings follow the general rules of the national criminal procedure. The matter is reserved to the first instance of the criminal Courts. The competence *ratione loci* is the jurisdiction of the place of the defendant.

Burden of Proof and Standard of Proof

As said above, in criminal proceedings the burden of proof is on prosecution and remains for all the proceeding. No shift of the burden of proof is admissible. As for the standard of proof, the general provisions on criminal procedure provides that the offence must be proven, proof "must be beyond reasonable doubt" for common law and until the "full conviction" of the Court in the European civil law.

An exception to this principle is the "implied statutory defence" of the United Kingdom system. It the defendant calls for the statutory defence, the burden of proof is reversed on him. The Consumer Protection Regulations admits this kind of defence: breach of the prohibition under the Regulations means that an offence has been committed "unless the due diligence or innocent publication may be demonstrated".

As said above, in the Member States using criminal proceedings, the criminal offences in consumer protection are strict-liability offences: it means that the Public Prosecutor has to prove the intention of violating the legislative provisions but not the *mens rea*. In Belgium, the jurisprudence has clarified that, in case of violations of the provisions of Article 124 LPMC (now Article XV.83 of the Code), which covers the violation of consumer protection that constitutes strict-liability criminal offences, there is no need to prove the fraudulent intent but only the material element. In this case, the *bona fide* is not sufficient for the defendant to be discharged. In case of violation of Article 125 LPMC (now Article XV.84 of the Code) that covers the general category of violations, on the contrary, the Public Prosecutor must prove that the offence has been committed with bad faith in order to start criminal proceedings. The limited national case law is does not seem to provide a clear indication on the content of the bad faith and the doctrine has noted that the prosecution in criminal cases is more oriented to prosecute the offences under Article 124 LPMC in order to avoid having to prove the moral element¹³⁴.

In one of the most discussed Belgian cases, the criminal Court found that a company had committed offences and violated Article 102 LPMC (on the price reduction and obligation to indicated the day of the starting of the sale) when the Dutch holding company had mistakenly sent some commercial directives to its branches in Belgium which were, in fact, reserved to its Dutch branches. The criminal Court found that there was a violation of LPMC but due to the fact that these directives had affected only one of the 124 branches, imposed a small fine 135. The criminal Court considered the violation of the LPMC was sufficient without any moral element.

With regard to the standard of proof, Belgium and France established that the reports of the officers authorized to investigate infringements that may constitute criminal offences are covered by a presumption of correctness until the contrary is proven. The Court must accept the fact as established in the report as

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¹³³ A. TALLON, *La procedure*, id, from pages 147 to 156.

¹³⁴ A. TALLON, *La procedure*, id, p. 153.

¹³⁵ Corr. Bruges, 19 October 2005, en *Droit pénal des affaires – Chronique de jurisprudence 2006-2006*, p. 49.

long as it is not proven that the report is incorrect. In France the evidence against the report is admitted only in writing.

In the United Kingdom, the level of evidence in order to start the criminal proceedings must be enough to pass the "Evidential Test" and when it is in the public interest to do so. The Evidential Test requires to the Crown prosecutor to analyse not only the level and the type of evidence but also if the seriousness of the crime, the circumstances and the harm to the victims, the impact on the Community and evaluate if the criminal proceedings is the adequate and proportionate response. The evidential test refers only to the standard of proof and to the opportunity to start a public action against an offence. The consumer protection offences are strict liability offences and they may be prosecuted with criminal proceedings. However, other options are available to the enforcers and the evidential test is required in order to assess if the criminal proceedings is the most suitable for the public interest. Moreover, it is intended to prevent that the action is started but dismissed by the Court for lack of evidence.

In view of this, many local authorities in the United Kingdom have prosecutorial guidelines. The importance of these guidelines for prosecution was illustrated by the case R vs. Adaway 36 were the indictment for offences of supplying goods with false trade descriptions was rejected by the Court for abuse of process and the prosecution was found oppressive and not in accordance with the prosecuting authority public enforcement policy code. In order to take forward prosecution, the individual or organisation must meet one or more of the following criteria: engaged in fraudulent activity, deliberately or persistently breached legal obligations.

The Court decided that it was clear that neither of the abovementioned criteria was substantiated and the TSS was found having started the criminal action without enough evidence.

Standing of the competent national authorities under the CPC Regulation in criminal proceedings

No provisions have been found in the national procedural rules regarding the possibility of the competent national authority to stand in criminal proceedings. In criminal proceedings the authorities are no more involved in the proceedings. The only parties that may stand in the criminal proceedings are the Public Prosecutor, the defendant and the third civil parties.

Proceedings

Criminal proceedings are adversarial and the defendant has to be provided with the possibility to submit its evidence in order to be acquitted. General procedural rules apply with no short proceedings. The only possibility to reduce the length of the proceeding is that the defendant pleads guilty in the United Kingdom or accepts a settlement in Belgium.

A relevant issue, examined in the Belgium report, is the interaction between the cease and desist order and the criminal proceedings. If both actions are started at the same time, the latter is suspended until the decision on cease and desist order is taken. If the cease and desist order is introduced first, the possibility to start criminal proceedings is frozen until the cease and desist order becomes res judicata. However, since the cease and desist order and the criminal proceedings have different statute of limitations, the criminal proceedings may become statute barred pending the cease and desist order proceedings.

The French system seems geared to avoid the overlap of proceedings since the competent national authority before seek a cease and desist order, has to inform the Public Prosecutor. The Public Prosecutor cannot oppose the decision of the competent national authority to seek a cease and desist order but it is informed of the action of the competent national authority.

Court Decision and Appeal

¹³⁶ Regina v Glen Adaway, No: 200400511/B4 Court of Appeal (Criminal Division) 3 November 2004, [2004] EWCA Crim 2831.

The defendant may always lodge an appeal against the judgment of the Court within the deadlines provided by the national procedural rules.

Statute of Limitations

Statute of limitations for criminal proceedings in all three Member States is objective and starts running from the day when the offence has been committed. A statue of limitations is also provided for imposing of the criminal sanctions.

Criminal Sanctions

Criminal sanctions include a range of monetary penalties (reported in detail, for each Member State, in Chapter 1.3) and, for the most serious cases, imprisonment.

Cease and Desist Orders									
	BE	cz	DE	FR	ІТ	LV	UK		
Requesting NCA	Ministry General Director SPE	N/A	Instructed entities' according to UKlaG and UWG respectively	DGCCRF	n/a	n/a	CMA, TSS and CPC enforcers		
Issuing authority	President of the Commercial Court	CTIA	Regional Tribunal (<i>Landgerichte</i>)	Civil Court	AGCM	CRPC	High Court/county Court		
Violations	All	All	BVL: all UKlaG Intra-EU infringements of consumer protection the legal acts UWG Unfair commercial practices,	All except aggressive practices	All	Any violation of consumer rights supervised by CRPC.	All		
Ratione loci	Court of the defendant	All the Czech territory	BVL: all the German Territory UKlaG and UWG Court of the Defendant	Court of the defendant.	All Italian Territory	All Latvian territory	Court of the defendant		
Ratione materiae	President of the Commercial Court	CTIA: all the violations of CPRL except for the regulated sectors	BVL: all the violations UWG The regional courts (Landgerichte) are competent for all civil disputes in which an action based on the UWG is claimed	Tribunal d'Instance	All violations of Consumer Code. Opinion of the competent authority for regulated sectors.	All violations of CPRL	The High Court or a county Court in England, Wales and Northern Ireland; The Court of session or the sheriff in Scotland.		

Cease and Desist Orders									
	ВЕ	CZ	DE	FR	IT	LV	UK		
Burden of proof/Standard of proof	General procedural rules. Reverse burden of proof is admissible. No business secret may be used in court.	General procedural rules in the administrative proceedings	BVL General procedural rules in the administrative proceedings UKlaG The general rules of the Civil Procedure Code apply. UWG A special rule is contained for interim injunctions procedures.	General rules of the Code of Civil Procedure. Reverse burden may be imposed by the Court	Reasonable evidence. All the evidence may be acquired and use. The authority may impose reverse burden of proof. Statutory reverse burden of proof in financial services.	General rules of the Administrative Procedure Law.	General rules of civil proceedings. Reversed burden of proof		
Safeguards	Court decision must be enough precise to identify the act whose termination is ordered.	Notice of the opening of the investigation; possibility to be heard; information to the parties of the submission of the evidence outside the hearing; Review of the administrative decision	BVL: no self-incrimination UKlaG The general rules of the Civil Procedure Code UWG Parties should give a warning notice to the debtor prior to the proceedings	The Code of Civil Procedure grants procedural safeguards and principle of "equality of arms".	No particular safeguards. No disclosing confidential information to third parties	No particular safeguards	Obligation to inform the business before seeking for an order.		
Time-frame/legal deadlines	Decided by the Court.	General rule is that the decision should be issued within 30 days from the commencement of the proceedings or from the investigation. The term is suspended for the acquisition	BVL: no deadlines UKlaG Three years UWG Claims statute-barred after six	The proceedings follow the general rules of the Code of Civil Procedure.	120 days from the commencement of the proceedings to close the infringement procedure.	No provision	No particular legal deadlines are provided when the enforcer seeks for an enforcement order (except for the time limit of 14 days - or 7 days - for consultation).		

Cease and Desist Orders										
	BE	cz	DE	FR	IT	LV	UK			
		of the evidence.	months.							
Statute of limitations	One year from the day the infringement has terminated.	2 years from the commitment of the infringement. 3 years for the administrative sanctions	UKlaG 3 years which starts to run at the end of the year in which the claim arose or the claimant did or would have had to obtain knowledge thereof. UWG Claims become statute-barred after six months.	One year from the commitment of the infringement if punished with a fine between 3,500 EUR and 7,500 EUR, 3 year if the fine is between 7,000 EUR and 15,000 EUR	No provisions	No provision	No provisions			
Monitoring of compliance	In case of non- compliance with the order, the case is referred to the Public Prosecutor.	In case of non- compliance: criminal sanctions, prohibition to undertake professional activities; monetary punishment.	In case of non- maximum enforcement penalty of EUR 250,000 and imprisonment for up to two years.	Referral to the Public Prosecutor	In case of non- compliance there are administrative fines, the closing the business for maximum 30 days.	Administrative fines Referral to the Administrative Court.	In case of non- compliance the OFT has the right to apply to the Court the enforcer who made the application for the order.			

	Cease and Desist Orders									
	ВЕ	cz	DE	FR	IT	LV	UK			
Appeal	Court of Appeal 30 days from have been served the order.	Administrative Court	BVL: ordinary Court at regional level within 30 days from the decision UKlaG Conditions: appeal requires a value of the claim superior to 600 EUR upon certain conditions UWG The rules for appeal are contained in Civil Procedure Code.	Court of Appeal 30 days from the serving of the judgment.	Administrative Court. 30 days from the decision	Administrative Court	Upon authorisation of the Court.			
Sanctions	Adverse publicity	Adverse publicity	Administrative fines Adverse publicity	Administrative fines	Adverse publicity Administrative fines	Adverse publicity Administrative fines	No administrative fines			

Self-managed administrative proceedings										
	BE	CZ	DE	FR	IT	LV	UK			
NCA	DGCM FSMA	CTIA	BLV	DGCCRF	AGCM	CRPC	CMA, TSS, FCA			
Competence	DGCM and FSMA have full competence for all the Belgian Territory	Full competence in the Czech Territory	Full competence in the German territory	DGGCRF has regional offices competent for the investigation of the infringement under the supervision of the central office (DIRECCTE)	Full competence for the Italian territory	Full competence for the Latvian territory	TSS competence at local and national level. CMA will intervene for systematic failures in the market or when the importance of the case will create a precedent. FCA is competent for financial services.			
Investigative powers	All the investigative powers provided by the Code, inspections, request for information, copies of documents.	Inspectors are authorized to enter to business premises within the inspection. They can inspect books and other documents, take away samples of goods to be further inspected, verify the identity of the persons controlled.	Obtaining information, make or require copies, extracts, and printouts. Inspections of business premises	All the investigative powers provided by the Commercial Code for antitrust investigations.	A pre-investigative phase can be opened if more evidence is required in order to start an investigative phase: AGCM officials may carry out inspections, require information and evidence, obtain a copy of the documents and require information.	Require information and evidence, inspections.	All the investigative powers under Part 8 of Enterprise Act 2002.			
Control	DGCM, FSMA and the Public	Director of the Inspectorate	Federal Ministry of Food and	DGCCRF	AGCM	CRPC	TSS, CMA			
	LITE FUDITO	moperiorate	i oou anu			l	<u> </u>			

Self-managed administrative proceedings										
	BE	CZ	DE	FR	IT	LV	UK			
	Prosecutor.		Agriculture							
Safeguards	Officials in charge of the investigations works under control of the Public Prosecutor.	An objection can be submitted to the CTIA Director	-Statutory requirement of legal representation -Reasoned decision -Access to records (for the appellant and the competent authority)	No particular safeguards except against investigation under warrant	The proceedings are subject to the guarantees set for proceedings in front of the public administration.	The proceedings are subject to the guarantees set for proceedings in front of the public administration.	Prior notice of the inspection. Legal privilege recognized. Documents seized may not be retained for more than 3 months.			
Opening/closing of investigation	No formal opening and closing of the investigation.	CTIA has autonomy to decide whether to start an investigation. An investigation may be initiated by a complaint or ex officio.	No express provisions	No express provisions	The responsible for the proceedings informs the parties on the closing of the investigations and provides a deadline of ten days to submit additional information.	No express provisions	No express provisions			
Opening/closing of infringement procedure	No express provisions	A general rule is that the decision should be issued within 30 days from the commencement of the proceedings or from the investigation. The term is suspended for the acquisition of the evidence.	No express provisions	No express provisions	Notification of the opening of the infringement procedure to the business.	No express provisions	No provisions are included.			
Settlement	DGCM officials (only those duly delegated) may propose the transaction If the infringer pays	General administrative rules provide the possibility for the authority to issue an order on site and	No	DGCCRF may propose a settlement. If the infringer complies with the imposed undertaking, no	No	No	No			

Self-managed administrative proceedings									
	BE	CZ	DE	FR	IT	LV	UK		
	the proposed amount in time, criminal proceedings cannot longer be brought.	if the party accept it, the infringement is proven and the case close. A monetary fine applies.		jurisdictional proceeding will be initiated. The settlement requires the Public Prosecutor's approval					
Burden/standard of proof	Reports of the inspections prepared by the appointed agents are <i>prima facie</i> evidence to the contrary.	CTIA officials are required to find out all the information needed in order to satisfy the standard of proof.	The Court explores the merits of the case ex-officio in an oral proceedings. The Court decides on the basis of a free valuation of evidence. The decision can only be based on evidence on which the parties had the opportunity to be heard.	Reports prepared during the inspections and investigations are proof to the contrary. Business secrets and the confidentiality of the documents may not be opposed to the agents during the investigative phase	General procedural rules on the burden of the proof apply. AGCM may require expertise and statistical and economical analysis.	CRPC will investigate only those complaints that have evidence included on the existence of dispute and its object.	Evidence must demonstrate how a particular infringement has or may, in the future, have an adverse effect upon consumers.		
Final decisions	No decision. DGCM officials may only issue a warning to the trader to stop the act or omission constituting the infringement.	Prohibition of the act or omission.	Prohibition of the act or omission.	At the end of the investigation, the DGCCRF may: 1) Close the investigation for lack of evidence, 2) propose a settlement 3) act before the civil Court in order to obtain an injunction or 4) transmit the file to Public Prosecutor in order to start the criminal proceeding.	At the end of the procedure the following decisions may be adopted: 1 Non violation of the provisions; 2 Violation; 3 Acceptance of the undertakings.	Prohibition of the act or omission.	No decision		
Undertakings	The business may voluntary comply.	No provisions in the CTIA Act but they	The authority may accept	Business may voluntary comply	The trader may submit	The CPRC may accept	Voluntary and court undertakings		

Court undertakings under cease and desist order Could be possible. Could be possible. Undertakings, or impose them with a decision and adopt undertakings. Undertakings. directed to remove the misleading advertising or the unfair commercial practice. In case to the trader does not comply with them, the authority may re-open the	undertakings. They may be voluntary and do not require a decision from the authority.	UK
under cease and desist order impose them with a decision impose them with a decision directed to remove the misleading advertising or the unfair commercial practice. In case t the trader does not comply with them, the authority may re-open the	may be voluntary and do not require a decision from the	
proceedings.		
Sanctions DGCM may impose fine for warning and settlement. Administrative fine up to 2 million CZK (EUR 45,000) or confiscate goods. Compliance: the enforcement of the competent authorities decisions is to be taken according to the regular rules for administrative actions. There is a maximal enforcement penalty of EUR 250,000. For non-compliance: the enforcement of the competent authorities decisions is to be taken according to the regular rules for administrative actions. There is a maximal enforcement penalty of EUR 250,000.	Administrative fine up to a maximum of EUR 14,000.	No administrative fines
Time frame/legal deadlines No deadlines A general rule is that the decision should be issued within 30 days from the commencement of the proceedings or from the investigation. The term is suspended for the acquisition of the evidence. Statute of limitations No legal deadlines are imposed No legal deadlines are imposed AGCM has 180 days from the request for intervention to open an investigation and 120 days to close an investigation from the day of the opening. Three years from No provisions	No provisions Consumer is	No time frame and legal deadlines are provided. No statute of

Self-managed administrative proceedings								
	BE	CZ	DE	FR	IT	LV	UK	
	included in the Code on the deadline to start and close investigations.	to be started within one year from the day the inspector learned about the infringement.		the day the infringement has been committed if no investigation is started.		entitled to submit a claim within a period of two years from the day of purchase of the goods or receipt of the services or if the warranty exceeds two years – until the end of warranty period.	limitations is provided	
Monitoring of compliance with final decision	Except for warning and settlement, no decisions are adopted by DGCM.	Enforcement warrant from the authority issuing the decision and imposition of additional fines.	Referral to the Court.	No decision adopted by DGCCRF	Non-compliance with the authority decision, an additional fine (up to EUR 150,000) may be imposed to the trader. Closing business for a maximum of 30 days.	In case of non-compliance CPRC may refer the case to the Administrative Court.	No decision form CMA or TSS.	
Appeal	No appeal	Regional inspectorates and, second instance. Administrative Court for judicial review.	Regional Tribunal	No appeal	Administrative Court of Lazio Region (TAR Lazio) Extraordinary appeal before the President of the Republic (the term is 120 days).	Administrative Court.	No appeal	

CRIMINAL PROCEEDINGS							
	BE	CZ	DE	FR	IT	LV	UK
Offences	The Code provides four categories of offences, of which three of progressing seriousness and one specific offence.			Misleading advertising, the misleading commercial practices; the aggressive commercial practices			The offences which may constitute criminal offences are: A) Contravention of requirements of the general prohibition; B) Misleading actions; Misleading omissions C) Aggressive practices; D) Specified unfair commercial practices as indicated in Schedule 1 (points 11 -28).
Ratione materiae	Tribunal correctionel			Tribunel correctionnel (offences punished with a criminal sanction up above EUR 3,750 or with imprisonment); jurisidiction de proximité for the first four classes of offences			Magistrate Court
Ratione loci	The competent Court is the Tribunal correctionnel of the infringer.			Competent Court is that of the infringer			The Court which covers the area in which the defendant resides or carries on business or which covers the area in which the action

CRIMINAL PROCEEDINGS							
	BE	CZ	DE	FR	IT	LV	UK
							giving rise to the proceedings occurred.
Plaintiff/Prosecutor	Public Prosecutor			Public Prosecutor			In England, Wales and Northern Ireland: The CMA; TSS Services, DTI Office . Procurator Fiscal Service on behalf of the Lord Advocate in Scotland.
Burden/standard of proof	Statutory burden of proof on the Public Prosecutor. The evidence and the probatory means are regulated by the Code d'Instruction Criminelle.			Statutory burden of proof on the Public Prosecutor.			Statutory burden of proof on the Public Prosecutor. Reverse burden in case of Statutory defence. Standard of Proof must pass the Evidential Test
Safeguards	Provided by Code of Criminal procedure.			Code of Criminal Procedure Code			Provided by Code of Criminal Procedure Code
CPC CNA standing	No			No			No
Judgment	The judgement of the Court may incriminate or discharge the defendant.			Professional may be found guilty or discharged. Before to adopt its decision, the Court refers to the Public Prosecutor (his opinion).			The Court may convict or acquit the defendant
Appeal	Condemned party			The decision may			The magistrate

CRIMINAL PROCEEDINGS							
	BE	CZ	DE	FR	IT	LV	UK
	may file an appeal against the decision within 15 days from the serving of the decision			be appealed before the Court of the Appeal competent ratione loci.			Court decision may be appealed within 14 days from the judgment in front of the High Court.
Civil action/third party standing	It is admitted according to the general rules of the Code.			Yes.			Yes.
Sanctions	Criminal sanctions include a range of fines and, for the most serious cases, up to five years imprisonment.			Criminal sanctions are indicated in the Consumer Code.			Penalties are: A) on summary conviction, to a fine not exceeding the statutory maximum; or B) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both (see criminal sanctions).
Time frame/legal deadlines	Provided by the Court			The Court provides deadlines for the parties.			The Court at the first hearing provides the deadlines. No time frame and statutory legal deadlines are provided for the trial in front of the magistrate Court.
Statute of limitations	5 years from the commitment of the crime			3 years for the offences punishable with imprisonment,1 year for offences punishable only with fines.			Statute of limitations for prosecution apply either within three years of the offence taking place, or

CRIMINAL PROCEEDINGS							
	BE	CZ	DE	FR	IT	LV	UK
							within one year of the discovery of the offence by the prosecutor.

2.3 RULES APPLICABLE IN CROSS-BORDER ENFORCEMENT

Task Specifications, under Deliverable 4, require providing a comparison on the rules applied in the domestic context and in a cross-border context. However, as we have already indicated in the previous chapters, except the case of Germany, there are no different rules procedural rules that are applied in cross-border cases. The domestic rules are of application since the CPC Regulation requires that the competent national authorities exercise the powers mandated by the Regulation in conformity with their national law. The CPC Regulation has intended to ensure a common *level playing field* with regard to the investigative and enforcement powers entrusted to the public authorities; however these powers are without prejudice to the national procedural rules.

As discussed under Chapter 1.2, the minimum enforcement powers provided by Article 4(6) of the CPC Regulation do exist in the examined Member States. In many of them, these powers were already entrusted to the authorities before the adoption of the CPC Regulation, and minimal adjustments were needed. In implementing the CPC Regulation, the examined Member States have introduced rules to include the cooperation under the CPC Regulation in their existing rules on consumer protection.

Only Germany, among the examined Member States, has a separate set of rules for tackling intra-Community infringements. In fact, the BVL acts through a set of public/administrative law rules, modelled on the CPC Regulation, while the domestic enforcement is based on private law. The separation between the two types of enforcement is not so rigid and the BVL may decide to refer the infringement to a delegated third party that will proceed on the basis of private law. In this case, the BVL may carry out the investigation (the consumer associations, as private bodies, do not have investigative powers) and then refer the file to the consumer association to start an action before the Court.

However, only a few provisions were detected in the national procedural laws that directly address the issues of the cooperation under CPC Regulation. This requires therefore assessing potential or actual problems that the application of national procedural rules (normally designed for a domestic enforcement context) may raise in the transnational context of the CPC.

> National Procedural Rules Directly Addressing Cross-border Cooperation

The competent national authority called to tackle the infringement on request of another competent national authority in the CPC context does that according to its national procedural rules. In the light of the general principle of effectiveness and equivalence, national procedural rules should not make it excessively difficult for competent authorities to fulfil their obligations under the CPC Regulation and should not discriminate against enforcement initiated following a CPC request, compared to similar purely domestic enforcement.

From research and from the replies to the questionnaire, it appears that competent national authorities generally apply the same procedural rules for domestic and intra-Community infringement.

A special case is Germany, were the intra-Community infringements are dealt with by the BVL through a self-managed administrative proceeding (thus applying public administrative law), while the domestic infringements are deal with under private law rules and court proceedings. A mixed case is where the BVL decides to refer the intra-Community infringement to the delegated third parties. In this case, the BVL is in charge of the investigations, if needed, and the consumers' associations of the enforcement through civil law proceedings before the Courts. In fact, the consumers' associations do not have the investigative powers provided by Article 4(6) of the CPC Regulation that are of exclusive competence of the BVL.

The United Kingdom is one of the Member States that has reformed the enforcement powers in order to allow other enforcers to be active in consumer protection under CPC Regulation. The 2006 Statutory reform has made available the enforcement powers to all the enforcers listed in Section 213 of Part 8 of 2002 Enterprise Act. The Section 2013 makes reference also to the Community enforcers for the purpose of the Injunction Directive 137. The United Kingdom legislation has been modified in order to include the officials from

¹³⁷ A Community enforcer is a qualified entity for the purposes of the Injunctions Directive:

⁽a) Which is for the time being specified in the list published in the Official Journal of the European Communities in pursuance of Article 4.3 of that Directive, but

another Competent national authority to assist inspections with a TSS in order to protect the interest of their national consumers, as provided by Article 6 (3) of the CPC Regulation. The recent CMA Guidance has addresses the issue of the CPC Regulation: Principle 6 has added a new power for the CMA, to impose sanctions in case of intra-Community infringements. Point 6.54 provides that "in relation to Community infringements, the CMA has the powers itself (or more likely by applying to the Courts) to require to the losing defendant to make payments into the public purse in the event of failure to comply with the decision"¹³⁸.

The Belgian Code, in repealing and consolidating the legislation on consumer protection has introduced a "safeguard clause" which attracts all the violations of the Annex of the CPC Regulation within the infringements covered by the Code. The new Article VI. 96 of the Code includes all the violations to the Annex, as they are implemented in the Member States, within the prohibited practices under the Code. When the DGCM is required to act to protect the affected interests of consumers resident in another Member State, it will do so according to procedural rules of the Code. In our opinion, this should remove the issue of the applicable law in cross-border infringement, since the applicable law will be that of the Member State where the affected consumers reside (Est également interdit, toute acte ou toute omission contraire (...) aux directives également mentionnées à l'Annexe susdite telles qu'elles ont été transposées). The applicable substantive law will be that of the Member State where the consumers affected reside while the procedural rules will be those of Belgium.

The Italian AGCM has introduced a provision, in its regulation, to allow the exchange of information on an investigation with other competent national authorities under CPC Regulation.

The other examined legislation contains only some reference to CPC Regulation, in general only to provide obligation to cooperate with other competent national authorities. In general, with specific exception of Germany, all the national enforcers apply their domestic rules to tackle also the intra-Community infringements. Issues related to the application of domestic rules to intra-Community infringements are examined at Chapter 2.5.

[[]F1(b) which is not a general enforcer, a designated enforcer or a CPC enforcer.]

¹³⁸ CMA, Consumer Protection, Guidance on the CMA's approach to use of its consumer powers, id. p. 46.

2.4 INTRA-COMMUNITY PUBLIC ENFORCEMENT

This chapter cover Deliverable 5 and, according to the methodology set in Chapter 2, provides an analysis of the impact of the CPC mechanism covering the countries selected and difficulties arising from the application of the national procedural rules, both on the basis of the case law examined and on the basis on issues detected from the questionnaire to the competent national authorities.

CPC Regulation lays down the conditions under which national authorities responsible for the enforcement of consumer protection laws must cooperate in order to ensure compliance with those laws. The scope of the Regulation is limited to intra-Community infringements of EU legislation that protects consumers' interests.

Article 3 b) of CPC Regulation defines an intra-Community infringement as "any act or omission contrary to the laws that protect consumers' interests, as defined in (a), that harms, or is likely to harm, the collective interests of consumers residing in a Member State or Member States other than the Member State where the act or omission originated or took place; or where the responsible seller or supplier is established; or where evidence or assets pertaining to the act or omission are to be found".

From the provision, it is possible to infer that the cooperation could be envisaged in the following situations:

- A trader acts in Member State A and causes consumer harm in Member State B;
- Member State A is the place of establishment of the trader causing harm in Member State B. This
 may include situations where the trader acted in a country other than that of the place of its
 establishment (Member State C);
- Member State A is the place where evidence or assets are found while harm occur in Member State B (regardless where the trader has acted, Member State A or C).

A fourth option is the act or omission that causes harm in one Member State and has network effects in others.

In order to remove transnational infringements, the CPC Regulation requires that the competent national authorities exercise the powers conferred by the Regulation in conformity with their national law. The CPC Regulation has intended to ensure a common *level playing field* with regard to the investigative and enforcement powers entrusted to the competent public authorities; however these powers are to be exercised in accordance with the national procedural rules.

The examined Member States' systems have recently introduced changes and updates to ensure the implementation of the CPC Regulation, especially with regard to the investigative powers. However, only a few provisions were detected in the national procedural laws that directly address the issues of the cooperation under CPC Regulation. This requires therefore assessing potential or actual problems that the application of national procedural rules (normally designed for a domestic enforcement context) may raise in the transnational context of the CPC.

> Allocation of Competence Among Competent National Authorities

The CPC Regulation provides the obligation for the competent national authorities to engage in mutual assistance, including the possible exercise of investigative and/or enforcement powers, when there are intra-Community infringements of the national laws transposing the EC consumer *acquis communautaire* and as listed in the Annex of the CPC Regulation.

The purpose of the mutual assistance is to extend the scope if the territorial protection in cases when the scope of the protection of the norm infringed or the *locus standi* of the relevant enforcer does not extend to foreign based consumers. The CPC Regulation imposes "Competent authorities shall fulfil their obligations under this Regulation as though acting on behalf of consumers in their own country and on their own account or at the request of another competent authority in their own country" (Article 11(1)). In this context, any restriction to the territorial scope of the protection of the national laws may not apply under the CPC Regulation.

The CPC Regulation does not define the way the competences are allocated among the competent national authorities. However, the Explanatory Memorandum of the Commission proposal for the CPC Regulation clarified that "the proposed regulation established several reciprocal mutual assistance rights and obligation on competent authorities. This balance reflects the fact that the authority in the Member State of the consumer is best placed to understand and judge the harm suffered by the consumer but the competent authority in the Member State of the trader is best placed to act within their own jurisdiction and national culture. All competent authorities will have to play both roles" 139.

The rules of Article 3(b) of the CPC Regulation may be seen as rules of "jurisdictional competence": Three criteria are provided: where the act or omission originated or took place, where the responsible seller or supplier is established, where the evidence or assets pertaining to the act or omission are to be found. All these places are different from where consumers affected reside. The three criteria are all alternative and cumulative, letting open the possibility that different competent national authorities may take action at the same time.

In general, the place where the act or omission originated or took place is also that where the trader resides, but it may differ in case of electronic commerce or in case of corporate bodies. For the case of the assets or evidence to be found, it is direct to cover the need for a competent national authority to intervene also to research evidence on behalf of another authority. In fact, the investigative powers cannot be exercised outside the national territory. For this purpose Article 6 of CPC Regulation provides that "The requested authority shall undertake, if necessary with the assistance of other public authorities, the appropriate investigations or any other necessary or appropriate measures in accordance with Article 4, in order to gather the required information".

The first example of procedural issues may be made under the first option provided by Article 3 b) when a trader acted in State A which harms consumers in State B and the competent national authority of State B will ask assistance to his peer in State A in conducting the investigations and/or obtaining the cessation of the infringement.

However, the intervention of State A is possible if the trader is also in State A¹⁴⁰. If the trader is not in State A, the competent national authority will only seek evidence, thus covering the third option of the Article 3 b) (place where evidence or assets pertaining). If the competent national authority in State B seeks for assistance in removing the infringement, it is necessary that the requested authority may serve the decision or order to the defendant within its territory. Otherwise the competent national authority in State A would act against a trader based elsewhere or only required to search for evidence.

The identification of the competent authority to tackle the intra-Community infringement is an issue of public international law, since it refers to the competence of public authorities. However, since some Member State enforce consumer protection through instruments of private law; concerns about the application of private international law can arise among the involved authorities. Moreover, the Article 2(2) of the CPC Regulation provides that "This Regulation shall be without prejudice to the Community rules on private international law, in particular rules related to court jurisdiction and applicable law" which has been interpreted as allowing the application of the rules of private international law to intra-Community infringements.

In our opinion the two issues must be divided into two stages: at the first stage, there is the identification of the authority competent to tackle the infringement (i.e. the allocation of the competence among the competent national authorities); at the second stage, once the competent authority or authorities have been identified, the identification of the applicable proceedings follows. A third stage, discussed below, may refer to the territorial scope of the competent authority decision.

With regard to the first stage, i.e. the allocation of the case among the national authorities, in order to give a tentative approach of the correct allocation between authorities in the examined possible situation, we

¹⁴⁰ G. BETLEM, *Public and Private transnational enforcement*, in W VAN BOOM, M. LOOS, *Collective enforcement of Consumer Law*, id. p. 43.

¹³⁹ § 37 of the Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws ("the regulation on consumer protection cooperation"), 2003/0162 (COD) of 18.7.2003.

consider that the rules regulating the allocation of the cases among the competent national authorities of the Member States in the European Competition Network (ECN) may be of help¹⁴¹.

In fact, similarly to the consumer protection competent authority in the European Union, the structure of the national competition authorities varies between Member States. In some Member States, one body investigates cases and takes all types of decisions. In other Member States, the functions are divided between two bodies, one that is in charge of the investigation of the case and another, often a college, which is responsible for deciding the case. Finally, in certain Member States, a Court can only order prohibition decisions and/or decisions imposing a fine: another competition authority acts as a prosecutor bringing the case before that Court.

In this context, in order to allocate the competence in case of multijurisdictional competition infringements for which the European Commission is not competent, general guidelines setting criteria for the allocation of the cases have been drafted.

In case where the Commission is not competent to tackle a competition infringement the general rule is that a material link between the infringement and the territory of the Member State should exist for that member State's competition authority to be considered well placed.

Three main rules are provided for the allocation of the competence: an authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met:

- "1.the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;
- 2. the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;
- 3. it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement" ¹⁴².

The first criterion provides the "ratione loci" competence: an authority may be territorially competent when: the infringement affects the competition in its territory, when it is implemented in its territory or it originates from its territory.

These three criteria are very similar to the three criteria of Article 3(b) of CPC Regulation. The Commission Notice lays down two additional criteria for the antitrust competence, which helps to better identify the better placed competent authority: it must be the authority that can effectively bring an end to the infringement, also imposing a sanction and that may gather the evidence.

Applying there criteria to intra-Community infringements of consumer protection, the competent national authority of the Member State where the trader or supplier is established should be the better placed to obtain the cessation of the infringement (the place where the trader is also, in the majority of cases, the place where the act or omission originated or took place).

This approach would also follow the general rules of the jurisdiction of the place of the defendant that ensure the procedural safeguards and allows the infringer to defend himself. Moreover, this would permit to the authority to enforce the decision against a trader. In fact, in case of administrative proceedings, the administrative decision cannot be enforced outside the national territory of the issuing authority since the Regulation (EC) 44/2001 does not cover them (now Regulation (EU) 1215/2012¹⁴³).

The doctrine seems also oriented towards this approach, considering that "the scheme of the (CPC) Regulation seems to contemplate only one possible scenario of transnational enforcement: legal action (civil, administrative and/or criminal) by a watchdog against a trader based in its own country, either of its own

¹⁴¹ Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101 of 27 April 2004.

¹⁴² Commission Notice, id.

¹⁴³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351 of 20 December 2012.

accord or on request of a watchdog of another Member State –in the interest of protecting consumers based outside its territory"¹⁴⁴.

However, the general rule of competence of the authority of the place where the trader resides may not work for all the cases or the intervention of another authority may be necessary in order to gather the evidence. Some cases are analysed below, also taking into consideration the "real experience approach" used by the competent national authorities to tackle intra-Community infringements.

It is worth to mention that, even if not included into the sample of Member States to be examined under Theme 2, Spain has provided suggestions to the allocation of the competence between all the regional authorities. According to the Explanatory Memorandum to the Royal Legislative Decree 1/2007 there is the competence to the local authority of the place where the act or omission has been committed, independently from the nationality of the infringer. However, the competent authority may relinquish its competence when the infringer is in another department and the authority of the place where the infringer is or where it has its head office is best placed to carry out the investigation and the inspections as well as to enforce the sanctions.

1. A trader acts in Member State A and causes consumer harm in Member State B

In this case, the competent national authority of Member State A is well placed to deal with the case. However, in order to seek assistance, State B will have to provide enough evidence that there is reasonable suspicion that an infringement has been committed. In general, State B will support the request for cooperation with the complaints received from consumers who claim to have been harmed by the traders' activities.

Some procedural obstacles may prevent the smooth cooperation between the two authorities. When State A starts the infringement proceedings, firstly it has to evaluate if his action is not statute-barred. In the examined Member States there were no particular statute of limitations for the investigative powers (the Czech Republic has a subjective one). Statute of limitations is therefore provided for the cease and desist orders.

For example, in case State A is Belgium, it has to evaluate if, provided that the outcomes of the investigations are positive, a cease and desist order is still possible, since the competent national authority has no decisional powers. That means that it has to detect the day when the infringement ceased and if the statute of limitations has intervened.

If the cease and desist order is no longer possible, the alternative is a criminal proceedings. The first requirement to be met is that the infringement committed by the trader who is in Belgium and that harmed the consumers in State A constitutes a violation of a provision qualified as statutory offence in Belgium or it has been committed with bad faith according to the Belgian law. However, according to the general rules on non-contractual obligations the law applicable to a non-contractual obligation arising out of a tort/delict is the law of the country where the damage occurs¹⁴⁵. A criminal proceeding, in our opinion, should only be possible if the infringement constitutes a statutory offence in both Member States involved.

Criminal proceedings, where possible, have the advantage of a longer statute of limitations and are made easier by the fact that the outcomes of the investigations have a higher evidentiary value. However, it takes long time to obtain the conviction of the trader with higher costs for the public purse.

If the requested competent national authority in State A relies on self-managed administrative proceedings, the proceedings are smoother. The authority is competent to investigate and to adopt a decision. The action of public authority in these proceedings, in general, has no statute of limitations but deadlines to close the infringement procedure. The Czech Republic and France have a statute of limitations for the intervention of

¹⁴⁴ G. Betlem, *Public and Private transnational enforcement*, id. p. 42.

¹⁴⁵ Article 4 of Regulation (EC) 864/2007 (Rome II).

the competent national authority. However, the administrative authorities have a larger discretion in evaluating the outcomes of the investigations and larger power to manage the proceedings.

In case the requested competent national authority is Germany, issues are evident if the action to tackle the infringement is delegated to third parties. The action of the authority becomes statute barred after six months from the day the consumer had knowledge of the infringement. Moreover, the enforcement is carried out through private enforcement, which requires a civil proceeding before a Court. This has an impact on the standard of proof and on the length of the proceedings.

On the other hand, if the BVL takes charge of the cross-border request against a trader, it uses administrative proceedings that allow more flexibility to the authority, without a statute of limitations.

Where the State A is the United Kingdom, the OFT may delegate a TSS territorially competent for the enforcement. However, the enforcement rules are the same as for the OFT except for the standing before the Court for an enforcement order.

Practical examples

The majority of the cases of cooperation among competent national authorities under the CPC Regulation related to bilateral cooperation, mainly in cases of distance selling and misleading advertising, including sweepstakes.

In a case involving an Italian trader, the OFT required the Italian AGCM to prevent the trader from sending misleading advertisements to UK consumers giving the false impression that they had won a prize. The OFT transmitted the complaint to the AGCM which opened an infringement proceedings according to its national administrative rules. The Italian authority also carried out an additional investigation. After adversarial proceedings, the authority ordered the trader to dis-continue sending the misleading advertisements. The decision was appealed but the appeal was rejected. The decision was based on the assessment made by the OFT of the violation of the UK legislation implementing the Directive 2005/29/EC. The decision does not contain references to an assessment made by the AGCM but the authority relied on the assessment of the OFT. In this context, made application of the procedural rules of the CPC Regulation and the legal basis of the decision is considered Article 4(6)(f) and Article 8 of the CPC Regulation 146.

Another example of administrative proceedings was the investigation carried out by the German BVL which had received an enforcement request from another Member State Elderly consumers in another Member State were misled by mail which was personally addressed to them and describing products as free which were not free, through creating the false impression the consumers had won a prize which they had not. Furthermore, the trader did not provide sufficient information about his identity and at a promotional excursion that the consumers attended and where products were advertised for sale, the consumers were not provided with sufficient information about the right of withdrawal. In addition, the trader performed aggressive sales practices during the sales demonstration at the promotional excursion. The BVL first investigated following an information request regarding the same case through sending out a hearing to the alleged trader according to Article 4 (6)(a) and (b) of the CPC Regulation in order to receive information regarding e.g. which trader of various possibly responsible traders was actually responsible. Afterwards, the BVL required the prohibition of the determined infringements following an enforcement request of the same applicant authority making use of the power set out in Article 4(6)(f) of the CPC Regulation. In this case the BVL decided to proceed itself without using the possibility to delegate the enforcement to the consumer associations.

In case the enforcement in Member State B is competence of the local authorities, such as in Spain, some difficulties may arise with regard to the identification of the competent authority. The single liaison office under the CPC Regulation may help to identify the local competent authority. In case of Spain, the legislation provides for the territorial competence: the enforcement is in charge of the authority of the place where the

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¹⁴⁶ Decision No 21682 of 13 October 2010, *Geni International*, AGCM Bulletin 40/2010.

act or omission has been committed, independently from the place of the affected consumers. In case of an infringement is within the competence of different local authorities (as in case of cross - regional infringement) the general guidelines suggest that the other local authorities should relinquish the competence in favour of the authority where the trader is if this facilitates the investigation and enforcement. If various local authorities may apply for a cease and desist order for the same infringement, the rules of competence should follow the general procedural rules: the actions may be reunite or suspended until the first request is decided.

Conclusions

The "classical" bilateral infringement does not create, in general, particular problem at the level of the allocation of the competence: the authority where the trader resides (if it the same of the place where the act or omission took place) is that competent to obtain the cessation of the intra-Community infringement. Problems may arise at the second level, through the application of the national procedural rules. The main issues arising from national procedural rules will be examined in the next-chapter.

2. A trader acts in Member State A and causes consumer harm in Member States B and C

There is the possibility that the act or omission of the trader affects consumers in various Member States. In this case, the authorities of the Member States affected will require to the authority where the act or omission has been committed to investigate and order the cessation of the infringement. If the place of the act or omission is not the place where the trader resides, the case falls in the example under point 3, In our opinion,, the authority of the Member State where the trader resides should retain the competence in opening the infringement proceedings.

As in the case at point 1, the allocation of competence among the competent national authorities is not problematic. Once the authority is in charge of the cessation of the infringements, issues may arise from the application of its national procedural rules to infringements that had effects in other jurisdictions.

For example, in case the trader resides in France but his act or omission affects the United Kingdom and Germany, the competent national authorities, once collected the complaints of the affected consumers, will sent a request for cooperation under CPC Regulation to DGCCRF.

According to the new legislation, the statute of limitation is between one and three year from the day the act or omission has been committed depending from the gravity of the infringements. However, the French statute of limitations depends from the amount of administrative fines that may be imposed and this is based on the qualification of the offence under French legislation. This would imply that the act or omission is evaluated by the DGCCRF on the basis of the French Consumer Code that is the applicable legislation.

The DGCCRF, provided that the limitation has not expired, may decide to issue an administrative injunction or bring the case before the Civil Court to obtain a cease and desist order.

In France, where the act or omission constitutes statutory offence, criminal proceedings may be initiated. However, in a case of infringement which affects consumers in other Member States, the applicable law for criminal proceedings should follow the rule of Regulation (EC) 864/2007: the law applicable should be determined on the basis of where the damage occurs. In this case test, the infringement may constitute a statutory offence in the United Kingdom, thus being prosecuted with a criminal proceeding, but not in Germany, where the consumer legislation violation are private law infringements. In our opinion, this should prevent the French authorities from applying criminal proceedings.

Consequently, the administrative injunction and the cease and desist order are the only remedies available to intra-Community infringements in France.

Practical example

A case that affected consumers in various Member States involved Belgium France and the United Kingdom¹⁴⁷. A Belgian company was sending misleading advertising mails to recipients in British, German and French territories. The Belgian authority was request by the OFT to intervene against the trader. The DGCM applied for a cease and desist order. Since the cease and desist order is civil proceedings in Belgium, the applicable rules were those of the civil jurisdiction.

The Court competent *ratione materiae* was that of the defendant while the applicable law was the Belgian law. The unfair commercial practice was assessed on the basis of the Belgian LPMC. However, the appellate Court considered that the first instance incorrectly assessed the practices under the Belgian law, since the applicable laws where those of the United Kingdom and France on the basis of Regulation (EC) 864/2007 on the applicable law to non-contractual obligations.

The appellate Court recognized that the practices were to be considered unfair but the first instance "wrongly referred to the Law of 6 April 2010 relating to market practices and consumer protection, which is inapplicable to the dispute since the commercial practices that are "complained of" in the present dispute were implemented in France and Great Britain and not un Belgium; furthermore, the special nature of the request for judicial assistance is to examine the mass mailings complained of with regard each of them".

Comments

Two elements may be drawn from this case law: first, when the infringement may only be dealt with by judicial cease and desist order, reference to the applicable law and jurisdiction cannot be avoided. Secondly, the unfair practices were carried out in various Member States but the decision prevented the trader to continue the practices only in two of them, which were those that applied to the DGCM for the request of cease and desist order.

This may give rise to the question of the territorial application of the judgment: a judicial decision should not be applied outside its territorial scope since it is direct to satisfy the demand of the requesting parties and it is bound to this request. This could give rise to different treatment of the same practice across Member State. In this case, the company was prevented to act in France and the United Kingdom but could continue to do so in Germany.

It should be mentioned that, in some cases, the competent national authorities of the Member State of the affected consumers acted to stop an infringement without resorting to a mutual assistance request proper. An example that can be mentioned is a case concerning fees applied when purchasing airlines tickets with debit cards. Both the OFT¹⁴⁸ and the AGCM¹⁴⁹ opened infringement proceedings against the air transport carriers involved. They were national proceedings in the substance but the main defendant, was a company which sells tickets through its website but is headquartered in Ireland. Thus the proceedings were against a trader established abroad.

The authorities cooperated in exchanging information and both imposed the cessation of the practice. The OFT obtained undertakings from the involved airlines, while the undertakings presented to AGCM were not considered adequate. The AGCM issued a decision and imposed administrative fines on the airlines.

Conclusions

As for the example under point 1, this case does not raise particular problems relating to the division of the work among the competent national authorities: the authority better placed to tackle the infringement and able to gather the evidence, should take the lead. However, procedural issues may arise that will be discussed in the following chapter. Some discussion could also be started with regard to the fact that, where the consumers of many Member States may be affected, the order to cease the infringement adopted by the

¹⁴⁷ Tournai District Commercial Court, 16 March 2011 and Mons Court of Appeal, 15 November 2011.

¹⁴⁸ http://www.oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/card-surcharges/#.UzR016h5M4o

http://www.agcm.it/stampa/comunicati/6062-ip117-ip130-ip131-ip136-ip138-trasporto-aereo-antitrust-da-dicembre-prezzi-on-line-piutrasparenti-per-i-consumatori.html

competent authority will only be in the benefit of the consumers whose competent national authorities have submitted the request for a cease and desist order.

3. Member State A is the place of the act or omission that causes harm in Member State B, but the trader has his establishment in Member State C

Article 3(b) of CPC Regulation provides that the act or omission may originate in a place different from where the responsible seller or supplier is established. This may be the case when the act is made through electronic communication but also when the trader or supplier has its legal office or headquarters in one Member State and is acting through a branch or an employee who resides in another Member State.

In this case, both the competent national authorities of the place where the trader resides and where the act or omission took place could be competent to tackle the infringement. Parallel investigations and infringement may be appropriate in this case where the act was committed on behalf of the trader, who should in general, take responsibility for the act or omission, or via electronic means based in another Member States. In this case, the competent national authority of the Member State C is competent to obtain the cessation of the infringement from the trader while the competent national authority of member State B is well place to obtain the cessation of the infringement from the subject that has operated on behalf of the trader or remove the assets or pertaining used to commit the infringement.

Some legal systems have already taken into consideration the possibility that the act or omission is not committed directly by the trader or supplier. In order to tackle infringements that involve the responsibility of more subjects with links between them, the United Kingdom system provides for the responsibility of the corporate bodies and accessories. Since the system provides for civil proceedings enforcement orders, the legislation provides that the Court may issue an order against an accessory to prevent him from carrying out the conduct whether in the current business or in another business and from consenting to or conniving in the carrying out of such conduct of any other body corporate with which he has a special relationship.

The OFT may accept undertakings from trader/supplier, both physical and legal person and by those involved in the *lieu of action*. Also in a civil proceeding, the enforcement order may be required against the legal person, subject with the power to represent the company and against the subject who has performed the act or omission.

The Belgian Code provides that a cease and desist order may be asked against a legal entity for the actions of an agent in case of distance selling, if the identity of the agent is unknown. In this case, the Belgian authority retains competence to obtain from the trader the cessation of the infringement, even if agents of the trader in another Member State have committed it.

A situation where the trader may be in one Member State and the act or omission originates from another Member State may be when the trader is using an electronic communication means. In this case, action may be necessary also in the Member State where the service provider is based, both in form of inspections as well as infringement proceedings. In fact, the legislation of some Member State provides for the responsibility of the provider of the electronic equipment that facilities the service provision for particular serious unfair commercial practices committed though electronic communications.

The national authorities dealing with a case in parallel will have to coordinate their action to the largest extent possible and ensure a smooth flow of information and cooperate in order to gather evidence. If the two acting authorities use different proceedings (civil vs. criminal) they may search for different kind of evidence and meet a different standard of proof. Coordination and exchange of information should be a priority.

The cooperation may be impeded by the rules on the access to file. The national legislation of the investigating authority may prevent it from transmitting some relevant information, such as business secrets. The evidence acquired by the investigating authority may not be sufficient for the deciding authority especially when a court proceeding has to be started.

Practical example

The case study is reported in the end of Chapter 2.5 (AGCM v. BVL).

Conclusions

In case the act or omission originated in a Member State different from where the trader is based and which cause harm to consumers in another Member State, both the authorities should conduct a parallel investigation.

4. Network Effects

"Network effect" is a concept predominant in competition law. The standard definition of network effects refers to an increase in consumer benefits due to an increase in the number of others consuming network goods. The network effects are typical of the new economy business and telecommunications industries, as well as transport industries. High technology markets are often characterised by significant demand-side network effects, which lead to a tendency for markets to allow only a single dominant vendor or technology; hence, the more users join a network, the more valuable a network becomes to all users 150. The definition of network effects implies consumer coordination: to obtain mutual benefits from consumption, coordination between consumer decisions is necessary 151. The lack of coordination and the alterations with the conduct of one consumer or a small group will affect the mutual benefit of the others.

Network effects may also be produced by mass marketing and mass advertising which coordinate consumers' behaviour. When mass marketing applies to industries, such as telecommunications, which are network industries, the alteration of the behaviour may create higher inefficiencies and abuse. Businesses in network industries such as communications and high-tech products advertise extensively. Informative and persuasive messages offer coordination devices. These can induce large numbers of consumers to sign up for a network service or to adopt a new technology¹⁵².

The network effects of mass marketing generally alter consumers' coordination behaviour. The choice of the consumers becomes based on persuasion and not on "command and control".

Consequently, misleading mass marketing actions performed by traders reduce the consumer welfare and mutual benefits. A lot of case law and decisions of the Member State authorities relate to cross-border unfair mass marketing practices, such as mail draw prize. The European Court of Justice assessed the risks of such practices especially when a price has to be paid in order to obtain the prize: "provided by these It is the very prospect of taking possession of the prize which influences the consumer and may cause him to take a decision he would not take otherwise, such as choosing the quickest method of finding out what prize he has won, even though that may be the most expensive method".

In general, such practices arise from one trader or service provider and spreads across one or more Member States, in order to catch the largest number of consumers.

In our opinion, the act or omission which produce network effects may be dealt with according to the rules described in point 1,2, and 3. The Member State where the trader resides, which mainly is the place of the act or omission, should retain the competence in tackling the infringement. In case the two places differ, coordination between the competent national authorities is required.

Practical case

An Italian content provider was offering multimedia services for mobile phones in Germany and Hungary. The consumers with subscriptions to certain phone companies were receiving SMS messages that advertised free multimedia contents. Once the services were downloaded for free, the service provider

¹⁵⁰ M. MESSINA, Article 82 and the New Economy: Need for Modernisation?, The Competition Law Review, Clasf, 2/2006.

¹⁵¹ D. F. SPULBER, Consumer Coordination in the Small and in the Large: Implications For Antitrust in Markets with Network Effects, Journal of Competition Law and Economics, 4 June 2008, pp. 1-56,

¹⁵² D. F. SPULBER, Consumer Coordination in the Small and in the Large, id. p. 45.

¹⁵³ Judgment of the Court of 18 October 2012, case C-428/11, Purely Creative and others, id. § 50.

changed the contractual conditions and turned the free services into paying services. The consumers were charged the price through their phone bill. The German BVL and the Hungarian Nemzeti Fogyasztóvédelmi Hatósá, both required to the Italian AGCM to order the cessation of the practices. The trader removed the practices and the AGCM decision provided the amount of the fine in case of non-compliance 154.

Conclusions

In our opinion, the infringements may be tackled according to the point 3.

5. Territorial Scope of the Authority Decision

One of the criteria that should be considered when allocating competence to tackle infringements among the national competent authorities is the fact that the authority should be able to effectively bring to an end the entire infringement and to sanction the infringement adequately. The issue of the enforcement of the decision may raise, in particular, where the trader is in a Member State different from that where the national competent authority adopting the decision is placed.

The mutual recognition of judgments and their enforcement is an issue discussed in the 2011 public consultation on the introduction of collective redress mechanisms¹⁵⁵, where it has been recognized that it would require legislative modifications.

The issue of the extra-territorial enforcement of a public law decision is, in fact, very controversial. The Regulation (EC) 44/2001 on the recognition and enforcement of judgements in civil and commercial matters does not contain a positive definition of civil and commercial matters. In the *Eurocontrol* decision 156, the first dealing with the interpretation of "civil matters", the Court clarified that "civil matters should be considered as an independent concept that has to be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems". However, "types of judicial decision must be regarded as excluded from the area of application of the Convention, either by reason of the legal relationships between the parties to the action or of the subject-matter of the action. Although certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the Convention, this is not so where the public authority acts in the exercise of its powers".

Each of the two criteria is considered self-sufficient.

The criterion of "exercise of public power" was advanced in the Sonntag decision¹⁵⁷ where the Court held that actions are only excluded from the Convention if the public authority has exercised the powers "going beyond those existing under the rules applicable to relations between private individuals". Hence, in the Sonntag, the Court drew an explicit line between the cases where the State acts in the same way as private person in relations governed by private law (acta iure gestionis) which are covered by Regulation (EC) 44/2001 (former the Brussels Convention) and act conducted in the exercise of the sovereign authority (acta iure imperii) which do not fall with the scope of application ¹⁵⁸.

In our opinion, both self-managed and judicial cease and desist order cannot be enforced outside the territory of the issuing authority. Even in case of civil law proceedings, such as in Belgium and United

¹⁵⁴ Decision 19607 of 5 March 2009, Request for enforcement measures from Germany and Hungary (DADA net S.p.A.), in Bulletin 10/2009.

¹⁵⁵ Study JUST/2010/JCIV/CT/0027/A4 Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress, http://ec.europa.eu/competition/consultations/2011_collective_redress/study_heidelberg_summary_en.pdf

¹⁵⁶ Judgment of the Court of 14 October 1976, case C- 29/76, *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, ECR 1976, 01541, p. 4.

¹⁵⁷ Judgment of the Court of 21 April 1993, case C-172/91, *Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, ECR 1993 Page I-01963.

¹⁵⁸ V. GÄRTNER, The Brussels Convention and Reparations–Remarks on the Judgement of the European Court of Justice in Lechouritou and others v. The State of the Federal Republic of Germany, German Law Journal, 4/2008, p.422.

Kingdom, the question whether the proceeding might be of a civil nature is irrelevant if the act underlying the action has been carried out in the exercise of public powers 159.

The intervention of the public authority to protect the consumers public interests certainly qualify as *acta iure imperii* thus cannot be enforced through the rules of the Regulation (EC) 44/2001.

An exception may be represented by the German third party enforcement system. In this case, the judicial cease and desist order is based on private law subject matter and the two parties (the consumer association and the trader) are qualified as private bodies. Even if the consumer association receives public funds and acts on behalf of the public authority, this is not enough to be qualified as public subject acting *iure imperii*. The Injunction Directive defines the qualified entities such as "organisations whose purpose is to protect the collective interests of consumers, in accordance with criteria laid down by national law" and which are separate by the public bodies in charge of protecting consumer interests. Even if they act on behalf of the State, they do not exercise public powers, since their conduct "does not entail the exercise of any powers going beyond those existing under the rules applicable to relations between private individuals" 160.

In this context, the judicial cease and desist ordered obtained by a German consumer association against a trader, under the subject matter of private law may be enforceable abroad under the rules of the Regulation (EC) 44/2001: the judgment must be final and valid on the merits and an application for an exequatur must be submitted before the competent court. However, since we had no notice of a such practical case, this remains an theoretical option. Consequently, it remains of primary importance to allocate the enforcement to the national public authority that is better placed to tackle the infringement, including the enforcement of the decision.

2.5 PROCEDURAL ISSUES IN THE APPLICATION OF CPC REGULATION

From the results of the research and from the information collected among the competent national authorities, a certain number of procedural obstacles to the fruitful cooperation under the CPC Regulation have emerged. Once again, it has to be stressed that the different proceedings applicable in the examined Member States, that imply the application of different procedural rules, may render difficult the smooth cooperation among authorities.

In some cases, difficulties may also arise from the trader's conduct. In the same investigation carried out by the OFT and AGCM against airlines companies for the booking fees, both the competent national authorities reached the same conclusions that the airlines were implementing unfair commercial practices. However, in the United Kingdom the companies provided undertakings that were implemented almost immediately, while in Italy, they refused to comply with the AGCM's decision and were fined.

Legal basis for request for mutual assistance

In some circumstances, the availability of different mechanisms to tackle the intra-community infringement may create some difficulties. In the *Germanwings* case¹⁶¹ the Italian AGCM received a complaint from consumers' association concerning the credit card surcharge and fees applied by the low cost company when selling the tickets on their website and the fact that the general transport conditions to be acted at the moment of the purchase were only in English. The Italian authority sought for assistance of the German authority in charge of the monitoring and enforcement of Directive 2000/31/EC.

However, the request was introduced by the AGCM under the Article 3 of the Directive 2000/31/EC and not under Consumer Protection Cooperation System. Article 19(2) of Directive 2000/31/EC provides that each Member State should appoint one or more contact point for cooperation. The requesting Member State may

Decision No 22340 of 28 April 2011, Germanwings, in Bulletin 17/2011.

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¹⁵⁹ V. GÄRTNER, *The Brussels Convention and Reparations*, id, p. 430.

¹⁶⁰ Judgment of the Court of 21 April 1993, case C-172/91, Volker Sonntag, id, p. 22

contact the national competent authority of another Member State in order to obtain compliance with the national provisions applicable in the Member State in question.

Due to the fact that the violation was referring to Directive 2000/31/EC, AGCM submitted the request for cooperation according to Article 3, while the BVL considered that the CPC Regulation should be the legal basis applicable for any request of mutual assistance. In the end, the Italian Competition Authority decided to pursue the infringement without recurring to the CPC mechanism.

Different/multiple mechanisms provided by the different EU legislative acts, intertwined with the rules lay down by the CPC Regulation, may create some difficulties in detecting the applicable mechanism for mutual cooperation.

Lack of evidence, Burden of Proof and Standard of Proof

One of the most discussed issues raised from the participation to the questionnaire, is that the competent national authority requesting assistance, does not provide enough evidence to meet the standard of proof of the requested Member State.

Article12 (1) of the CPC Regulation provides "The applicant authority shall ensure that all requests for mutual assistance contain sufficient information to enable a requested authority to fulfil the request, including any necessary evidence obtainable only in the territory of the applicant authority".

The notion of "sufficient information" does not seem to find a unanimous agreement. The different approach essentially depends on the national applicable proceedings. Where the action has to be brought by the requested authority before a Court, the standard of evidence is higher. In case of cross-border infringements committed via electronic communications, some authorities may require the provision of readable screenshots as evidence of the infringements, containing the name of the creator and the creation date, as well as the URL of the part of the website and comprehensible booking steps. Where this evidence is not available, the affidavit of the targeted consumers should be provided.

In general, sufficient information is considered gathered when a high number of complaints have been received. The main identified cross-border cases regarded the "prize draw mailings". In these cases, the major evidence was the letters sent to the consumers. Italy's AGCM considers that the standard of proof is fulfilled when a large number of consumers is affected; a serious economic harm has occurred or may occur and the practice is directed towards a category of consumers who is considered weak.

In Chapter 3.5 we provide a brief description of the burden of proof that may be described, in general, as the duty to produce evidence. In consumer protection enforcement cooperation cases, the general burden of proof relies on the authority that acts for the enforcement on behalf of the requesting authority.

The standard of proof may be defined as the level of evidence needed by a party to persuade the authority or the Court of his own assertion. Standard of proof is different between civil and common law. Civil law standard of proof is higher than the evidential or tactical burden of proof in common law, and implies a level of evidence that is the "full conviction of the judge", while the standard of proof in common law is "beyond any reasonable doubt".

However, no quantification of the level exists although some recent studies have tried to provide a quantification of the civil standard 162.

According to the Court of Justice, the essential function of evidence "is to establish convincingly the merits of an argument" 163.

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¹⁶² M. SCHWEIZER, The civil standard of proof –what is actually?, id, p. 4

¹⁶³ Judgment of the Court of 15 February 2005, case C- 12/03, Commission/Tetra Laval, ECR [2005] I- 987, § 41.

It must also be recalled that the definitions vary among different legal systems, since the expressions such as legal *burden of proof*, the *burden of producing evidence* or the *standard of proof* do not always find equivalents in the legal tradition of certain Member States.

The burden and standard of proof in self-managed administrative seems more close to the evidential or tactical burden of proof in common law since it does not require the almost certainty but the "balance of probabilities" 164. However, the competent national authority will pay a lot of attention in meeting a sufficient threshold even in the self-administrative proceedings, since in case the decision is challenged before the Court, the standard of proof will be that applied in the judicial proceedings. This is because the authority must be satisfied that it could defend its decision in Court, thus the standard applied by the national Courts necessarily determines the standard applied by the competent national authority.

The burden/standard of proof is an issue especially when the enforcing authority has to seek a cease and desist order before the Court. In the case of German private enforcement by delegated third parties, through German civil proceedings, for instance the standard of proof in civil proceedings must be such as to raise in the judge a "conviction raisonnée" This may create difficulties for the requesting authority in gathering the sufficient evidence to meet the national standard of proof. For example, with regard to the misleading unfair commercial practices, some provisions require that false information was provided. Some authorities have indicated that it is difficult to prove that the given information was false. Moreover, the German authorities seems to give more value to written evidence requiring that oral evidence are in form of affidavit.

The Courts may require the defendant to disclose certain evidence or reverse the burden of the proof, having at his disposal other procedural powers which are not available to the administrative authorities. It is clear that the authorities will not have to bring before the Court the case that they are sure to win. On the other hand, there is a lot of reluctance in submitting request for cease and desist order that could be rejected.

Two interesting aspects have emerged in the examination of the Member States: the reversal of the burden of proof and the higher evidential value of the investigative reports.

Belgium and France provide the possibility to reverse the burden of proof on the defendant. Reverse burden may be imposed by the Court during the proceedings for the cease and desist order concerning unfair commercial practices on the basis of Article 12 of the Directive 2005/29/EC. The Italian competition authority in the self-managed administrative proceedings may impose the same rebuttable burden of proof.

With regard to the reports from the investigations, Belgium and France have introduced provisions in order to give to reports from the inspectors a higher evidential value, until "proof to the contrary".

In France, Article L. 141-1 of the Consumer Code states that "violations and breaches are recorded in the minutes, which are valid, until evidence of the contrary". Thus, the judge is bound by the findings contained in the minutes until proven otherwise 166. Such minutes must be regarded as true. They are sufficient enough to establish the offence and can be challenged only if contrary evidence is reported "in writing or by testimony" (Article 431 CCP). These last two terms should be interpreted broadly. In fact, the respondent can bring any legal evidence 167. The judge will assess the evidence case-by-case.

According to the Belgian legislation, the "procès-verbaux dressés qui font foi jusqu'à preuve du contraire" are a legal instrument that are able to prove infringements that are very technical or volatile and therefore difficult to prove. This kind of official reports can only be issued by designated agents with regard to specific domains, such as infringements to the Code, and the special evidential value only extends to the facts the agent has established himself (ex propriis sensibus). For example, an agent can establish (with special proof

¹⁶⁴ H. PRAKKEN, G. SARTOR, *A Logical Analysis of Burdens of Proof*, in H. KAPTEIN, H. PRAKKEN, B. VERHEIJ, *Legal Evidence and Proof: Statistics, Stories, Logic*, Ashgate Publishing, 2009, p. 223-253.

¹⁶⁵ G. DEPPENKEMPER, Beweiswürdigung als Mittel prozessualer Wahrheitserkenntnis: Eine dogmengeschichtliche Studie zu Freiheit, Grenzen und revisionsgerichtlicher Kontrolle tatrichterlicher Überzeugungsbildung (§ 261 StPO, § 286ZPO) Göttingen: V&R Unipress, 2004, 208 sq, 421.

¹⁶⁶ Cass crim, April 25, 1977, Bull crim No. 134, Crim Cass, 15 February 2000 Procédures commentaires nº 134.

¹⁶⁷ Cass crim, 4 March 1976, Bull crim 82.

value) that a price was not indicated on a good (substantive element). However, he cannot establish that it was on purpose (moral element).

In general, one can concur with the position of the doctrine that the evidence which can lead to a finding, absent proof to the contrary, must already have sufficient weight to convince the judge, and the "only objective of leaving open the possibility for the accused to present counter evidence is ultimately to acknowledge that the accused may always produce exculpatory evidence and to define what such exculpatory evidence could be in the specific context of the case"¹⁶⁸.

Both the instruments may be useful to overcome the problem of the potential lack of evidence raised in the CPC Regulation context. If an authority has carried out investigations or obtained the affidavit of the consumers, the investigation of the competent national authority should be considered as having a higher evidential value both for the requested administrative authority and for the Court. It will be up to the trader to prove the contrary. The same should be valid for the report of the authorities requested to investigate and search for evidence. In this context, all the investigative reports of the competent national authorities would have the same evidential value in the EU on reciprocal basis.

Linguistic Barriers

The information collected seems to indicate that one further obstacle to the fruitful cooperation between national authorities is the fact the documents and information provided by the requesting competent national authority are in a language different from that of the requested authority. Moreover, some authorities have clearly stressed the fact that the cooperation is easier with Member States using the same language, such as between the Dutch and Belgian authorities.

Linguistic issues are obstacles when enforcement is carried out with an action before a Court. In the case "Friedrich Müller" ¹⁶⁹, the first request for a cease and desist order, submitted before the Court by the Austrian Federal Antitrust Authority (on behalf of the OFT) was rejected essentially because essential documents submitted by the plaintiff "which were absolutely necessary for establishing the claimed fact for the purposes of confirmation were in English and were submitted to the Court without translation. According to the content of its decision documents not written in the language of the Court (per Article 8 B- VG [Federal Constitution] were not suitable for establishing findings."

Interestingly enough, the petition of the FAA was rejected for not having produced the translation of the documents but was considered sufficient by the Court to interrupt the statute of limitations.

For the purpose of continuing the plaintiff's main case, the Court requested with a decision that duplicated copies of translation into the German language of the relevant parts of filed documents be submitted.

Article 12(4) of the CPC Regulation already provides some instruction on the linguistic issue: "The languages used for requests and for the communication of information shall be agreed by the competent authorities in question before requests have been made. If no agreement can be reached, requests shall be communicated in the official language(s) of the Member State of the applicant authority and responses in the official language(s) of the Member State of the requested authority".

The main problem arises in connection with the file, since the complaints submitted by the consumers and other evidence are mainly in the language of the requesting member States. Many competent national authorities require the translation, at least in English, of the submitted evidence. For court proceedings, translation into the national language of the Court is required.

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¹⁶⁸ F. CASTILLO DE LA TORRE, Evidence, Proof and Judicial Review in Cartel Cases, id. p. 16.

¹⁶⁹ Judgment of the Commercial Court of Vienna of 2 June 2010, Federal Antitrust Authority v. R.T.C. Radio-Television Communication Handels GesmbH and others.

We suggest that the applicant authority should at least provide some translation of the essential parts of the complaints and of the evidence before submitting the request for assistance.

Distinction should be made between the self-administrative proceedings and the court proceedings. In case of self-administrative proceedings simple translations should be enough, while in case of court proceedings, the procedural rules regarding the translation should find application and certified translation has to be provided. In our opinion, the main obstacle to the request of a certified translation, besides to the costs, is the fact that it is time consuming and the cease and desist order should be characterized by some speed in order to be efficient.

The rules on the transmission of the evidence and their translation should take into consideration, and be coordinated, with the European and international rules on the taking of evidence as described below. The general rules of the cost of the translation, as indicated by the Hague Convention on the taking of documents, should be borne by the requesting authority or Court. However, in our opinion, they should be charged on the trader, if ordered to cease the act or omission or convicted, as deterrent.

We consider that the CPC Regulation should introduce some rules to prevent rendering the transmission of the translated evidence too burdensome. In particular, the requesting authority's use of a certified translator should be recognized by the authority (and by the Court) requested to take enforcement measures, without any additional translation.

Other European and international procedural rules on the taking of evidence

In evaluating the revision of the procedural rules of CPC Regulation, especially with regard to the taking and translation of evidence, for the completeness of the discussion it is important to mention that at European and international level some provisions already exist with the purpose to smooth the taking of evidence for judiciary proceedings. These rules may provide some relevant inputs especially with regard to the judicial cease and desist order, which require the taking of evidence that may be deemed sufficient to meet the standard of proof of the requested Court.

Regulation (EC) 1206/2001¹⁷⁰ has created a European system for the taking and transmission of evidence between Courts. The Regulation is based on the principle of direct transmission between the Courts, in which the requests for taking evidence are transferred directly from the "requesting Court" to the "requested Court". The Regulation provides for precise criteria on the request of evidence and strict deadlines (at latest 90 days) for the transmission. Refusal to provide evidence is subordinated to strict conditions.

In 1968 the Hague Conference on Private International Law adopted a Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. This Convention makes provision for the obtaining of evidence in one State pursuant to Letters of Request received from a judicial authority in another State and the taking of evidence in one State by commissioners appointed by Courts in another State or by the diplomatic officers or consular agents of that State.

The Convention contains some rules with regard to the language of the request and of the evidence as well as on the party that has to borne the costs for the translation. In particular, it is clarified that, when translations are needed, the cost for the translation of the evidence has to be borne by the requesting Court.

We would like to mention that, with regard to the ground for refusal, the Article 14(3) of the Regulation (EC) 1206/2001 provides that the execution cannot be refused on the ground that the Court of the requested Member State would have full jurisdiction over the subject matter or the law of that Member State would not admit the right on action on it. This is important because it separates the applicable substantive rule from the procedural rules and provides that the national substantive rules of the requested Court cannot constitute an obstacle to the procedural cooperation.

These procedural rules are of application in case of Court proceedings when evidence have to be taken abroad, but they are clearly relevant in cross-border infringement especially when it is necessary to collect

¹⁷⁰ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the Courts of the Member States in the taking of evidence in civil or commercial matters, in OJ L 174 of 27 June 2001.

evidence for a judicial cease and desist order. The rules on the request, deadline for provisions and ground for refusal provide some interesting inputs for the better working of the CPC Regulation.

Statute of Limitations

Among the examined Member States, the issue of statute of limitations varies. Statute of limitations for the competent national authorities (which is a separate issue from the statute of limitations for the consumers to submit a complaint to the competent office, which a matter of private law) exists in Belgium, the Czech Republic, France (recently introduced by the Loi 17 mars 2014) and Germany.

The different nature of the statute of limitations has been analysed in Chapter 2.5. The statute of limitations may constitute a procedural obstacle where an action before the Court is required to obtain a cease and desist order. The identification of the statute of limitations depends from the applicable law to the cross-border infringement. The procedural rules applicable in the action before the Court are in the law of the competent Court, however, the statute of limitations of the national procedural rules applies to act or omission committed in another Member State. Statute of limitation provides for short period of time in order to start an action (usually one year from the day the act or omission has been committed) that may complicate the cooperation since the requested authority has to proceed with urgency in order to prevent that the action becomes statute barred.

The Friedrich Müller case is interesting from this point of view because the authority, due to the urgency, submitted the action without providing the translation of the documents. However, the Court considered that the action was sufficient to interrupt the statute of limitations. The Appellate Court clarified that the "plaintiff's (the authority, n.d.r.) petition does not constraint the statute of limitation, because the translation of the documents originally submitted in English were not attached to the petition. A constraint of the statute of limitation would therefore apply by 21.4.2010 at the earliest. The advertisement submitted by the first defendant date from 30.1, from 23.2, from 2.3 and from 9.3.2009 and it is not known when they were submitted to the British Consumer Protection Agency. The Agency would be obligated to prove that I had only learned of these advertisements after 21.4.2009. (....) a claim asserted within the time frame of the statute of limitation will not become statute barred because the lawsuit will end after the period of limitation has expired"¹⁷¹.

The statute of limitations is a peculiar aspect of the national procedural rules. However, rules under CPC Regulation should take into account the possibility that the limitation, according to the legislation of the requested authority, has started to running out. The CPC Regulation could clarify this and for instance provide that, in this case, the request for an authority may interrupt the limitation. In case the limitation has already expired and no action is possible in the requested Member State, the Commission should be informed and alternative tools and possibilities (such as an extraterritorial action from the requesting Member State) should be possible. Another possibility would be clarification the statute of limitation for CPC actions via the CPC Regulation.

Access to File and Exchange of Information

Access to file constitutes a relevant procedural issue especially where an authority is requested to investigate on behalf of another in order to search for evidence. Access to file may be twofold: access granted to the parties of the investigation (such as the case of Italy AGCM's Regulation which governs the access to file of the parties involved in the investigation) and the exchange of information between the authorities within the CPC Regulation. A key element of the performance of the CPC Regulation is the power of the competent authorities to exchange and use information (including documents, statements and digital information) obtained through complaint or investigations.

Access to information should not be an issue since Article 6(1) of the CPC Regulation provides that "A requested authority shall, on request from an applicant authority, in accordance with Article 4, supply without delay any relevant information required to establish whether an intra-Community infringement has occurred or to establish whether there is a reasonable suspicion it may occur".

¹⁷¹ Judgment of the Appellate Court of Vienna of 10 October 2010, Federal Antitrust Authority v. R.T.C. Radio-Television Communication Handels GesmbH and others.

Two of the examined Member States, France and Italy, have introduced in their legislation a provision in order to permit the transmission of the file to other authorities in the context of cooperation under the CPC Regulation. Moreover, the access to file for other authorities, even when provided, is not considered as an absolute right but it may be subject to restrictions. In particular, some documents may be excluded from the access, especially if considered sensitive or business secrets. In principle, these restrictions should not apply to the exchange of information among CPC authorities since Article 13 of the CPC Regulation binds the national authorities to a confidentiality obligation. However, some clarification on the exchange of information should be useful. In particular, the fact that some legislation has expressly provided for the transmission of documents under CPC Regulation while others have remained silent may create some confusion, at least with regard to the content of the exchange.

Article 13 of the CPC Regulation already provides rules on the exchange of information, clarifying the use of information and the protection of personal data, professional and commercial secrets.

Ensuring the protection of confidential information improves the quality and the confidence in the investigation process and strengthens the credibility of the enforcement actions. Protection of confidential information, however, must be balanced against the need to provide investigation targets with the evidence that provides the basis for the case ¹⁷².

In order to clarify the contents and the modalities of the exchange of information between competent national authorities, it may be useful to have a look at the rules governing the exchange of information between the competent antitrust authorities under Regulation (EC) 1/2003¹⁷³

In the antitrust investigations, the competent national authorities may exchange the information with some procedural safeguards: the authorities may disclose information necessary to prove the infringement but have to respect the professional secrets. Moreover, the information exchanged may only be used for the purpose for which it was gathered (in competition case, for the application of Articles 101 and 102 TFEU) and for the subject matter for which it was collected. The third safeguard relates to the sanctions on individuals on the basis of information exchanged. In fact, while the Regulation (EC) 1/2003 provides for fines to undertakings, national legislation may impose sanctions on individual. In this case, the exchange of information is admitted in condition of reciprocity, if the laws of the transmitting and the receiving authorities provide for sanctions of a similar kind for individuals. If on the other hand, both legal systems do not provide for sanctions of a similar kind, the information can only be used if the same level of protection of the rights of the individual has been respected in the case at hand.

It could be useful to consider similar clarification of the provisions also for the exchange of information under the CPC Regulation that will take into account the different procedural rules of each Member State and the need to give special protection to certain information that may lead to criminal sanctions.

With regard to possibilities for the parties of the investigation to have access to file, some provisions could be useful especially in the self-managed administrative proceedings. While in the court proceedings there is, in general, an obligation to transmit or disclose certain information or evidence to the defendant, in the administrative proceedings, especially when the evidence are provided by another authority involved in the investigation, the possibility for the defendant to have access to some information included in the authority's file should be provided to ensure respect of due process rights.

Internal Competence of the Competent National Authorities

Difficulties in cooperation under the CPC Regulation may arise from the internal division of competence among authorities. Some Member States, such as the Czech Republic have assigned competence to tackle infringements under CPC Regulation to sectorial authorities. While in Italy the legislative reform has enlarged the competence of the Italian competition authority to deal with all the infringements under CPC Regulation,

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¹⁷² International Competition network ICN Investigative Process Project. Issue Paper and Mandate, 2012.

¹⁷³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4.1.2003.

the Czech Republic still maintains the division. This may create some delays and difficulties in managing the case.

Difficulties were signalled also in "decentralized" enforcement systems such as that of the United Kingdom. The fact that the local and national consumer protections is assigned to local authorities, with limited territorial competence, has given rise to case where an unfair practice was too large of a TSS to pursue but not sufficiently important to be taken on by the OFT and there were gaps that leaved many consumers unprotected.

The new approach will be that the CMA should work "to build seamless partnership with co-enforcers such as the TSS and the sectorial regulators by developing Memoranda of Understanding and participating fully in new co-ordinating groups such as Consumer Protection Partnership (CCP) to deliver high impact outcomes. In particular, the CMA will work with others to share best practice, build enforcement capability and help identify strategic priority enforcement" The new role of CMA will be to adopt a supportive and facilitative partnership role in area of potential overlap rather than the role of leadership that the OFT had prior the reform.

Similar issues with regard to the decentralized system may be found in Spain, where the autonomous regions have the power to enforce the national legislation on consumer protection. Differently from the United Kingdom system, the Spanish system does not provide for the control and coordination of the newly created national central authority over the local authorities. However, it provides some procedural rules on the allocation of competence among the territorial competent authorities. No information is provided on whether the most important cases are taken by the central authority of they remain of competence of the local authority.

Jurisdiction and Applicable Law

From the information collected from the survey and in analysing the national decisions, issue related to the applicable law have arisen. Strictu sensu, the question of the applicable law (both jurisdiction and substantive law) is prominent in court proceedings. However, we have noticed some inconsistencies also in the administrative decisions: while some authorities assess the intra-Community infringements against their national law which has implemented the EU Directives, others make reference to the legislation of the requesting Member State or, in a neutral way, to the CPC Regulation and EU Directives.

Below we report on some of the issues that have emerged.

Court Cases

The Court cases reported are mainly the judicial cease and desist orders, from Member States where the cease and desist order is obtained through a judicial decision.

Applicable Jurisdiction under International Private Law

The Belgian Court, in defining the jurisdiction, simply stated that the action for injunction was based in CPC Regulation and "as the respondent has its head office in Mouscron, international competence for Belgian jurisdiction applies under the aforementioned regulation; furthermore as the respondent has its office in the Tournai district, the Presiding judge of this Court has competence over this area".

The Court considered its competence under the general rule of the international law. The Belgian case law considers applicable, in case of unfair commercial practices committed in different Member States, the competence of the Court where the infringer business has its office.

The general rule applicable in conflict of laws in order to identify the jurisdiction is generally based on the defendant's domicile. This grants a high predictability of the jurisdiction ¹⁷⁵.

¹⁷⁴ CMA, Consumer Protection, Guidance on the CMA's approach to use of its consumer powers, id, p. 4.

¹⁷⁵ Whereas 11 of Council Regulation R (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001,

Applicable law under private international law

With regard to the applicable law, the Court considered that the evaluation of the misleading character and the unfairness of the commercial practice should have been carried out according to the United Kingdom and French legislation. However the Presiding judge of the commercial Court, in issuing the cease and desist order, made reference to the misleading commercial practices under the LPMC. The Appellate Court, in confirming the cease and desist order, underlined that the only applicable law was the French and the United Kingdom law and the reference to the Belgian legislation was incorrect. The Appellate Court stated that "it wrongly referred to the Law of 6 April 2010 relating to the market practices and consumer protection, which is inapplicable to the dispute since the commercial practices that are complained of in the present dispute were implemented in France and Great Britain and not in Belgium; furthermore, the special nature of the request for judicial assistance is to examine the mass mailing complained with regard to each of them; (...)"¹⁷⁶.

Two elements may be reported from the judgement. The misleading practice has to be evaluated with reference to the legislation of the Member State of the consumers affected. In this case, the Court examined the mailing under the French and UK legislation.

The applicable law follows the rule of the Regulation (EC) 864/2007¹⁷⁷, which defines the conflict-of-law rules applicable to non-contractual obligations in civil and commercial matters, including product liability, *negotiorum gestio* and *culpa in contrahendo*.

The Regulation (EC) 864/2007 retains, as main applicable law, the *lex loci damni*, where the direct damages occurred. The regulation considered that this choice a "fair balance between the interest of the person claimed to be liable and the person sustaining a damage" (Whereas 16). Article 2(3) provides that "(a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and(b) damage shall include damage that is likely to occur". The rules apply also for the unfair competition and acts restricting free competition. Article 6(1) provides that "The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected".

In this context, act or omission that is likely to produce harm to consumer (such as sweepstake lotteries, misleading advertising) should be included in the "events giving rise to damage" and the applicable law defined according to Article 2(3) of Regulation (EC) 864/2007. In this direction, in our view, goes also Article 3(b) of the CPC Regulation that, in defining intra-Community infringements, refers to "any act or omission contrary to the laws that protect consumers' interests, as defined in (a), that harms, or is likely to harm, the collective interests of consumers harms, or is likely to harm, the collective interests of consumers residing in a Member State or Member States other than the Member State where the act or omission originated or took place".

Taking into consideration anti-competitive conduct would also support this approach. The proposal for a Directive on private damages for infringement of the competition law provisions identifies the applicable law referring to Article 6(3) of Regulation (EC) 864/2007.

The rules under Regulation (EC) 864/2007 are rules of civil procedure, so they are used in the Member States where the public enforcement is carried out with an action, filed by the competent national authority, before a commercial or civil Court. In this context, public enforcement is carried out through civil procedural rules that justify the applicability of the *lex loci damni* under Regulation (EC) 864/2007.

¹⁷⁶ Judgement of the Mons Court of Appeal of 14 November 2011, AMA/DGCM.

¹⁷⁷ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in OJ L 199/40.

Self-managed Administrative Proceedings

Applicable law in self-managed proceedings seems more controversial. Some competent national authorities, requested to intervene against a trader who has committed an infringements that affects consumers in another Member State, adopt decisions based on their national laws.

According to them, businesses are "required to comply with the national laws of the country in which they are established rather than with that to which they are selling". In this context, they apply the national law to the businesses irrespective of the location of the business's consumers. That means that the order is only issued if the cross-border infringements constitute also a domestic infringement. Otherwise, they seem reluctant to open infringement proceedings.

These authorities seem open also to the possible application of the legislation of the Member State of the affected consumers (similarly to what happens in court proceedings) but only "provided this is not a restriction of the freedom to provide services", especially those of information society.

Other enforcers adopt cease and desist orders against traders on the basis of the EU Directives directly and of the CPC Regulation. Other authorities, when required by another competent authority to adopt an executive measure against a trader, only assess the practice on the basis of the Directive and make reference to the CPC Regulation.

EU Courts and Interpretation of EU law

The issue of the applicable law in the CPC context has a substantive relevance to the extent that there is a potential conflict of rules. Bearing in mind that in this context the substantive rules to be applied stem from the European legislation, such conflict relates to possible conflicting interpretations of European rules when applying national law. In this connection the European Court of Justice has treated the issue. The Court has repeatedly clarified that "in applying national law, the national Court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the Unfair Commercial Practices Directive, in order to achieve the result pursued by that directive and thereby comply with the third paragraph of Article 288 TFEU" 178.

The Court assessment should be valid also for the national public authorities. When required to take an action against a trader who resides in its territory, for unfair commercial practice that affects consumers in another Member State or in various Member States, the authority should assess conduct in a way that pursues the purpose of the directives and that provides protection to consumers abroad.

This would help to remove uncertainties regarding the applicable law. The authority should adopt a decision following its national procedural rules (statute of limitations, procedural safeguards) but the assessment of the trader's practices should made as close as possible to the European Court's interpretation of the relevant Directives and practices. Where no case law exists yet, an effort to promote a common understanding of EU harmonised rules should contribute to promote a converging application of the law across the Union. The ultimate solution of these issues would likely be the adoption of the rules currently available in the EU Directives in EU Regulations that would have direct effect in all the Member States and thus provide a single legal basis for action to member States.

> Article 8 of the CPC Regulation

Differences have emerged in the approach of examined Member States in dealing with infringements and using the CPC Regulation in a cross-border context. These different approaches reflect the legislative traditions of the Member States and the practices of the competent national authorities. In fact, some authorities seek a decision against a trader also for ceased unfair commercial practices, when they are discovered later, in order to prevent the trader from implementing the same practice in the future or impose administrative sanctions for past conduct. While asking for assistance to other competent national authorities, the cooperation has been refused on the basis that the infringement was no longer in place, and

¹⁷⁸ Case C-106/89 Marleasing, id. case C-403/01 Pfeiffer and Others, id, § 113; and Case C-69/10 Samba Diouf, id, § 60.

the existence of the infringement is a condition for the full application of Article 8 of the CPC Regulation. The different approach is mainly linked to the fact that the decision of the authority is a tool to impose an administrative fine for the violation of the legislation as a punishment and deterrence for the violation and not only as a payment to the public purse in case of non-compliance with an order. In this case the cease and desist order prohibit the unfair commercial practice and imposes a fine on the basis of the length and of the gravity of the infringement.

This type of cases may be a source of difficulties. The case study below shows the problems that the limitations in the scope of the mutual assistance obligations and inconsistent interpretation may cause.

Case Study: Fox Mobile and Netsize Italy –Scope of jurisdiction

The case Fox Mobile and Netsize¹⁷⁹ provides some interesting results on the cooperation under the CPC Regulation.

AGCM self-managed proceedings and appeal to the Administrative Court.

A German content provider, the Fox Mobile Distribution GmbH, provided multimedia contents for mobile phones using an Italian service provider, Netsize Italia S.r.l. The paying service was directed to people at least 18 years old with a mobile phone contract, but it was advertised through media (newspapers, website and SMS directly to consumers' phones). One of the advertising was on a magazine mainly direct to young and underage people.

On the basis of a complaint received by one consumer and by a consumers' association, the Italian AGCM opened an investigation. Since the content provider, Fox Mobile, was a German business, it was requested the assistance of the German competent authority, the BVL. Two requests for assistance were sent but the BVL. The BVL came to the preliminary conclusion that the intra-Community infringement was no longer taking place, since the advertising had been amended. The trader informed the BVL that an undertaking had been obtained with the AGCM in respect of the advertisement. This was accepted by AGCM.

The AGCM decided to carry on the investigation and the infringement proceedings by itself. The infringement procedure was opened against the German content provider, the Italian service provider and two Italian mobile phone operators. The AGCM considered that they were all responsible for the infringement since the delivering of the service was possible only though the combined actions of the content, service providers and mobile phone operators, each of them obtaining profits from the subscription of the paying service by the consumer. In order to offer the multimedia service for mobile phones, the Fox Mobile had subscribed a contract with the mobile phone operators that received a fee each time the advertised service was activated by a consumer. The revenue sharing was applied also to the service provider, which made the service possible.

The Italian authority considered, according to the definition in Article 2 of the Directive 2005/29/EC, implemented in the Consumer Code, that the trader is "any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader". In this context, all the operators linked by the contract were considered responsible for the unfair commercial practices.

The authority recognized that, at the time of the decision, the unfair commercial practice was no longer in place, but it considered that the practice had been particularly serious, having been in place for more than three months and that it was directed to a large number of consumers who were particularly vulnerable due to the young age.

The authority adopted a decision against the traders, imposing fines and preventing them from repeating such practice in the future.

¹⁷⁹ Decision No 19888 of 20 May 2009, *Netsize Italy*, in AGCM Bulletin 21/2009; Judgment of the Administrative Regional Court of Lazio (TAR Lazio) No 08230/2012 of 1 October 2012, *Netsize/Agcm*.

Netsize submitted an appeal to the Italian administrative competent Court. The appeal was based on the fact a service provider should not be considered responsible for the unfair commercial practice of the content provider.

Among the procedural issues raised on the appeal there was the excessive length of the proceedings, which was beyond the deadlines laid down by the AGCM's Regulation. The Court considered that the AGCM operated correctly, since they made application of the possibility to extend the deadline in case one of the operators is abroad or in case of particular complex issues raised from the investigation.

The plaintiff argued that the decision was not sufficiently clear with regard to the contested practices and he was refused a hearing by the AGCM: the Court rejected the complaints considering that the decision was sufficiently clear with regard to the infringement, since the infringements have to be defined by the facts and by the violated legislative provisions. Moreover, the procedural safeguards were not violated since the hearing is an additional instrument for the authority to search for additional evidence or obtain clarification on certain issues, but it is not an absolute right for the defendant.

With regard to the main issue, i.e. the fact that the service provider could not be considered responsible for the act of the trader, the Court confirmed the AGCM's assessment. In fact, since the Fox Mobile was based abroad, the service provider was acting in Italy on behalf of the content provider and it was the one subscribing the contracts with the mobile operators. In this context, the content provider (trader) was in Germany, but the act was performed in Italy with the cooperation of the Italian service provider causing harm to the Italian consumers.

The Court did not enter into the merits of the cease and desist order and the fact that it was used to condemn past conduct and to prevent the trader from committing infringements in the future.

Comments

With regard to this case, two elements have emerged. Firstly, the different approaches of the two competent authorities, AGCM and BVL, with regard to the ground for action against the infringer.

According to the German authority, an action can only be started in case of an "on-going infringement". If the infringement has already ceased or was removed, there is no ground for the authority's intervention under the CPC Regulation. This is due to the fact that the authority's scope of intervention is strictly limited to the scope of the mutual assistance obligations under the CPC Regulation (in Germany, the same authority has no competence for domestic infringements). On the other side, the AGCM intervenes also to impose fines for infringements that have ceased at the moment the authority obtained information about the infringement. In this specific case, the infringement was committed between November 2007 and March 2008 but the first complaint was sent to the authority in April 2008. Since no statute of limitations is provided by the Italian legislation, the authority still had room to intervene imposing fines on the traders and issuing an order not to repeat the infringement in the future.

In our opinion, some clarifications of the CPC Regulation should be considered at the EU level to develop a common approach for such cases. An aspect that should be taken into consideration is that opposite interpretations may give rise to some "regulatory arbitrage": a trader may decide to act in some Member States, for a short period of time before the act /omission is detected and subsequently cease it without the risk to incur in a decision of the competent authority, leaving to the private parties the action to obtain restoration for the suffered harm.

Secondly, a unilateral initiative from a single authority shows the limits of the cooperation: in the absence of mutual assistance, compliance is pursued through an "extraterritorial" application of the national rules (the AGCM could have also sought an injunction order directly before the German Court under the Injunction Directive). However, not all the authorities have the will and powers to do so. It could also have requested the Commission to issue an opinion on the matter under Article 15(5) of the CPC Regulation. This mechanism has however not been used so far.

Beyond the advisability of promoting a common approach to the understanding of termination of infringing practices, which safeguards the purpose of the CPC Regulation (i.e. an infringement should not be regarded

as ceased as long as its cross-border harmful effects have not been effectively removed), this shows limitations of the CPC Regulation's mutual assistance mechanism. Short-lived infringements, which may occur in the context of new on-line commerce marketing techniques and may present characteristics that were not considered when designing cooperation mechanisms, may escape the cooperation mechanism all together.

Unilateral extraterritorial actions of the competent national authorities in one Member State against a trader in another Member State

The case reported above raises another possible issue in the performance of the CPC Regulation: the adoption by a national authority of a unilateral (extraterritorial) decision against a trader established abroad to protect its national consumers. This may be the consequence of the refusal of the requested authority to tackle the infringements (as in the case above) or a direct decision of the authority not to use the CPC Regulation instruments or the Injunction Directive.

Article 6 of the Regulation provides for the obligation of the requested authority to assist the requesting authority. Article 15 of the CPC Regulation provides the condition for the refusal of an authority to comply with a request of assistance. This provision includes the obligation to cooperate following a mutual assistance request as principle by default.

The grounds for refusal however seem to leave some wide discretion to the competent national authorities, especially the refusal under Article 15.2(b) where the requested authority may refuse to comply with a request for enforcement measures under Article 8 if "in its opinion, following appropriate investigation by the requested authority, no intra-Community infringement has taken place". .. The CPC Regulation does not provide exhaustive rules how to deal with refusals of mutual assistance; neither has it required that the refusal should be motivated. It only states that the requesting authority has to carry out an "appropriate investigation" without any further clarification. The same lack of clarity may be detected in relation to the refusal for "insufficient information" (Article 15.2(c)).

Moreover, the Regulation offers one route to tackle effectively cross-border infringements, but in some cases other routes may be more appropriate (for example the injunction before a foreign Court, especially in cases where the issue at stake goes beyond the EU-level minimum harmonised protection). Even when the mutual cooperation is set in motion, the outcomes of the national proceedings may not satisfy the applicant authority. The CPC Regulation does not address this outcome at all.

CPC Regulation does not deal with the outcomes of the application of its Article 15. In case of refusal of cooperation, the requesting authority may have the feeling that its national consumers, harmed by a trader from another Member State, are not adequately taken into consideration and not adequately protected.

This may led the national authorities, especially when some of the past requests were rejected or the cooperation was made too difficult for instance because of too burdensome request of information from the requested authority, to decide to take a direct extraterritorial enforcement action against a foreign trader.

The German Wettbewerbszentrale has adopted an extrajudicial order against non-German traders for practices affecting German consumers, as well as court action before German Courts against non-German traders. The extrajudicial order is a request to the trader to stop an act or omission explaining which are the legislative provisions that have violated. The trader is requested to sign a declaration of forbearance that contains a penalty clause in case of repetition of the infringement.

However, these unilateral actions have the consequence of the extraterritorial application of the national procedural rules. The author of the act or omission is summoned to defend himself before a foreign jurisdiction under foreign substantive and procedural rules and with different procedural safeguards. Besides, the proceedings may become longer in order to provide translation of the documents and to correctly serve the documents in another Member State. Even if direct enforcement proves to be more difficult than using cooperation under the CPC Regulation, the competent national authorities may decide to take the route in order to prevent that the harm to their consumers remains unpunished.

With regard to the exterritorial application of consumer law, in the *Alpine Investments* case the Court stated that a restriction to the freedom to provide services imposed by a Member State to activities from its territory

to other Member States was "justified by the imperative reason of public interest consisting in maintaining the good reputation of the national financial sector. Since the Member State from which the unsolicited telephone call is made is best placed to regulate the canvassing of potential clients who are in another Member State, it cannot be complained that the former Member State does not leave that task to the Member State of the recipient. Moreover, the restriction at issue cannot be considered excessive since it is limited to the sector in which abuses have been found and to only one of the possible methods of approaching clients" 180.

It is recognized that an administrative decision may have extraterritorial effects: the administrative authority, even if requested by a limited number of parties, may prevent a trader from acting in other Member States if a practice is considered unfair under the national legislations or under the Directive as interpreted by the European jurisprudence. Such extraterritorial action however has its limitations, in particular in terms of actual enforcement of the decision against a foreign trader in case such trader does not comply with the decision voluntarily and has no assets in the territory of the acting state.

The *Alpine Investment* case could constitute a basis for a "global" administrative cease and desist order in case of serious and repeated violations detected by an authority, if the conditions laid down by the decision are respected. A general injunction could be useful in case of unfair commercial practices included in the "black list" of Directive 2005/29/EC. Besides, the European Court of Justice has recently declared that certain practices, like giving the consumer the impression he had won a prize while is invited to pay a cost to claim it are prohibited absolutely¹⁸¹.

On the other side, the EU legislation has provided a comprehensive set of instruments to the competent national authorities to tackle the intra-Community infringements, which were directed to ensure consistency in the authorities' actions.

In our opinion, such unilateral extraterritorial actions do not seem to respond to this need for consistency and may increase legal uncertainties concerning the applicable procedures as well as the procedural issues in tackling intra-Community infringements. Moreover, the issue of the enforcement of the extraterritorial administrative actions remains relevant, as described in Chapter 2.4.

Effects of unilateral actions may be seen with the *Apple* case, where consumer organisations of 11 Member States aimed to stop misleading practices of Apple. Italy and Spain found that Apple had breached consumer rights by, first, not having correctly informed consumers about their statutory rights on legal guarantee and, secondly, by misleading consumer through provision of false/partial information in its advertising practices of Apple Care Protection Plan¹⁸². No actions were taken in other Member States (in Slovenia it was considered that the information was not misleading) and the result is that the company implements different national practices and different level of consumer protection across Member States.

Moreover, these inconsistencies in consumer protection through public enforcement across Member States may jeopardise the possibility for the consumers to bring an action before the Court for private damages, also in the form of the recently introduced class actions. The analysis of private remedies is beyond the scope of the Study, however it has to be recalled that public and private enforcement are intertwined and enforcement action may be followed by requests for damages.

For the reason examined, we believe that unilateral actions of the competent national authorities should constitute an exception to the cooperation under the CPC Regulation, and be carried out only if the other possible forms of cooperation are not possible.

¹⁸⁰Judgment of the Court of 10 May 1995, case C-384/93, *Alpine Investments BV v Minister van Financiën*, ECR [1995] I-01141, points 47 48

¹⁸¹ Judgment of the Court of 18 October 2012, case C-428/11, *Purely Creative and others*, not yet published.

¹⁸² Decision No. 24025 of 31 October 2012, Apple – prodotti in garanzia, in Bulletin 44/2012.

CHAPTER 3 – RECOMMENDATIONS AND POSSIBLE EU INITIATIVES

3.1 RECOMMENDATIONS

In our opinion, the CPC Regulation provides the competent national authorities with an appropriate range of instruments and powers to tackle intra-Community infringements while seeking compliance with existing legislation. It seems that, with the exception of the identified gaps in certain powers (such as the lack of undertakings in the Czech Republic and Slovakia), difficulties mainly arise from applying domestic procedural rules to cross-border cooperation and interpreting the CPC Regulation. However, the majority of these difficulties can be overcome with increased cooperation and better coordination at the EU level.

In the first place, we believe that the CPC Regulation should be regarded as the main instrument to tackle intra-Community infringements. If the Member States continue to perceive and use the CPC Regulation as an alternative instrument to direct national action, hurdles will continue to exist. Clarifying the role of the CPC Regulation is essential. This would also enhance converging national procedural rules.

Enhanced cooperation is essential to preventing negative spill over, distortion of competition, regulatory arbitrage and forum shopping.

The European Commission should ensure that the CPC Regulation is coherently interpreted and applied so as to ensure that it is coherently enforced throughout the European Union. Different enforcement approaches may cause regulatory arbitrage with traders who may decide to act from certain Member States where authorities could be less keen to tackle intra-Community infringements or where a higher evidential standard exists that may render proving the infringement difficult.

According to the structure of the Task Specifications and of the Study, we will divide the recommendation for each Theme and Deliverable.

• The scope of the CPC Regulation

The first issue, which is outside the limits of the two themes, is the scope of the CPC Regulation. In fact, the CPC Regulation currently constitutes one of the possible instruments available to competent national authorities to tackle intra-Community infringements. This European instrument was set up to ensure mutual assistance and to aid adapting existing national enforcement arrangements to the challenges of enforcement within the Single Market to ensure effective and efficient enforcement cooperation.

At present, the CPC Regulation is an alternative to the judicial instrument of the Injunction Directive and to direct extraterritorial actions by competent national authorities against intra-Community infringements that harm consumers in their Member States.

To enhance consumer protection at the European level and increase the integration of the Single Market, the CPC Regulation should become the primary instrument used to tackle intra-Community infringements. Direct or unilateral actions by competent national authorities should become exceptions to the CPC Regulation. This would grant consumers the same level of protection in all the Member States, enhancing their awareness that another competent authority in another Member State would protect their interests in the same way as their domestic authority. We believe that this would increase consumer confidence throughout the Single Retail Market.

In order to establish the CPC Regulation as the core of European consumer protection enforcement, a combined effort is necessary to ensure a common and consistent approach that should be promoted by the Commission through notices and guidelines on the application of the CPC Regulation. Implementing legislation is also recommended to clarify some aspects of the CPC Regulation and provide more detailed information on the procedures.

Recommendation

We believe that the Commission should start discussions to broaden the scope of the CPC Regulation. This would require modifying the current Regulation.

Theme 1 State of play of minimum powers of competent enforcement authorities

Undertakings

Among the main issue raised was the absence of undertakings in the Czech Republic and Slovakia and how the different Member States approach this issue: in Belgium, Italy and the United Kingdom, undertakings are structured very well so as to provide a clear indication of the conduct that the competent national authority expects from traders. Italy requires filling out a form to ensure consistency with submissions. A good practice, in our opinion, is the action plan of PhonepayPlus' Code of Conduct: undertakings are proposed by the office, but are subject to negotiation between the parties. Once both parties approve them, the recipient must demonstrate to the authority that it complied with the deadline. In order to establish consistency in the use of the powers under Article 4(6)(e) of the CPC Regulation, we believe that a notice from the Commission would help clarify the contents of the undertakings, ensure a suitable procedure for submitting and accepting, and establish a possible time line for parties to engage in discussions involving intra-Community infringements. Such notice would promote convergence among Member States in their enforcement practices.

Sanctions

Sanctions are a sensitive issue, since each Member State disciplines them according to its constitutional division of powers. In the majority of Member States, the competent national authority may impose fines for non-compliance with the decision and, in some cases, also for violating the legislation. In the United Kingdom, an application to the Court is necessary. The level of the fines is also highly varied among Member States.

However, in order to ensure deterrence and prevent negative spill over such as regulatory arbitrage, some clarifications on the Commission's expectations and the approach to follow when applying Article 4(6)(g) of the CPC Regulation would be very useful.

Recommendations

In our opinion, to ensure consistency with how minimum enforcement powers are applied by competent national authorities, a Recommendation similar to the one recently adopted by the ECN on the use of investigative and enforcement powers in Member States would be appropriate. The ECN Recommendation articulates prevailing considerations of competent national authorities and the minimum set of: (i) powers to effectively conduct inspections and request information; (ii) the means to effectively enforce these investigative powers; and (iii) the powers to impose effective sanctions on businesses for non-compliance with these investigative powers. It contains the general principles that the authorities consider relevant to ensure effective enforcement of the EU competition rules within the ECN.

• Theme 2: Procedural Rules and their impact on the CPC mechanism

The issues related to difficulties arising from the application of national procedural rules to intra-Community infringements are mainly discussed under Deliverable 5.

Some procedural issues should be tackled at the EU level. Hurdles in cooperation may arise from different interpretations on how to use the enforcement instruments and on the meaning of the provisions of the CPC Regulation. In first place, the definition of intra-Community infringement would need to be clarified concerning the scope of the CPC Regulation: the intervention is currently reserved for "on-going" intra-Community infringements and is mainly understood to be a "prohibitive injunction" consisting in a cease and desist order for unlawful conduct. However, some Member States, like Italy, intervene even after the unfair commercial practice has ceased. This approach reflects the idea of preventing any unfair commercial practice from remaining unpunished, thereby increasing the deterrent effect of consumer protection rules. Changing the scope of the application of the CPC Regulation will require careful consideration to ensure that the widest range of violations fall within its perimeter. This should prevent roque traders and unfair practices

from finding a convenient environment in which to flourish due to their falling into the cracks of diverging national approaches.

In this context, how competence is allocated among competent national authorities should be clarified. We envisage preparing a Notice on cooperation among competent national authorities that would provide some pre-defined criteria to identify the best placed authority to deal with intra-Community infringements in different model situations, taking into consideration the different situations that may arise from the definition set out in Article 3(b) of the CPC Regulation, which we outlined in Chapter 2.4. For instance, this could be modelled on the ECN jurisdictional notice.

A clarification from the Commission on the applicable law, both from the substantive and procedural points of view, would be helpful with promoting convergence and dispelling ambiguity, specifically for enforcement systems that are based on civil law. The issues of applicable law may be resolved with a consistent application of European Court case law. An overview of EU Court case law in the form of a notice may be appropriate to ensure consistency and uniformity.

The exchange of information may become a significant hurdle. Article 13 of the CPC Regulation already provides rules on exchanging information, clarifying the use of information and protecting personal data and professional and commercial secrets. However, to promote a common and consistent approach to the CPC Regulation, it would be useful to clarify Article 13. For instance, this could be done based on Regulation (EC) 1/2003, under which competent national authorities may exchange information as long as they comply with some procedural safeguards: that the exchange of information safeguards professional secrecy, and the purpose and the subject matter for which it was collected are complied with. Similar guidance would also be pertinent in the context of the CPC Regulation.

In our opinion, the issue of burden/standard of proof requires more in-depth intervention, both in the form of clarification, based on the position of the EU Courts on the issue, as well as by introducing provisions in the CPC Regulation that gives higher evidential value to the evidence collected by the competent national authority during the investigation, by asserting that such is valid unless "proven to the contrary" and by mutually recognizing the evidence collected by another competent authority as valid and presentable in Court. This would also permit overcoming problems concerning the application of Article 15 of the CPC Regulation: if the evidence collected by a competent national authority in an investigation is granted higher value, there would no longer be any grounds for refusing to cooperate based on "insufficient information" provided by the requesting authority or because of a wrong form of evidence.

The linguistic barrier may be overcome with a provision imposing the obligation on the applicant authority to provide, within a deadline, a translation of the relevant documents or an extract thereof. Article 12(4) of the CPC Regulation provides a complex mechanism where the parties must agree on the language beforehand and, in case of disagreement, each authority will use its national language. This risks causing misunderstandings and delays. Moreover, the authorities have shown preference in cooperating with those that share their same language. For court proceedings, under Regulation (EC) 1206/2001, the rules on translating requested evidence might provide some useful basis on how to regulate the issue.

As indicated above, a very important issue to be clarified are the grounds for refusing to cooperate under Article 15 of the CPC Regulation: the grounds used by an authority to refuse to proceed, especially under Article 15.2 (b), and the outcomes of the diverging positions of the applicant and the requested authority must be addressed at a European level, possibly with an amendment to the CPC Regulation. This not only concerns clarifying the actual grants for refusal, but also the need to develop an arbitration mechanism for such cases at a EU level. Although Article 15(5) already contains a rudimentary mechanism to this effect, in our opinion this mechanism should be developed further by, for example, also extending the possibility to make such request to the applicant authority and for disagreements other than a formal refusal of a request.

The issues concerning the statute of limitations and linguistic barriers may, in our view, may only require some legislative changes to the CPC Regulation. Provisions could be introduced to clarify the interruption of the statute of limitation, its duration and other measures that allow for dealing with cases where it has already expired. The same should be done to reduce linguistic barriers. We also suggest introducing a statute of limitations, both objective and subjective, comprising all possible infringements.

Recommendations

Issues related to the scope of the CPC Regulation, the burden of proof, the statute of limitations, the limits to exchanging information and the consequences of applying Article 15, in addition to a deadline for providing the document translations, require, in our opinion, modifications to the CPC Regulation.

Interpretative issues, including those on applicable law and allocation of competences could be addressed through *soft laws*.

3.2 POSSIBLE EU INITIATIVES

In order to make the CPC Regulation effectively work, cooperation between the national authorities and the Commission must be increased.

The CPC Regulation already provides instruments to this effect, such as enforcement coordination (Article 16) and administrative cooperation (Article 17), and it established a Committee under Articles 19 and 20 to examine all matters relating to the application of the CPC Regulation and especially "how the arrangements provided for cooperation are working" (Article 20).

We strongly believe that CPC enforcement coordination could be strengthened by using the model of the European Competition Network (ECN). Given the links between competition and consumer policy, some elements that have proved to function well for competition may also be applied to consumer policy. The ECN is based on decentralising enforcement; the same CPC Regulation model ,with a multi-layered setting composed of EU and national rules and supervised by the Commission and by the national competition authorities could be implemented.

The work of the ECN has been facilitated by the fact that the EU substantive rules on enforcement are the same and substantive competition rules in national legislation and these EU rules are very convergent. However, convergence and harmonisation of the procedural rules have also been deliberately promoted.

Even if the Commission does not have, in consumer protection, the same enforcement powers as the ones entrusted to it by the EU competition rules, it may play an essential role in monitoring, coordination and convergence among the Member States. In fact, the role of the Commission within the ECN is essentially managerial, since the system is based on the principle of parallel competence: the notice¹⁸³ provides that the ECN ensure efficient division of the work, mutual assistance and effective and consistent application of EU competition rules.

The ECN does not decide on which cases should be pursued or on the division of work between the competent national authorities: the authorities start, conduct and possibly conclude the proceedings in accordance with their own responsibility. The ECN provides a valuable forum for discussion and cooperation among the NCAs that can learn from each other's experiences, coordinate investigations, exchange evidence and information and discuss issue of common interest. It is supported by an IT tool where the competent national authorities provide information on parties, products, territories, alleged infringements, their suspected duration, and contact information of the case handler. Moreover, the ECN was designed in such a way so as to minimise conflicts among its members ¹⁸⁴.

We believe that a similar structure must be adopted in the area of enforcing EU consumer protection legislation and creating a mechanism that ensures legal certainty and minimises the risks of inconsistent enforcement.

The CPC network should also become the place supervisory measures are enhanced, through the coordination of market surveillance, as provided by Articles 6 and 9 of the CPC Regulation. Market surveillance is becoming a proactive form of enforcement adopted by competent national authorities to prevent market failures. An example of such approach is the newly created UK Consumer Protection Partnership (CPP), a joint partnership among the competent enforcement authorities and consumer

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¹⁸³ Commission Notice on cooperation within the Network of Competition Authorities, id.

¹⁸⁴ M. KEKELEKIS, The European Competition Network (ECN): It Does Actually Work Well, in EIPASCOPE 1/2009, p. 39.

organisations in charge of the advocacy, with the purpose of ensuring strategic and coherent enforcement and sharing information and education practices.

At present, intra-Community coordination seems to take place mainly at the regional level, among competent national authorities of the same geographical area (e.g. the Baltic countries or Benelux). For instance, among the examined Member States, Latvia has cooperation agreements with the national authorities of the Baltic States (Estonia, Lithuania). On the basis of these agreements, common meetings of Baltic State authorities are organised to exchange experience and information, including common CPC cases. These meetings are directed at promoting cooperation between national authorities (new trends, legal solutions, case handling aspects, enforcement mechanisms, tools etc.). Belgium has a similar form of cooperation with the Netherlands and Luxembourg.

We envisage that such form of cooperation should take place also at the EU level, and on a systematic and continuous basis. This would certainly help detect unfair commercial practices on a large scale and improve the tools to remove them.

The network for EU enforcement of consumer protection law may also take into account the already existing Committee, which could establish itself as a venue for maintaining regular contacts and addressing practical consumer protection concerns. It has to be a place that allows for dynamic dialogue that serves to build consensus and convergence towards sound policy principles.

In this context, the use of common positions from the national authorities and the preparation of joint projects should be improved. Further inspiration could be taken from the ECN, where subgroups deal with specific sectors or issues.

The Committee should become a forum for transparent discussion to promote a better understating of how different investigative processes and practices work, and contribute to enhancing the effectiveness of consumer protection enforcement.

CONCLUSIONS

In the Single Market comprised of more than 500 million consumers, consumer protection has a prominent role. The competent national authorities play an essential role in intra-Community protection. The CPC Regulation has introduced powers for the competent national authorities to tackle these infringements. These powers have mainly been implemented by the Member States, however, uncertainties and inconsistencies with their implementation and use still exists. In order to remove the sources of these problems, we believe that the CPC Regulation should become the primary framework for enforcing consumer protection legislation for intra-Community infringements. The perception of the CPC Regulation as one of the instruments available to the competent national authorities reduces, in our opinion, its role and use and possibly contributes to some of its weaknesses.

From the results of the Study we can draw the following specific conclusions.

 Theme 1: State of play of the implementation of minimum powers of competent enforcement authorities

Some difficulties with the proper performance of the CPC Regulation arise from the fact that competent national authorities are organised in various ways and operate under different legal systems. The examination of the minimum enforcement powers in the ten selected Member States has detected several loopholes, mainly in the field of undertakings. For the most part, minimum enforcement powers have been implemented or they already existed in Member States. The competent national authorities are provided with different types of enforcement powers and tools, depending on the jurisdiction's legal system and traditions. Belgium, France and Italy, have reviewed their national legislation during the preparation of the Study and they have increased the enforcement powers of the competent national authorities. The United Kingdom has undergone an extensive reform of its competent national authority.

We envisage more convergence in the application of these powers, mainly through interpretative notices from the European Commission and from clarifications of some elements of the CPC Regulation.

• Theme 2: Procedural Rules and their impact on the CPC mechanism

Under Theme 2 more shortcomings were identified with applying domestic procedural rules to cross-border infringements. The Study emphasises that, with the exception of the German system, there are no different rules for domestic and intra-Community enforcement, and national rules are applied to cross-border enforcement. Clearly, different national rules impact the effectiveness of enforcement in cases of intra-Community infringements, and create hurdles and gaps that may result in some infringement cases remaining unpunished. While some problems may be tackled by amending the CPC Regulation, others may be overcome by systematically using soft laws, such as guidelines, recommendations and notices.

As a final remark and possible initiative, we envisage stronger cooperation among the competent national authorities and the European Commission to promote strong links between all the authorities involved in the interest of effectively and efficiently applying the CPC Regulation in their respective jurisdictions and promoting consolidated supervision of the Single Market.

We would like to conclude quoting Professor Whitford, who had tried, three decades ago, to assess and evaluate the private and public remedies in consumer protection legislation. While some observations may now seem outdated, some others are still valid. Professor Whitford observed "Virtually all consumer protection legislation today provides for public remedies. This may be seen as representing a consensus that private remedies are inadequate in themselves to achieve compliance, a conclusion clearly ratified by our past experience. There is a wide range of public remedies that can be made available to an enforcement agency. Probably the most common is some form of injunctive remedy, typically effectuated through an administrative cease and desist order. Other public remedies include criminal and civil penalties, and public actions to require merchants to compensate for injury. It is very difficult to make any judgement about the relative effectiveness of these different remedies. Experience teaches that the commitment of the agency to

enforcement of legislation is far more important in determining levels of compliance than the enforcement powers of an enforcing agency" 185.

¹⁸⁵ W. C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, Wisconsin Law Review, 1981, p. 1041.

List of Definitions

Infringement: means any act or omission contrary to consumer protection rules laid down in the Capter 1.3 of Regulation 2004/2006/EC as converted into the internal legal order of the Member States.

Intra-Community, transnational or cross-border infringement: infringement as defined by Article 3 b) of Regulation CPC.

Infringer: legal or natural person that fails to comply with a legal obligation.

Self-managed administrative proceedings: proceedings for the non-judicial determination of fault or wrongdoing and may include, in some cases, penalties of various forms, conducted by government bodies.

Civil proceedings: refers, in the Study, to those proceedings taken in a Civil Justice Court against the trader by an administrative agency.

Strict-liability offence: a rule specifying strict liability makes a person legally responsible for the damage and loss caused by his or her acts and omissions regardless of culpability (including fault in criminal law terms, typically the presence of *mens rea*).

Criminal proceedings: refers to a proceedings in court in the prosecution of a natural or legal person charged or to be charged with the commission of a crime against the consumers, contemplating the conviction and punishment of the person charged or to be charged.

Traders: means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts.

Rogue trader: a trader who acts independently of others, and typically recklessly, usually to the detriment of both the clients and the institution that employs him or her, the traders typically trade in high risk investments which can create huge losses but also large gains.

Administrative fines/penalties: administrative fines are monetary penalties assessed and imposed by a regulatory authority to those who have infringed the consumers' rights, without recourse to a Court or independent administrative tribunal.

Penal or criminal sanctions: punishment for the commission of a specific crime as provided by the national criminal law in so far as to protect the public interest of the consumers.

Statute of limitations: refers to the maximum period to initiate a proceeding. Statutes of limitations exist for both civil and criminal causes of action, and start from the date of the act/or omission, or on the date it was discovered, or on the date on which it would have been discovered with reasonable efforts.

Business or professional secrets: refers to information which has commercial value because it is secret and it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. In competition and trade law it usually covers: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.

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