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Master thesis

Theoretical and Practical Issues of Control of Unfair Commercial Activity

Teoriniai ir praktiniai nesąžiningos komercinės veiklos kontrolės klausimai

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ABSTRACT AND KEYWORDS

The main purpose of this study is to investigate new types of unfair commercial activities and methods of combating them when online commercial activities are formed with the development of modern information technologies.

In order to achieve this goal, determining what "unfair" commercial activities are, determining the reasons that form them and different types of activities caused by these reasons, and mutually analyzing existing national and international legislative acts in this field have been identified as the main priorities.

The object of the study is the social relations that regulate the factors that create the basis for the emergence of unfair commercial practices and their legal consequences.

Keywords: unfair behaviors, trademark, codes of conduct, interest of consumer

SANTRAUKA IR PAGRINDINIAI ŽODŽIAI

Pagrindinis šio tyrimo tikslas – ištirti naujas nesąžiningos komercinės veiklos rūšis ir kovos su jais būdus, kai internetinė komercinė veikla formuojasi tobulėjant šiuolaikinėms informacinėms technologijoms.

Siekiant šio tikslo, svarbiausia yra nustatyti, kas yra „nesąžininga“ komercinė veikla, nustatyti jas formuojančias priežastis ir skirtingas šių priežasčių nulemtas veiklos rūšis bei tarpusavyje išanalizavus galiojančius šios srities nacionalinius ir tarptautinius teisės aktus. prioritetus.

Tyrimo objektas – socialiniai santykiai, reguliuojantys veiksniai, sukuriančius pagrindą nesąžiningos komercinės veiklos atsiradimui ir jos teisinėms pasekmėms.

Raktiniai žodžiai: nesąžiningas elgesys, prekės ženklas, elgesio kodeksai, vartotojo interesas

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INTRODUCTION

Issues about unfair commercial practices, both theoretical and practical, are extremely important in a variety of settings, from consumer protection and business ethics to legal and regulatory frameworks. Getting an understanding of the theoretical aspects helps policymakers in creating regulations that protect consumers from such types of practices. It also helps to shape the moral framework in which businesses function and assists in the formulation of global fair trade principles and guidelines. The mentioned issues make this topic relevant.

Novelty in addressing theoretical and practical issues involves keeping up with emerging trends such as online fraud, deceptive advertising, and other forms of misconduct. The landscape of unfair practices can change rapidly due to technological advancements, global markets, and shifts in consumer behavior and this research highlights the above-mentioned nuances and identifies ways to control unfair commercial practices.

The novelty of this research lies in adapting these frameworks to address new challenges posed by globalization, digitalization, and the interconnected nature of modern economies. Practical issues involve the implementation and enforcement of these regulations, which may require innovative approaches to stay ahead of deceptive practices.

One of the main research tasks is to first define the concept of unfair commercial practice. As the number of practices leading to unfair commercial practice increases over time, the definition of this category also expands. In this regard, before interpreting the characteristics of any legal category, it is necessary to define what it is.

As one of the main manifestations of unfair commercial practice, deliberate use of a trademark belonging to another to confuse the consumer, the damage caused by such use to both the right holder of trademark and consumers, the methods and means of combating such illegal acts, including the legality of use determining the way is among the tasks of this research.

The role of state bodies in the regulation of unfair commercial practices and determining the mechanism of influence on such practices are among the tasks of the research.

The largest part of the study is the use of codes of conduct as a tool in preventing unfair commercial practices and addressing optimization of interaction between UCPD and Codes of Conduct.

Also, the need to fight against unfair commercial practices by applying the principles of international law was justified.

As mentioned earlier, in order to ensure the control of unfair commercial practice, it is necessary to first learn the concept of unfair commercial practice, the causes that create it, and different forms of such practice.

These mentioned measures serve one purpose: to fight against unfair commercial practices and to control these practices in order to protect consumers, who are partially weak subjects of the market, from unfair commercial practices.

In this regard, determining the theoretical and practical issues of control of unfair commercial practice, including the role and importance of the DIRECTIVE 2005/29/EC and individual state bodies related to its implementation in taking these measures this Directive, is one of the main goals of the research, and the entire research is aimed at achieving this goal.

It has been studied that the DIRECTIVE 2005/29/EC is the main instrument in harmonizing the norms of law regulating unfair commercial practices and its role in combating such practices and also the impact of the Omnibus Directive on the regulation of unfair commercial practices.

The main method to be used to achieve these goals is the comparative method. The comparative method was used to examine the regulation of unfair commercial practice, its separate types and methods of combating such practices in the legislation of different states, especially, Poland and Azerbaijan.

Also, a descriptive method was used in terms of defining the concept of unfair commercial practice, as well as interpreting the positive and negative aspects of self-regulation in the regulation of unfair commercial practice.

P. Bartolomucci, H. Collins, C.M.D.S. Pavillon and Barbara Blasco examine the theoretical and practical issues of unfair commercial practice, the relationship between the Unfair Commercial Practices Directive which is the main regulatory instrument of unfair commercial practice and codes of conduct.

The originality of this study lies in the fact that not only the relationship between the Unfair Commercial Practices Directive and the codes, but also the concept of unfair commercial practice and its different types in this context were interpreted, and the Directive and codes of conduct were evaluated as regulatory tools of unfair commercial practice.

PART I

1.1. Definition of unfair commercial practice and description of its types

When talking about any legal category, it is necessary to define the concept of that thing. Unfair commercial practice is the term used to describe dishonest actions conducted by organizations or people when conducting business. These actions typically try to deceive consumers, obtain an unfair edge over rival businesses, or violate accepted moral and legal norms. False advertising, price manipulation, misleading marketing, intellectual property infringement, and other unfair commercial practices are only a few examples.

DIRECTIVE 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, the legal notion for unfair commercial practice is specified in Article 5 of the Directive. According to that norm a commercial practice shall be unfair if: (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers. As can be seen from the definition, in order to consider a commercial practice unfair, this practice must be contrary to professional diligence and affect the economic behavior of the consumer (DIRECTIVE 2005/29/EC).

In practice, one of the most common types of unfair commercial practice is false advertising. It is the practice of giving false or misleading information about that product in order to sell any product or service to the consumer. In particular, it manifests itself in the form of having specifications and differences that the product does not actually have.

Examples of the most common unfair commercial practices mentioned in the Unfair Commercial Practices Directive include:

- Stating that a trader or product has received endorsement, approval, or authorization from a public or private entity, when in fact they have not obtained such endorsement, approval, or authorization, or have failed to adhere to the conditions set forth by the endorsing entity. Claiming is a prevalent form of deceptive commercial activities;
- Engaging in the provision of after-sales service to consumers with whom the trader has previously communicated in a non-official language of the Member State where the trader is based, and subsequently offering this service exclusively in another language without adequately informing the consumer prior to their commitment to the transaction;

- Presenting a trust mark, quality mark, or similar symbol without obtaining the required authorization;
- Engaging in deceptive marketing practices by intentionally misleading consumers into assuming that a product is manufactured by a specific company, when in fact it is not, while promoting a comparable product;
- Falsely claiming that a product is able to cure illnesses, dysfunction or malformations;
- Engaging in a pyramid promotional scheme involves the creation, management, or marketing of a system where a consumer pays money in exchange for the chance to earn money primarily by recruiting other customers into the scheme, rather than via the sale or use of items;
- Using terms such as 'gratis', 'free', 'without charge', or similar to describe a product is misleading if the consumer incurs any costs other than the necessary expenses associated with responding to the commercial conduct and obtaining or delivering the item and so on.

Prior to 2007, the Unfair Competition Act encompassed both B2C (business-to-consumer) and B2B (business-to-business) interactions in Poland. Following the implementation of the Unfair Market Practices Act, a distinct legislation was introduced to govern these practices and establish their boundaries. The idea of separately regulating unfair competition activities in B2C and B2B contacts has faced significant criticism in Polish jurisprudence.

The rationale for implementing a broad clause, such as the one found in Article 5 of Directive 2005/29/EC, was explicitly outlined in the preamble of the Directive. Recital 13 emphasizes the need to substitute the current, varying general provisions of Member States with a unified general ban. The introduction of a universally applicable clause is perceived as a method to establish a fully integrated market without any internal obstacles. The adoption of clauses with identical wording by Member States was considered crucial in order to accomplish that objective. The general clause, as stated in article 4 of UCPA, is phrased with small variations. As per article 4(1) of the Unfair Commercial Practices Act (UCPA) of Poland, a practice is deemed unfair if it goes against accepted social norms and has the potential to manipulate the economic decisions of an average consumer. This applies both before, during, and after the consumer enters into a contract for the product in question. The notion of professional diligence, as referred to in article 5(2)(a) of Directive 2005/29/EC, has been substituted with the notion of good customs (*dobre obyczaje*).

The variation in language used in article 4 of the UCPA is evidently connected to the customs and practices of Polish unfair competition law. The broad provision of the Act on Combating Unfair Competition (art. 3 ACUC) also encompasses the notion of good traditions. In Polish jurisprudence, it is widely recognized to substitute the notion of professional diligence with the concept of good customs. Nevertheless, it appears that the two conceptions bear a striking resemblance. The definition of the idea of professional diligence, a relatively novel term in the majority, if not all, of the European Commission member states, is provided in article 2(h) of Directive 2005/29/EC. The definition in Article 2(h) explicitly refers to norms of conduct that are in line with honest market practices and the general principle of good faith within the trader's specific area of operation. In Polish unfair competition law, the term "good customs" pertains to a collection of ethical and customary standards that are commonly observed in business, either in general or within a specific economic sector. One might turn to a specific ruling by the competition court to exemplify this point. In this judgment, the court highlighted that the notion of good traditions is fundamentally rooted in the principle of showing respect towards other individuals. The text further elaborated that in consumer contacts, the aforementioned respect necessitated that customers be adequately informed about their rights and that the entrepreneur refrain from using their privileged position vis-à-vis consumers (Directive 2005/29/EC).

Looking at the legislation of the Republic of Azerbaijan, it can be determined that actions considered unfair commercial practice are defined as deliberately giving false information about the characteristics of the product and presenting the product in a form that creates a false impression, which causes confusion to consumers.

In contrast to the Polish legislation, the provisions regulating unfair commercial practices in the Azerbaijani legislation are still part of the relevant legislation on unfair competition.

According to the "Law of the Republic of Azerbaijan on Unfair Competition", the following actions of market subjects aimed at confusing consumers are considered unfair commercial practices:

- using any information that may confuse the consumer about the origin, method of preparation, suitability for use, quality and other properties of the goods, the identity of the entrepreneur or the nature of his economic activity;

- the use of unfair, inaccurate and hidden advertising methods that affect the consumer's freedom of choice during the purchase of goods or transactions;

-false comparison of goods that may confuse the consumer and its disclosure as advertising or informational material;

-furnishing the goods with an inappropriate distinguishing mark or brand in order to confuse the consumer about the consumption and other important properties of the goods.

Thus, although the Directive, which is the main regulator of unfair commercial practices, defines what unfair commercial practice is and the range of practices considered unfair commercial practice in each case, Polish legislation defines a slightly different definition from this concept. In contrast to this, a separate act regulating unfair commercial practice was not adopted in Azerbaijani legislation, and a certain scope of unfair commercial practice was determined only in the legal act regulating issues related to unfair competition.

1.2. Illegal use of trademarks as a special type of unfair commercial practice

One of the most widespread manifestations of unfair commercial practice is the deception and confusion of consumers as a result of illegal use of a trademark or distinguishing mark belonging to competitors in their product by market subjects.

According to Article 1 of the Law of the Republic of Azerbaijan "On Trademarks and Geographical Indications", a trademark means any combination of graphically depicted marks that distinguish the goods or services of an entrepreneur from the goods or services of other entrepreneurs.

As can be seen from this definition, the main function of the trademark is to distinguish the goods put on the market.

It would not be wrong to say that the trademark is the main means of presentation of the entrepreneur. Because, it is through the trademark that the entrepreneur individualizes and advertises his product and gets the opportunity to protect intellectual property rights over this product.

In most cases, people who understand the advantages of a trademark are interested in state registration of this mark. Because, in this way, individuals gain exclusive rights over the trademark and can prohibit other persons from using that trademark.

However, in many cases, although the trademark is registered in the name of one person, other people illegally and unjustifiably use the trademark in the sale of their products in order to gain advantage in the market and benefit from the success of the trademark. This situation causes unfair competition in the market.

The unauthorized use of trademarks can be regarded as an example of unfair business practices, especially when it results in consumer deception and violates the rights of trademark owners.

As a rule, the application of a trademark in the goods, containers and services to which they belong is considered as their use. Their application in advertisements, printed publications, signs, exhibits of held exhibitions and fairs and other documents related to the introduction of goods to the market is also considered use.

Here, not only the real owner of the trademark, but also the consumers are the ones who suffer damage.

Because putting products on the market under the name of an artificial, simulated trademark confuses the consumer and deprives them of the opportunity to get the real and original product.

According to Article 6.2 of the Directive, a commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves: (Directive 2005/29/EC)

(a) any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor.

As an example, it can be noted that in a court decision Marknadsdomstolen (Market Court in Sweden) considered the use of the indications 'Taxi' and 'Taxi Gothenburg', both in a yellow design on a taxi vehicle, to constitute comparative advertising and create confusion with the distinguishing marks of a competitor. This was because another trader had performed taxi services in the Gothenburg area since 1922 using the words 'Taxi Gothenburg' and the color yellow as its trademarks (MD 2015:9, Marknadsdomstolen, 11 June 2015).

According to the "Law on Unfair Competition" of the Republic of Azerbaijan, the following forms of "use" of trademarks encourage unfair business practices:

a) Trademark Infringement - it is intended that one market entity uses a trademark owned by another market entity that is identical to the state registered trademark or similar enough to confuse the consumer.

b) Counterfeiting - Placing counterfeit products on the market using the trademark on the original product. From the point of view of protecting the rights of consumers, it should

be noted that fake products are of low quality, which can put the safety of the consumer at risk.

c) Passing Off - The main feature of this type of use is that when the market subject puts the product on the market, his main goal is to achieve confusion between the original trademark and the trademark he uses. Such use can not only confuse consumers, but also seriously damage the reputation of the real trademark.

d) Trademark dilution - it is the process through which a trademark loses some of its individuality or repute, even when it is not utilized in a misleading or illegal way. If this lessens the value of the original trademark, it may be regarded as unfair practice.

e) Cybersquatting - the use of domain names that are identical to well-known trademarks or confusingly close to them in order to profit from their value is regarded as an unfair commercial conduct. Consumers may be misled by cybersquatting, and their attention may be drawn away from the actual trademark owner's website.

f) False Advertising - it is unfair business activity to use another person's trademark in deceptive or false advertising. Making erroneous assertions regarding the origin or caliber of goods or services falls under this category.

h) Parallel Imports- in some instances, parallel imports entail the importation of real trademarked goods from one market and their unauthorized sale in another. The specific legal frameworks in place will determine whether or not this behavior is seen as unfair.

Experiences of consumer confusion and deception as a result of illegal use of trademarks can be found in many court decisions. Thus, in a case pending before the Supreme Court of the Republic of Azerbaijan in 2017, the trademark "Arzum Felix" was registered and used by a company (conditionally the first company). The other company (the second company) that found out about this applied to the court and proved that the mark gained popularity as a result of their activity and consumers recognized the mark as a result of the circulation of the products produced by the second company. The court came to the conclusion that although the first company registered the trademark, that mark is the result of the intellectual activity of the second company, and the use of the mark by the first company not only causes unfair competition in relation to the second company, it also causes confusion and unfair trade practices in terms of consumers distinguishing between the products produced under that mark.

As for the methods of combating such practices in Azerbaijan, appeals of individual consumers, as well as market entities, regarding the illegal use of a trademark and the fact that this use leads to an unfair market practice are investigated by the State Service for

AntiMonopoly and Consumer Market Control of the Republic of Azerbaijan, and subjects who create such unfair commercial practice by their actions are subject to financial sanctions and other types of administrative sanctions imposed by that body.

Apart from that, The UK adopts a sector-specific strategy when it comes to enacting legislation related to commerce. The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) were enacted in 2008 as a result of the implementation of the Unfair Commercial Practice Directive (Directive 2005/25/EC). The regulations encompass a broad prohibition of unjust commercial conduct. Regulations 5 and 6 explicitly forbid deceptive actions and deceptive omissions. These instances occur when a product is promoted in a manner that causes ambiguity with a competitor's product, trademark, trade name, or other distinctive identifiers.

Thus, what has been mentioned suggests that the illegal use of trademarks not only violates the intellectual property rights of other market entities, but also that this action can confuse and mislead consumers in the market, which leads to unfair commercial practices and illegal use of trademarks should be investigated not only in the context of unfair competition, but also in terms of creating an unfair commercial practice for consumers.

PART II

2.1. DIRECTIVE 2005/29/EC as the main means of controlling unfair commercial practice

The manner that different national legal frameworks approach the control of unfair business activities varies substantially. Different methods have been used to incorporate relevant EC Directives in the field of consumer protection or internal market Directives with a focus on business-to-consumer transactions into national laws. The majority of these Directives simply called for a minimum level of harmonization.

Almost all member states have both general and specific rules on unfair commercial practices. The general provisions are supplemented by specific norms adapted to the Directives of the European Commission in the field of consumer protection and internal market. At this time, the "lex specialis derogat legi generali" principle, which is one of the widespread principles of international law, comes into play.

The principles of good faith and faith dealing, also the bonos mores of the competition are the basis of the norms of member states on unfair commercial practices.

The main purpose of the rules governing unfair commercial practices is to protect consumers and traders, including ensuring the harmony of the internal market.

There are several methods for enforcing laws against unfair business practices and for imposing punishments. Civil enforcement is carried out by public agencies in a number of Member States such as Azerbaijan, Turkey and Poland while private enforcement is prioritized in others. Some Member States have general or particular public authorities to handle complaints brought forth by parties with an interest (affected persons, businesses, or organizations). The resolution of complaints may also take place at the self-regulatory level, in which case the consumer may seek remedy from another independent agency. In all Member States, private enforcement is also anticipated through the filing of a civil suit for violations of fair business practice regulations. Consumers, competitors, businesses, and consumer associations may file such claims, which may include requesting an injunction order or damages. Additionally, certain Member States have laws that make some unfair business practices punishable by a fine and/or imprisonment.

The Directive 2005/29/EC seeks to standardize the laws of member states regarding unfair commercial practices in business-to-consumer (B2C) transactions inside the internal market. Directive 2005/29/EC aims to ensure a strong degree of consumer protection and explicitly declares that the harmonization it enforces is comprehensive. Consequently, there is limited autonomy for member states to determine their own method of implementation.

This approach deviates substantially from the minimal harmonization approach implemented in other directives pertaining to consumer protection and unfair competition law (Rafal Sikorski, Implementation of the Unfair Commercial Practices Directive in Polish Law)

The Unfair Commercial Practices (UCP) Directive must be reconciled with the specific legislation already in place regarding business-to-consumer practices in all Member States during the transposition process. Given the maximum harmonization nature of the Directive, such legislation must be changed or removed. For instance, Poland applies a broader definition of "consumer" than the Directive. According to Polish law the consumer shall be deemed to be any individual / natural person who performs acts in law with an entrepreneur, said acts not being directly connected with his / her economic or professional activity (**pursuant to article 221 Polish Civil Code**). In article 2(8), the UCPA introduces the definition of an "average consumer" for the first time in Polish legislation. The concept is vital in safeguarding consumer interests against unfair commercial practices. Commercial practices are evaluated based on the perspective of an average consumer, and they are deemed unfair only if they significantly distort or have the potential to significantly distort the economic behavior of such a consumer in relation to the product. The Unfair Commercial Practices Directive's implementation is generally viewed in the new Member States as without any significant challenges. However the Directive's implementation and continued enforcement may provide challenges. After the implementation stage, issues with the Directive's application may occur. Some Member States have less expertise enforcing general laws, which could have an impact on how the new legislation is applied. Courts and enforcement agencies could face issues with the interpretation of consumer protection legislation and the actual application of new terms like "average consumer," "professional diligence," and "material distortion of the economic behavior of consumers."

The adoption of each standard is undoubtedly related to the factors that make it necessary to prepare it. The main purpose of adopting this Directive is to achieve the protection of consumers' rights by promoting the organization of the internal market in a healthy way. For this, the Directive forms a legal basis against unfair commercial practices by harmonizing the internal rules of the member states.

The Council Directive 84/450/EEC of September 10, 1984 concerning misleading and comparative advertising establishes minimum standards for harmonizing legislation on misleading advertisements, but it doesn't prohibit the Member States from maintaining or adopting measures that offer higher consumer protection. Because of this, Member States' policies regarding misleading advertisements vary considerably.

Due to such disparities, whose national laws govern deceptive business practices that undermine customers' economic interests are unclear, which puts both consumers and businesses at a disadvantage. These obstacles raise the cost for enterprises to utilize internal market freedoms, particularly when they want to conduct cross-border marketing, advertising, and sales promotion activities. These obstacles also cause consumers to doubt their rights and develop faith in the internal market.

Such obstacles should be removed in accordance with the main objectives and principles of the Community as set out in Community legislation. In this case, the role of the Community policy entitled "Follow-up to the Green Paper on Commercial Communications in the Internal Market" should be highlighted. However, the most important way to overcome all obstacles is to establish uniform rules at the community level and ensure the harmony of the internal market.

As a result, this Directive approximates the laws of the Member States on misleading business activities, such as misleading advertisements, that adversely affect consumers' economic interests and, as a result, adversely affect the economic interests of lawful competitors. This Directive protects consumers against the effects of such unfair commercial practices when they are material, but it also acknowledges that there may be circumstances where the impact on consumers may be little. This is based on the principle of proportionality. Taking into account the principle of subsidiarity, Member States will still be able to regulate such practices, in accordance with Community law, if they so choose. It does not cover or have an impact on national laws on unfair commercial practices that harm only competitors' economic interests or that relate to a transaction between traders (Directive 2005/29/EC)

This Directive deals with business strategies specifically connected to influencing customers' purchase decisions. It doesn't cover business techniques used primarily for other objectives, such as investor-targeted commercial communication like annual reports and corporate literature. It does not address the various legal standards for morality and decency that exist across the Member States. For cultural reasons, some business methods, such as soliciting in public places, may not be desirable in Member States (Directive 2005/29/EC). In accordance with Community law, Member States should therefore be permitted to continue banning commercial practices on their territory for grounds of taste and decency even when they do not restrict consumer choice.

By directly preventing unfair business-to-consumer commercial activities, this Directive protects the economic interests of consumers. As a result, it indirectly protects

lawful companies from competitors that disregard this Directive's norms and ensures fair competition in the areas it coordinates. It is recognized that there are other corporate activities that, although not hurting consumers, may impact competitors and business customers.

Individual cases filed by persons who have been damaged by unfair business practices are not affected by this Directive. Additionally, it is unaffected by Community and National Laws regulating Contract Law, Intellectual Property Rights, Product Health and Safety, Conditions of Establishment and Authorization Regimes, including those Laws governing Gambling Activities in Compliance with Community Law, and Community Competition Laws and the National Provisions Implementing Community Competition Laws. Thus, regardless of where the trader is situated, the Member States will be allowed to maintain or introduce limits and prohibitions on commercial practices for the protection of consumer health and safety, such as those regarding alcohol, cigarettes, and pharmaceuticals. Due to their complexity and significant inherent dangers, financial services and real estate require specific regulations that include positive duties for traders. Because of this, this Directive in the areas of financial services and real estate does not affect the ability of Member States to take additional measures to protect the economic interests of consumers (Directive 2005/29/EC).

Accordingly, this Directive only applies in the absence of specific Community law measures governing certain elements of unfair business practices, such as information standards and rules for how the information is transmitted to consumers. When there is no special sectoral regulation at the Community level, it protects consumers and prohibits sellers from misleading the characteristics of their goods. This is essential for complicated items that could be a significant danger to customers, like some financial services products. As a result, this Directive completes the Community acquis, which is applicable to business actions that impair the financial interests of consumers.

A high common degree of consumer protection is created by the high level of convergence created by the appointing of national regulations under this Directive. This Directive sets a single, complete ban on those unfair business practices that influence consumers' purchasing decisions. Additionally, it establishes regulations for aggressive business strategies, which are currently not controlled at the Community level.

With the establishment of this Directive, consumers and businesses will be able to refer to a legal framework regulating every aspect of unfair commercial practices throughout the European Union. As a result, these measures will lead to the creation and operation of an

effective mechanism for the elimination of unfair commercial practices that seriously affect the interests of consumers.

It is essential to replace the current, different general clauses and legal principles used by Member States if the Community is effective in removing internal market obstacles. Therefore, unfair business activities that alter consumers' economic behavior are covered by the single, common general prohibition established by this Directive. The broad prohibition should cover unfair business activities that take place outside of any contractual relationship between a trader and a customer as well as those that happen after the conclusion of a contract and during its execution in order to support consumer confidence. Rules on the two categories of commercial practices—misleading commercial practices and aggressive commercial practices which are by far the most prevalent expand the general prohibition.

It is preferable that deceptive business strategies include false advertising since these actions prevent consumers from making informed and successful decisions by deceiving them. This Directive divides misleading practices into misleading actions and misleading omissions in accordance with the laws and customs of Member States regarding false advertising. This Directive outlines the few essential pieces of information that consumers must have access to in order to make an informed transactional decision in the case of omissions. Only when the trader makes an invitation to purchase, which is an idea explicitly defined in this Directive, will such information need to be given. The full harmonization approach used in this Directive does not prevent the Member States from defining in national law the key features of specific products, such as, for instance, collector's items or electrical goods, whose omission would be significant when a purchase invitation is made. It is not the objective of this Directive to restrict consumer choice by forbidding the promotion of goods that resemble other goods, unless the comparison misleads consumers about the commercial nature of the product.

The adoption of this Directive shall not have the effect of limiting the use of other Community laws regulating the protection of consumer rights in one form or another.

Interfering with the consumer's choice accompanied by the use of physical force, threats, and coercion is included in the restrictions prohibiting aggressive business activity.

In particular, it should be the general duty of traders to protect the rights of consumers of this category, taking into account their economic behavior in relation to the sale of products to which people with age, mental or physical limitations are more sensitive.

It is appropriate to provide codes of conduct so that merchants can effectively implement the directive's principles in certain economic sectors. It is reasonable that these

will also provide proof as to the requirements of professional diligence in those areas where there are specific regulatory standards regulating the behavior of traders. Control by code owners at the national or community level to end unfair business activities may prevent the need for administrative or legal action, thus it should be supported. Consumers' organizations could be informed of and involved in the creation of codes of conduct with the goal of seeking a high level of consumer protection.

Individuals or organizations with a legitimate interest in the matter as defined by national law must be able to pursue legal action against unfair business practices, either in court or before an administrative authority with the authority to hear complaints or bring the necessary legal action. Although the burden of proof is determined by national law, it is appropriate to allow courts and administrative authorities to demand that traders provide proof of the veracity of any factual claims they have made.

The Member States must establish sanctions for violations of the requirements of this Directive and make sure that these are upheld. The sanctions must be efficient, fair, and deterrent.

As a result, the Community can best implement the objectives of the Directive, which are mostly covered by the national legislation of individual countries, eliminating unfair commercial practices that create restrictions on the functioning of the internal market and, most importantly, ensuring the highest level of consumer rights.

The Directive applies to business-to-consumer practices both before and after commercial transactions.

The laws governing the legality, creation, and effects of contracts, in particular, are not impacted by this Directive. The Community or national regulations governing the health and safety aspects of products are not impacted by this Directive. When the provisions of this Directive and other Community regulations governing particular aspects of unfair business practices conflict, the latter shall take priority and apply to those particular aspects.

The action of the courts to regulate unfair commercial practices is not covered by this Directive.

The member states of the Directive can establish stricter and more imperative rules for the regulation of matters related to financial and real estate matters.

Another feature of the Directive is that it defines what acts are unfair commercial practices.

The basic formula of unfair commercial practice is expressed in Article 5 of the Directive. So that, A commercial practice shall be unfair if: (a) it is contrary to the

requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

One point to note is that there is a conflict between Article 6(1) and Article 5(2)(a) of the Directive when determining whether an act constitutes an unfair commercial practice. The question arises whether, in order to consider any commercial practice unfair, which misleads any consumer there is a need to check whether that practice meets the condition stated in Article 5(2)(a) of the Directive (*it is contrary to the requirements of professional diligence*) ?!

According to CJ EU the Unfair Commercial Practices Directive must be interpreted as meaning that, if a commercial practice satisfies all the criteria set out in Article 6(1) of that directive for being categorized as a misleading practice in relation to the consumer, it is not necessary to determine whether such a practice is also contrary to the requirements of professional diligence as referred to in Article 5(2)(a) of the directive in order for it legitimately to be regarded as unfair and, therefore, prohibited in accordance with Article 5(1) of the directive (CHS Tour Services GmbH v Team4 Travel GmbH [CJEU], No.C-435/11, 19.09.2013).

Regarding clause b) of Article 5 of the Directive, the disposition conditions of Article 6 of the Directive are essentially similar to those of Article 5(b) and when the practice is judged to be unfair in this respect, the conditions of both mentioned clauses are considered to be verified.

The most appropriate criterion used when evaluating commercial practices is whether they distort the economic behavior of the average consumer, including the impact of any commercial practice on the consumer's mental or physical disability, age, and other relevant factors. This does not interfere with the typical and acceptable practice of using overstated or remarks that shouldn't be taken literally in advertising.

Although this Directive, adopted in 2005, is considered as the most harmonized and unified legal document in the field of unfair commercial practices, some amendments have been made to this Directive over time. Directive 2019/2161, also known as the Omnibus Directive or the "Enforcement and Modernization Directive", amended several Directives, including the Unfair Commercial Practices Directive (2005/29/EC).

Some of the changes are related to the "definitions" section of the Directive. So, under the 2005 Directive, when we say "product". So according to the 2005 Directive 'product'

means any goods or service including immovable property, rights and obligations. The Omnibus Directive expanded the scope of this definition: 'product' means any good or service including immovable property, *digital service and digital content*, as well as rights and obligations.

The amendment also introduced a new definition to the directive, which is directly related to the expansion of the area of trade and the formation of online trade. So, an "online marketplace" refers to a software-based service, such as a website or application, that is run by a trader. It enables customers to enter into distance contracts with other traders or consumers.

A relevant article has been added to the Directive, providing for the opportunity for consumers who have been harmed by unfair commercial practices to claim compensation. According to the requirement of that norm, consumers who have been negatively affected by unjust business practices should be provided with appropriate and efficient solutions, such as compensation for any harm caused and, if applicable, a decrease in price or the cancellation of the contract. Member States have the authority to establish the requirements and consequences of those remedies. Member States have the option to consider, if it is suitable, the seriousness and kind of the unfair commercial practice, the harm experienced by the consumer, and other relevant factors.

One of the new provisions added to the directive is that to confirm the authenticity of the evaluations, it is necessary to determine if they are indeed from individuals who have bought or utilized the product or service in question. When a trader offers access to consumer reviews of items, it is important to provide information regarding the measures used to ensure that the published reviews are from consumers who have actually used or purchased the product.

Provide confirmation of whether the third party selling goods, services, or digital material on the online marketplace is a professional merchant or not, based on the statement made by that third party to the marketplace provider. If the third party is not engaged in commercial activities, it is necessary to notify them that the consumer rights provided by consumer protection legislation do not extend to the contract.

In terms of protecting the rights of consumers with regard to products or services provided by third parties, the addition to the Directive is that to provide confirmation of whether the third party selling goods, services, or digital material on the online marketplace is a professional merchant or not, based on the statement made by that third party to the marketplace provider. If the third party is not engaged in commercial activities, it is necessary

to notify them that the consumer rights provided by consumer protection legislation do not extend to the contract.

Although the Directive adopted in 2005 provides general provisions on penalties for violations occurring during its implementation, the Omnibus Directive further expanded these provisions and established a detailed and effective procedure for penalties for violations of the provisions of the Directive.

So, in the DIRECTIVE 2005/29/EC only stated that Member States are required to establish penalties for infringement of national regulations implemented in accordance with this Directive and must implement all necessary actions to ensure their enforcement. The penalties must possess efficacy, proportionality, and deterrent effect.

Apart from that, The Omnibus Directive specified a certain range of indicative criteria for the application of penalties: (a) The characteristics, seriousness, extent, and duration of the violation; (b) Any measures taken by the trader to minimize or eliminate harm to consumers; (c) Any previous violations committed by the trader; (d) Financial profits or losses avoided by the trader due to the breach, if relevant information is accessible; (e) Penalties imposed on the trader for the same violation in other Member States in cross-border cases, where information on such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council; (f) Any other factors that increase or reduce the circumstances of the case.

Failure to comply with any of the obligations arising from the Omnibus Directive may lead to significant monetary penalties. The Directive imposes penalties of up to 4% of the entity's annual revenue in the Member State(s) where the violation occurred, or at least EUR 2 million if information on revenue is not accessible. Member States have the authority to impose even more substantial penalties in their own laws when they adopt the Directive.

Based on what has been mentioned, it can be said that the Unfair Commercial Practices Directive, being the main regulatory tool in this field, is an exemplary legal act that provides the maximum harmonization of legal acts in this field by defining the concept of unfair commercial practice, which situations lead to unfair commercial practice, and the methods and means of combating such practices.

2.2. Codes of conduct as an alternative mean of combating unfair commercial practice

Codes of conduct are one of the widely used legal tools to prevent unfair commercial practices. Directive 2005/29/EC does not prohibit Member States from regulating unfair commercial practices by code owners and allowing individuals or organizations mentioned in Article 11 to seek remedies through such bodies. However, these proceedings should be in addition to the court or administrative proceedings mentioned in the same Article. The use of such regulatory entities should never be considered as a substitute for the option of seeking legal or administrative recourse, as outlined in Article 11 (DIRECTIVE 2005/29/EC).

This provision mentioned in the Directive has been included and developed in the legislation of many countries. According to Republic of Lithuania law on the prohibition of unfair business-to-consumer commercial practices, code of conduct refers to standards (rules) of conduct agreed upon by traders in one or more specific commercial practices or business sectors and not enforced by laws or other legal acts (Republic of Lithuania law on the prohibition of unfair business-to-consumer commercial practices, Article 2).

The significance of codes of conduct is increasing. In September 2004, the members of Lithuanian pharmaceutical company organizations unanimously approved the Code of marketing for medicines. The purpose of this code is to establish fair and ethical procedures in the marketing of pharmaceutical products. In December 2004, the Lithuanian brewers' association implemented the Lithuanian brewers' Code, which governs the advertising, sponsoring, and fair competition practices of brewers and traders (General Report by British Institute of International and Comparative Law, at 41).

The sole code of conduct in Latvia is the Code of Ethics implemented by the Latvian Advertising Association. The Latvian Advertising Association interprets this code. The code establishes legal responsibility for comparable advertising, covert advertising, and inadequate disclosure of information (General Report by British Institute of International and Comparative Law, at 41).

Theoretically, codes of conduct, which are standards that an organization undertakes to uphold, are not legally binding. They have indeed long been thought of as nothing more than basic marketing tools. However, all available data tends to indicate that these codes are increasingly regulating trade by requiring adherence to ethical corporate practices. Additionally, in recent years, codes of conduct have also contributed to the protection of consumers by serving as a legal foundation for court cases.

Codes of conduct are sets of standards or rules that firms and organizations follow to guarantee that their commercial actions are ethical, transparent, and fair. These codes of behavior are frequently formed by trade associations, governmental agencies, or international organizations to safeguard consumers and keep the market competitive.

It is crucial to remember that depending on the sector, area, and organization concerned, the particular substance and enforcement methods of these regulations might differ greatly. Businesses that voluntarily accept these codes in order to show their commitment to ethical behavior and win the trust of stakeholders and customers are frequently members of industry associations or trade groups. These codes can be broken, which can lead to penalties, fines, or legal action (Collins (2004), at 73).

In terms of the formation of codes of conduct, traders have the right to define their own code of conduct and monitor compliance with them.

The main rule stipulated in the legislation of some countries is that commercial subjects must inform that body about the approval of the code of conduct and the appointment of the owner of the code in the manner determined by the competent state body.

In this case, the authority's primary role is to support the creation of the code of conduct and work with code owners and other traders who have committed to implementing the duties outlined in the code of conduct or who intend to do so.

The code of conduct set forth by businesses codifies a promise to customers on quality and dependability. They act as tactical tools for companies to showcase their knowledge. The standards of the codes provide suggestions for raising corporate productivity. Because of this, codes of conduct are made to level the playing field for companies, workers, and clients, which promotes trade, business, and high-quality products and services.

A code of conduct is defined in Directive 2005/29/EC as "an agreement or a set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behavior of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors." (DIRECTIVE 2005/29/EC).

Although codes of conduct have a legal impact, the legal profession, which often favors conventional legal instruments, is still not very interested in them. For instance, codes might be the foundation for false advertising proceedings even though they are not a distinct legal entity. In April 1998, Nike faced a lawsuit from Marc Kasky, a California resident, who alleged that the firm was involved in unfair and deceptive business practices that violated the state's False Advertising Law and Unfair Competition Law. Nike was acquitted of the accusations. Nike was discovered to have breached both of these statutes. Kasky asserts that

Nike engaged in deceptive practices by making false statements or intentionally withholding significant details on the labor conditions in which its products were manufactured, with the aim of maintaining or enhancing its sales. Throughout the entire duration, the Bush administration and business organizations provided support to Nike, asserting that if Kasky achieved success, it would have a deterrent impact on how corporations presented themselves in the marketplace. Advocates for increased corporate accountability argue that companies like Nike and other multinational firms should be subject to a more stringent standard of honesty. The decision in this case was reached by the Supreme Court of the United States in 2003. The Court ruled that it had granted certiorari in an unwise way and dismissed the case, effectively upholding the decision rendered by the California Supreme Court of Appeal on the merits. After engaging in lengthy discussions, they ultimately negotiated a settlement and consented to remit an approximate sum of \$1.5 million to the Fair Labor Association (a US organization whose aim is to analyze work conditions and improve standards among subcontractors), an organization tasked with overseeing employers' adherence to fair treatment of their workforce (Certiorari to the Supreme Court of California, No. 02-575, Nike, Inc. v. Kasky, 539 U.S. 654 (2003)).

Since the 1970s, stakeholders (businesses, professional associations, etc.) have been encouraged to accept the codes of conduct that have been created by or mandated by the European Union in general and the European Commission in particular. Bypassing these delays and challenges, the EU is allowed to move forward with its legislative procedure.

The 11 May 2005 Directive 2005/29/EC on unfair business practices affecting consumers has advanced consumer protection.

Companies have come to the realization that they can no longer make statements without being held accountable for them. Firms may create codes of ethics that are only based on broad, generic ideas in order to avoid legal action. However, there is no restriction on member states implementing rules that are more binding than the EU directive. Similar to this, advocacy groups are free to inform the public about the discrepancy between words and facts. It was a first for France when Peuples Solidaires, SHERPA, and Indecosa-CGT sued Samsung for its labor policies. Samsung was accused of misleading customers in a suit that was filed in February 2013.

One of the issues to be paid particular attention to is determining the interaction between codes of conduct and Directive 2005/29/EC.

By influencing both the interpretation and the execution of the directive's criteria, codes of conduct may help advance the directive's objectives of harmonization and consumer protection.

The Commission regarded self-regulation to be a potentially valuable supplement to regulation in the Green Paper that paved the way for the UCPD and pondered whether it would be beneficial to incorporate a basis for self-regulation in a framework directive. The Commission also noted that because of the degree of national variety, self-regulation remained severely hampered at the EU level (Green Paper on EU Consumer Protection, COM(2001) final 531, at 2, 5 and 15). Prior to the directive, EU-wide self-regulation had not made much progress outside of the area of technical harmonization. The establishment of Europe-wide codes of conduct has not been greatly aided by EU instruments pertaining to commercial practices, particularly in the areas of distance marketing and electronic commerce. However, there were a few exceptions (Directive 97/7/EC on distance contracts (OJ 1997, L 144/19) and Recommendation 92/295/EC).

The implementation of self-regulation has been used to support consumer policy and has primarily been pursued through the establishment of codes and standards. All the measures considered, however, possess a multifaceted nature. The British Code of Advertising, Sales Promotion, and Direct Marketing is connected to 8 out of the 12 policy instruments mentioned previously. The measures possess a multi-dimensional nature, which is partly attributed to the presence of overlapping and complementary elements in certain instruments. For instance, codes of conduct have the capacity to address a wide range of matters, such as education and awareness, information disclosure, and conflict resolution. Self-regulation is beneficial on a global scale because it can effectively address problems that cannot be resolved or may be more challenging to resolve through intergovernmental cooperation, legal measures, or other methods. Implementing guidelines, standards, trustmarks, and codes of behavior can enhance consumer protection in cross-border transactions. Business organizations have created international self-regulatory tools in various fields. In the field of advertising, the International Chamber of Commerce (ICC) has formulated a Consolidated ICC Code of Advertising and Marketing Communication Practice. This code aims to establish ethical principles that promote fair competition and reduce the necessity for legal or regulatory limitations. Simultaneously, it seeks to foster consumer trust by ensuring that advertisements are honest, lawful, respectable, and truthful. Additionally, it emphasizes the importance of promptly addressing any violations that may arise (OECD 23

March of 2015 Industry Self - Regulation: Role and Use in Supporting Consumer Interests, at.15).

Similar to other types of regulation, self-regulation has the potential to hinder market entry and distort competition by establishing licensing or certification bodies that unjustly discriminate against specific enterprises, or by imposing criteria that unfairly discriminate against firms introducing new products or processes. This holds true at both the national and international levels (OECD 23 March of 2015 Industry Self - Regulation: Role and Use in Supporting Consumer Interests, at.21).

It is appropriate to bring up Euro-Label, a European Electronic Trustmark established in 2002 and based on an EU-wide code of behavior. The European Advertising regulations Association (EASA) has published numerous rules and regulations in the area of advertising over the years. Without any encouragement from any EU instrument, the Organisation for Timeshare in Europe (1998) even created a Code of Ethics. The Commission stated that implicit "presumptions of conformity" with the fairness requirement should be provided by European codes of conduct. However, none of these desires and intentions have come true in the UCPD (Follow-up Communication to the Green Paper on EU Consumer Protection, COM (2002) final 289, at 11).

Although the Commission Guidance states that high standards, which are broadly supported and largely adhered to, "may be a useful term of reference for national authorities and courts in assessing whether, in a concrete case, a commercial practice is unfair," the Court of Justice of the European Union (CJEU) has not yet provided for an autonomous interpretation of the professional diligence requirement. Although following a code of conduct does not guarantee that the "professional diligence" requirement will be passed, a market-based interpretation of the fairness clause that places the emphasis on the accepted standards is likely to prevail (Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices, SEC(2009) 1666, at 20).

Although compliance to a code of conduct may not entirely clear the trader, the opposite is also true—non-adherence does not necessarily incriminate him. A trader who is not bound by a code of conduct will not necessarily violate the standards of professional diligence. This trader might nevertheless act honorably and in compliance with market norms. The fairness criteria may be interpreted more strictly in codes since they are not fully harmonized. They might interpret the law in a way that is very consumer-friendly or even set higher criteria. Most codes of practice are intended to outline appropriate business practices

for consumers that go beyond what is required by law (Twigg-Flesner et al. (2005),, at 8 (§ 2.16)).

Nevertheless, imposing the greatest standards on sellers would result in an adverse effect on competition. Code owners have the authority and are even urged to enhance the level of security required by the UCPD. The Office of Fair Trading (OFT) in the UK exclusively supports and advocates for codes that can be substantiated to surpass the basic legal criteria, with the aim of safeguarding and promoting consumer interests. Nevertheless, in specific situations, a trader who breaches a voluntarily accepted code of conduct is participating in unjust actions. The UCPD prioritizes the ethical implementation of standards of behavior rather than focusing on their specific details.

The directive clause requiring adherence to codes of behavior is the one that interferes with self-regulation the most. A trader is prohibited from engaging in misleading practices by failing to comply with a code of conduct to which he has agreed (Article 6(2)(b)):

A business practice is also considered deceptive if, in the factual context, taking into consideration all of its features and circumstances, it prompts or is likely to prompt the typical consumer to make a transactional decision that he would not have made otherwise, and it involves:

(b) failure by the trader to comply with commitments made in codes of conduct by which the trader has agreed to be bound, provided that (i) the commitment is firm and verifiable and (ii) the trader makes clear in his commercial actions that he is bound by the code.

The list of business practices that are always considered unfair supports the moral implementation of codes of conduct and trust marks. Due to their obviously deceptive nature, the following behaviors are prohibited: 1. Making a code of conduct claim while not actually being a signatory. 2. Making use of a trust mark, quality mark, or comparable without the required authorization. 3. Making the false claim that a code of behavior has the support of the general public or another group. These clauses guarantee that traders employ rules of conduct effectively in their marketing activities. The black list seems to be a deterrent. There aren't many administrative or judicial judgements yet relating to the self-regulatory black list rules (Directive 2005/29/EC, Annex 1)

The UCPD's legal system is heavily dependent on judicial and administrative enforcement. Codes of conduct are voluntary agreements that require compliance by norms that complement both law and precedent. The function of self-regulation in preventing unfair practices is described in Articles 10 and 11(1). 'Not excessively friendly towards codes' is

how Article 10 is described. Self-regulation cannot substitute for judicial or administrative action, but MS may support using self-regulatory groups in addition to other mechanisms. Contrary to the E-commerce Directive, this article does not obligate MS to encourage code owners to prevent unfair business practices or to support the development of codes. Article 11(1) encourages reliance on codes in more detail. It gives MS the choice of allowing administrative or judicial authorities to demand earlier use of "other" recognized procedures for resolving complaints, such as those mentioned in Article 10. Finally, Article 17 requests that MS encourage businesses and code owners to let customers know about their codes of conduct when it is appropriate to do so (Howells (2006), at 211).

Codes were introduced into the UCPD with extreme caution because it doesn't offer many incentives for private players to create new self-regulatory systems at the national or EU level. The actual content of the codes and the ability of customers to participate in their creation are not subject to any legally binding regulations. People who voluntarily follow a non-binding code are not given any privileges. Even if they have received widespread support, codes are not "safe harbors" nor are they taken to be compliant with the UCPD. Codes may serve as a guide in developing the general clauses, but it is up to those using them to do so. Thus, conforming to a code might not actually provide anything of value (Collins (2004), at 32).

Nevertheless, the manner in which the UCPD is being put into practice and understood on a national scale might have influenced the role of codes of conduct in advancing the goals of consumer protection and harmonization set forth by the directive. The study will employ an analysis of legal precedents from the Dutch, French, and English legal systems, together with self-regulatory practices, to evaluate the interaction between the UCPD and codes of conduct. The Unfair Commercial Practices Directive (UCPD) is integrated into the Consumer Protection from Unfair Trading Regulations of 2008 (CPR 2008), the Civil Code of the Netherlands, and the Consumer Code of France.

Although traders are not given a "safe harbor" or a presumption of conformity when they voluntarily comply with codes of conduct, administrative authorities and the judiciary may have come to a different conclusion and interpreted compliance with a code of conduct as proof of fairness. However, codes are expected to be more effective in demonstrating that a practice is unfair than in proving its fairness. Setting the "minimum standards" that consumers may reasonably expect is more acceptable for code owners than "to set a cap on what the law accepts." (Howells (2006), at 213). Since private bodies are allowed to apply their own higher requirements under the directive and are most likely to do so, codes will

often include everything except a minimum norm. The focus on non-compliance might make self-regulation less likely. However, it would guarantee the high level of consumer protection that the UCPD sought (G. Howells (2004), at 122).

Setting codes of conduct that traders sign and abide by is necessary for private enforcement of the UCPD. Additionally, it requires self-regulatory organizations to guarantee the fairness of their codes and to effectively enforce them in accordance with the directive. The need for complex laws and formal administrative and judicial enforcement measures can be reduced by effective self-regulation that includes consistent commitments to customers. The minimal standard defined by the UCPD must be included in codes, and code owners must have the option of enforcing their codes through ex-ante instruments (aimed at prevention) and/or ex-post schemes (aimed at redress). However, the directive does not sufficiently support this possibility (EP, DG for Internal Policies, Misleading Advertising on the internet (July 2010), at 17)

A code of conduct has never served as an argument in a formal enforcement proceeding, despite expectations that it would have a negative impact on self-regulation if it were not officially granted safe harbour's status five years after the UCPD went into effect. The directive clause that defines a violation of a code as a misleading practice serves as an additional barrier to traders. For instance, the Polish advertising self-regulatory authority claimed that some companies were reluctant to comply with a code following the UCPD's setup (EP, DG for Internal Policies, Misleading Advertising on the internet (July 2010), at 20).

Following the implementation of the directive, further codes were formulated in response to the demands of the public authorities in the two Member States where the UCPD is explicitly being enforced. The UCPD is among the many types of regulations that governments are responsible for upholding. These new codes were a result of a continuous disregard for multiple legal obligations. The UCPD has not significantly motivated the adoption of national self-regulation in B2C company activities. This can be somewhat attributed to the broad scope of the directive, which was designed to serve as a framework directive. Sector-specific guidelines have had a greater influence on self-regulation. Most Member States already have national self-regulatory authorities for the advertising business.

Prior to the establishment of the UCPD, there were multiple codes of conduct in place in the UK and the Netherlands across various fields of activity. The UCPD has not significantly enhanced the existing European legal incentives for self-regulation.

Article 10 of the UCPD states that MS (Member States) may help in upholding the authority of code owners in regulating unfair commercial practices, while also assuring the proper implementation of the directive, as stipulated by Article 11. Code owners are only permitted to utilize this control if their codes conform to the specifications of the directive. In addition, a code can only be utilized by courts that have adopted the UCPD as a benchmark for objectivity if the content can be determined to be "equitable." The extent to which national code owners have fully incorporated the UCPD requirements will determine the amount of fairness of a code of conduct. The general duty's scope include trade groups and other organizations that formulate codes of conduct and provide advice regarding business practices.

The UCPD expanded the criteria employed to assess commercial activities. Any practices that impact the consumer's capacity to make an informed decision regarding a commercial transaction, both before to and during the contract's fulfillment, must meet or exceed the UCPD standard. The UCPD primarily influences advertising regulations and obligations related to information dissemination. Consequently, warranties, methods for managing complaints, and post-sales activities must adhere to regulatory requirements. Nevertheless, the unclear wording of this criterion and the broad and flexible nature of the directive pose challenges in achieving compliance. The code of conduct may contain promises that employ phrasing that is equally unclear to that of the directive. Despite the guidance available, including that supplied by the Commission, and legal precedent, there are still possibilities for different interpretations (Howells (2006), at 218).

The directive rules have been integrated into multiple national and European codes of conduct that focus on B2C business practices at both national and European levels. The degree to which code owners are incorporating the UCPD standards internally varies considerably. Certain codes of conduct, including those approved by the OFT, include a comprehensive requirement to engage in business with honesty and prohibit the use of deceptive strategies in advertising. Self-regulatory groups have prioritized the enforcement of compliance with the misleading sections of the UCPD in the advertising sector. Another method for code owners to implement the standards of the directive is by mandating the interpretation of the code in conformity with the directive.

The 'transposition' of the UCPD into codes of conduct is frequently less obvious and does not involve changing the general clauses of the directive. Some sectoral codes contain regulations that (allegedly) adhere to the requirements set forth in the directive, such as thorough information obligations and 'fair' advertising strategies. Many codes neither

expressly nor literally transpose the UCPD. This is the rationale behind why enforcement organizations avoid equating the UCPD's definition of appropriate behavior with codes of conduct (BAC, at § 3.5). Some MS still do not have advertising groups that cover all commercial activities permitted by the UCPD. For instance, there is no comprehensive definition of unfair business practices in the Austrian and German regulations. Even “misleading” advertising is not covered under the Austrian legislation (Misleading Advertising on the internet, at 17).

Indeed, not all existing codes have independently undergone changes since the implementation of the rule. The Dutch SMS-Code of Conduct, established in 2003, was modified solely in response to governmental coercion. The Code underwent revisions in 2008 and 2010 to rectify unjust practices that numerous consumers had lodged complaints about, including their lack of awareness regarding their enrollment in a premium SMS service, disregard for pricing information, and difficulties encountered when attempting to unsubscribe from the service. Regulatory bodies and law enforcement agencies possess a range of methods, varying in level of interference, to incentivize traders to adopt the UCPD standard in their codes. The command grants the MS the autonomy to choose from any of the available techniques.

It is imperative that its members adhere to strict norms of conduct that promote fairness. These rules should be obligatory and enforced through independent, non-legal means such as guidelines, certification, and, if necessary, aggressive measures. This approach aims to enhance consumer protection. Implementing regulations necessitates the establishment of a consumer complaint mechanism, accompanied by penalties for failure to comply and/or suggestions for compensation. There are a wide variety of mixed plans at the European level, ranging from completely voluntary to completely forced. At the government level, the aforementioned statement holds true (P. van der Zeijden and R. van der Horst, *Self-Regulation Practices in SANCO Policy Areas, Final Report (2008)*, at 20-21). The majority of programs in France are entirely voluntary. The Jury de Déontologie Publicitaire (JDP), established in 2008, is a rare independent body responsible for addressing complaints relating to advertising and enforcing breaches of ethical norms. The primary focus of advertising self-regulatory authorities has been on ex-ante control of advertisements, which involves regulating ads before they are released. The JDP is intended to enhance post-implementation oversight. The Commission Paritaire de Médiation de la Vente Directe is an impartial dispute resolution institution in France that operates based on a code of conduct. Consumer complaint programs are the primary means by which behavior codes in the UK are implemented. The

rules of conduct authorized by the OFT ensure that individuals have access to affordable, impartial support for resolving disputes. Additionally, these regulations establish user-friendly and efficient procedures for addressing client complaints.

Organizations such as the Travel Association [ABTA] offer autonomous redress initiatives. In the Netherlands, there is a regular practice of linking bilateral dispute committees, which handle specific cases related to compliance with General Terms and Conditions (GTC), to two-party GTC agreements.

The UCPD encourages government agencies to take on the role of "enforcer of last resort" (Article 10). Public enforcement is required for two reasons, and self-regulatory institutions cannot take the place of legal enforcement. First off, adequate and efficient measures for ensuring compliance are not always included in codes of conduct. The greatest consequence under a code is removal from the organization, and few code sponsors maintain proactive compliance monitoring programs. Since it is challenging for code owners to take action against their own members, the enforceability of private regulation continues to be one of its weaker components. There are frequently insufficient enforcement options that operate without any influence from their constituents (Green Paper on EU Consumer Protection, COM(2001) at 14).

Public authorities may feel the need to step in to enforce conformity with a code of conduct in order to comply with the requirements of the directive, even if an independent redress mechanism is provided. For instance, the OFT advised the ABTA to remind its members that their code of conduct, which is enforceable against all members, requires that all fixed non optional fees be included in the basic advertised rates of their vacations. Individual dispute resolution processes are unlikely to be able to deal with unfair business practices that only marginally harm certain consumers, who will therefore choose not to use those processes. Both of those plans are not designed to handle widespread infringement (www.offt.gov.uk).

Second, self-regulatory entities' interpretations of the UCPD might not always be correct. The UCPD regulations, which have been included into their codes, are being interpreted and enforced by private organizations. Code owners who serve as the primary enforcer have come under criticism in the UK because their interpretation of the rules was deemed to be unfriendly to consumers. The rulings of private enforcers are not decisive as to the fairness of a commercial activity, the Dutch public enforcers have made this very straightforward (CFI Rotterdam 19 April 2012, LJN BW3358, at § 23.3).

Ultimately, for well-operating private enforcement mechanisms to be successful, official entities must grant them a certain degree of legitimacy and power. Incorporating filters that encourage the utilization of complaint mechanisms overseen by code owners can enhance the effectiveness of codes of conduct. As per Article 11(1) of the UCPD, Member States have the authority to determine whether courts or administrative authorities might mandate that complaints be initially resolved through alternative dispute resolution methods, such as code complaints programs, before resorting to judicial proceedings.

In keeping with their aims and enforcement strategies, public enforcers in the UK promote compliance through the most practical means. Enforcement on a civil and criminal level is given the lowest priority. Relationships have been built with "established means" to deal with CPR violations. In instances of deceptive advertising, the OFT may already require previous reference to code complaints programs. All of the behaviors covered by the directive are now included in the CPR's expanded definition of when "established means" may be used. When alternative dispute resolution (ADR) is available, public entities and consumer organizations (such as Citizens Advice) actively encourage extrajudicial complaint processing (OFT Guidance, at 51)

In the Netherlands, referrals are commonly practiced. Samenwerkingsprotocollen, also known as collaboration protocols, are utilized to explicitly establish and regulate the cooperation among many recognized processes. The Dutch Consumer Protection Enforcement Act allows administrative bodies responsible for enforcing the UCPD and self-regulatory groups to establish cooperation protocols through agreements. A protocol regulates various aspects, including the exchange of information and recommendations, between government and private enforcement organizations. Under this protocol, the CA delegates its enforcement responsibilities in advertising to the Stichting Reclame Code (SRC). The CA and the aforementioned bilateral dispute bodies have also reached an agreement on a cooperation protocol. The bipartisan GTC is responsible for addressing specific concerns in several businesses, while the CA focuses on actions that harm the interests of all consumers.

In France, there aren't any 'filters' or explicit agreements for collaboration. The administrative agency may choose to simultaneously and independently take one of its own actions, even if a self-regulatory compliance mechanism has been set into motion. Independent B2C conciliation and mediation are steadily becoming accepted dispute resolution methods, yet these ADR techniques frequently come from governmental legislation. In general, privately requested mediation and conciliation are not accompanied by

a code of behavior. Although the consumer has made his way to the JDP, he is still able to make a complaint with a government agency or in court (Un an d'activité en chiffres, www.jdp-pub.org).

Despite the implementation of the UCPD, there has been minimal alteration in MS, a region known for its tradition of self-regulation. Self-regulation enhances consumer protection in both the UK and the Netherlands. Free complaint programs can be quite helpful in addressing individual problems. Private organizations that possess high standards of conduct are entrusted with responsibility. Nevertheless, self-regulation does not consistently achieve desired outcomes, and the Dutch Competition Authority (CA) plays a crucial role in ensuring compliance with conduct standards and two-sided General Terms and Conditions (GTC). Article 6(2)(b) provides a useful tool for accomplishing this goal. Nevertheless, the lasting consequences of the extensive public control on self-regulation remain uncertain; it has the potential to either enhance or diminish the attractiveness of self-regulation.

However, the UCPD did not enhance self-control. There are notable disparities across various MS regarding the importance of national advertising self-regulatory authorities. Furthermore, the directive did not effectively promote additional self-regulatory measures beyond the already coordinated sectors of advertising and e-commerce. There have been little additions to the codes of conduct since the directive was implemented, even in Member States where self-regulation is already firmly established. Several current regulations have integrated the UCPD and have been specifically crafted to manage emerging advancements (new media) and grievances. The utilization of codes remains predominantly confined to marketing.

Based on a report commissioned by the European Parliament, there is potential to enhance cooperation between EU enforcement authorities and self-regulatory advertising associations in addressing minor violations of the Unfair Commercial Practices Directive (UCPD). Self-regulatory groups can play a crucial role in preventing the occurrence of misleading business practices by promoting adherence to standards and providing assistance. In addition, they may prioritize cases that are considered less complex, so reducing the expenditure of time and resources for national law enforcement agencies. In countries like the UK and the Netherlands, where this interaction has been formalized, private and public entities have a harmonious relationship.

Nevertheless, consumer organizations lack confidence in the effectiveness of self-regulation when it comes to the UCPD's enforcement. The Bureau Européen des Unions de

Consummateurs (BEUC) advises against relying on self-regulation for addressing unfair business practices.

Some codes do not include or expand upon the UCPD recommendations. However, if they do, regulations frequently focus on several types of obligations due to the variations in market and national norms within the same industry. Furthermore, code owners have the ability to offer more extensive protection compared to the directive, as they are not have to strictly adhere to the legal standards set by the UCPD. The UCPD is a fundamental tool for harmonizing conduct codes. Hence, if varying codes of behavior across different Member States influenced this ranking, it would distinguish the assessment of fairness. However, it appears that this occurrence is infrequent.

Codes of conduct typically contain multiple general clauses and unspecified obligations. Due to the similarity in general wording and the prohibition of deceptive practices in most advertising codes, there may be variations in interpretation among self-regulatory organizations in different Member States. For example, the SRC decided to interpret the directive's restrictions on misleading advertising in a manner that favors consumers, whereas the ASA has faced criticism for its lenient approach towards business proprietors. Furthermore, the main emphasis of self-regulatory standards in advertising is often on national concerns related to "taste and decency". These concerns, which are not covered by the UCPD, yet have an impact on the evaluation of fairness by private organizations. The absence of access to preparatory procedures has further impeded harmonization for self-regulatory institutions (Collins (2004), at 86).

The integration of European law has been facilitated by private regulation, namely in the domains of advertising (EASA), direct marketing (FEDMA), timeshare (OTE), direct selling (FEDSA), and distance selling (EMOTA). Nevertheless, the UCPD had minimal impact on this contribution, and there is presently limited self-regulation of other economic processes and businesses within the EU. The establishment of EU-wide norms of conduct is consistently impeded by the discrepancies in state legislation.

The Commission stated in its Green Paper that EU-wide self-regulation could only be possible if trade associations and other organizations that support trade practices and establish codes were encompassed within the overall obligation, and if failure to comply with a voluntary code was classified as either an unfair or deceptive trading practice. The regulation upheld the MS's responsibility to enforce code owners' accountability for establishing codes, while also rendering voluntary commitments legally enforceable. However, Article 6(2)(b) has not yet endorsed self-regulation across Europe. The implementation of EU-wide codes of

conduct may have been an effective mechanism in establishing durable and acceptable "safe harbors." Consequently, the development of "safe harbors" would have represented a substantial advancement in terms of EU self-regulation.

Thus, codes of conduct insufficiently focus on the general sections of the Directive and primarily concentrate on enforcing the misleading clause. Codes of conduct make merely a minimal contribution to the directive's objective of achieving harmonization. The UCPD and its implementation at the national level have limited rather than enhanced their influence on the interpretation and enforcement of the directive's criteria. In order to enhance the contribution of self-regulation to the accomplishment of the consumer protection and harmonization objectives of the directive, it is necessary to modify the directive to increase the influence of codes of conduct in the interpretation and implementation of the UCPD requirements.

2.3. Optimizing the Interaction between the UCPD and Codes of Conduct

The UCPD aims to enhance the efficiency of the internal market by curbing unfair corporate practices and enhancing consumer trust. Codes inadequately fulfill the UCPD's dual aims of safeguarding consumers and promoting consistency due to legal and cultural factors.

But this contribution has not been appropriately promoted by the Directive. Self-regulation should serve as the first line of defense; it was suggested at the time of its release that the UCPD would have a negative impact on it. Self-regulation is seen by the UCPD as an optional extra, and it has come under fire for refusing to acknowledge the existence of dependable and successful regimes before the directive. The UCPD, a welcome addition to the consumer protection arsenal that fills in the gaps left by outdated law and ineffective self-regulation, hasn't interfered with the operation of successful and dependable regimes, though (Howells (2004), at 125).

Codes of conduct in the UK and the Netherlands have a notable impact on consumer protection by affecting the interpretation and application of UCPD regulations. Nevertheless, the case of the Dutch SMS-Code exemplifies the necessity of extensive implementation of UCPD (Unfair Commercial Practices Directive). The Netherlands' incorporation of the concepts outlined in the directive implies that further consideration may be necessary in order to effectively reconcile the interests of consumers and enterprises. This strategy seeks to assess the potential benefits of incorporating additional codes of conduct into the UCPD to

enhance consumer protection and promote harmonization. It strives to find a way to balance the interests of both consumers and traders.

Which approach to codes of conduct would effectively enhance consumer protection and promote uniformity, while also considering the interests of traders, based on past experience? Codes of conduct can only lead to harmonization if there is substantial cooperation between national self-regulatory organizations, public authorities, and courts.

Due to the inherent ambiguity of most code parts, assessing the equity of conduct can be a difficult task. Determining whether a specific behavior infringes upon a code and thereby breaks the law may not always be readily apparent. The perspective of the individual responsible for the code should serve as the primary point of reference for the public entity when considering the extensively documented code provision. If the public entity opts to dismiss this interpretation, they ought to provide a rationale for their decision. If such guidance is not provided, one should adhere to the following "principles". Given that consumer organizations were not involved in its drafting, any rule that is unclear would need to be read in favor of the professional. (Article 5 of Directive 93/13/EEC on unfair terms in consumer contracts).

The application of the *contra-proferentem* rule may incentivize trade associations to engage in productive dialogues with consumer advocacy groups and draft regulations that are clear and easily understandable. It is important to carefully consider the interests of both parties when objectively interpreting "bilateral" codes.

A presumption of adherence should be formed for concrete and strong commits in order to strengthen the attractiveness of codes of behavior, provided that they have been approved by a public enforcement authority. Only after consumers have been requested to take part in the self-regulatory process may such a recommendation be made. This presumption would encourage the development of new standards of conduct while providing traders with clear direction and legal clarity. However, it should only be used if the obligations are stated in sufficiently precise and authoritative language. Owners of the code may be prompted by this to clarify its unclear provisions and enforce their commitments (Collins (2004), at 31).

The utilization of extensive provisions in domestic regulations and the incorporation of these provisions in the UCPD itself hinder the process of standardization. Undoubtedly, there will be extensive deliberation over the level of concreteness and strictness of an obligation, but, the Commission or the CJEU may offer guidance on determining the appropriate threshold.

Codes that offer enhanced safeguarding measures, such as more stringent information prerequisites, ought to exclusively be applicable to traders who adhere to them. An independent trader who fails to adhere to a code should not be automatically presumed to have operated without employing professional attention. Only individuals who adhere to these regulations may be subject to more rigorous or specific guidelines. Nevertheless, it is imperative for law enforcement officials and judges to definitively ascertain if the code's level of protection adheres to the UCPD's prescribed threshold. Law enforcement authorities should understand that the UCPD functions as a tool to establish a baseline standard for harmonizing codes of conduct (Howells (2006), at 193).

The characteristics that establish the legitimacy of a code, such as its endorsement, consultation with stakeholders, or general support, were not considered relevant in the published judgments and legal decisions when codes were used to clarify the UCPD norms. However, if these factors were explicitly included, a code would possess enhanced reliability as a benchmark of fairness.

The directive's enhanced engagement in enforcing its criteria should promote self-regulation. The protection of consumers' interests is ensured by the implementation of codes of conduct that include the Unfair Commercial Practices Directive (UCPD) and are enforced through easily accessible dispute resolution procedures and proactive compliance measures, which operate as the initial means of interaction. It is advisable to utilize formal tactics, such as referral programs that are applicable to both agencies and courts, in order to encourage the establishment of such procedures and systems. Providing ADR as an option may incentivize consumers to opt for it instead of pursuing a legal case through a local court. The most recent draft for a Directive on consumer ADR recognizes the necessity for supplementary dispute resolution alternatives (Howells (2006), at 220).

Public entities should enhance the credibility of exceptional private enforcement judgments regarding the requirements of the directive by officially acknowledging them. When assessing a business practice that falls within a UCPD norm explicitly integrated into a code, such as the deceptive provision of an advertising code, it is appropriate to apply a "presumption of conformity." Authorities should consult the private enforcement body's understanding of this paragraph when comparing the same action to the equivalent statutory general provision and utilize that understanding as the foundation for any decision to vary from it. Typically, a court should support a decision reached by a private enforcement mechanism unless the claimant can provide evidence that the private decision has plainly

misunderstood the instruction. An explicit misinterpretation of a broad statement is uncommon but nevertheless possible. (Cf. Cafaggi (2011), at 122).

Code owners should have responsibility for ensuring the conformity of their codes. Article 11(2) should not delegate this determination solely to the Member States. It is crucial to highlight to them the implications of their behavior. Public agencies must play a role in monitoring and guaranteeing fairness, as well as enforcing the laws. Nevertheless, the extent of involvement of enforcement authorities in the self-regulation process should be conditional upon the willingness of private actors to actively cooperate and integrate legal obligations. Public entities should initially restrict their participation to endorsing and acknowledging private initiatives.

Similarly to the E-commerce legislation, the regulation should explicitly promote the development of codes that apply across the European Union. EU-wide codes can facilitate harmonization if they meet the following criteria:

- They must have extensive backing from the Commission and ideally receive public endorsement.
- Both the code owners and closely collaborating public authorities must rigorously enforce them.
- They must play a crucial role in implementing the general provisions of the directive.

Consumer advocacy organizations should participate in the development of EU-wide codes. Nevertheless, there is a lack of established institutional structures to facilitate the establishment of a consumer-trader relationship at the European Union level.

Therefore, the UCPD acknowledges the importance of self-regulation techniques and specifies the involvement that code owners and self-regulatory bodies could have in enforcing regulations. Member States have the authority to encourage the investigation of unfair business activities by code owners, in addition to enforcing the Unfair Business activities Directive (UCPD).

If the limitations specified in self-regulatory codes are rigorous and regularly followed by code owners and/or aggressively enforced by independent self-regulatory bodies, they can effectively reduce the need for administrative or judicial enforcement actions.

Moreover, in situations when there are stringent standards and a significant number of industry participants comply with them, these norms can function as a beneficial reference point for national authorities and courts to ascertain if a commercial action is unfair.

CONCLUSIONS

As a result of the research of the thesis, the following conclusions were reached:

1. As a result of the research, it was determined that although the Directive, which is the main regulator of unfair commercial practices, defines what unfair commercial practice is and the range of practices considered unfair commercial practice in each case, Polish legislation defines a slightly different definition from this concept. In contrast to this, a separate act regulating unfair commercial practice was not adopted in Azerbaijani legislation, and a certain scope of unfair commercial practice was determined only in the legal act regulating issues related to unfair competition.
2. The experience of the Court of Justice of the European Union suggests that in order to establish that an act constitutes an unfair commercial practice, it is sufficient to establish that it complies with the disposition conditions of Article 6 of the Directive and there is no need to assess the conduct in the light of the "contrary to the requirements of professional diligence" clause in Article 5(2)(a) of the Directive.
3. The illegal use of trademarks not only violates the intellectual property rights of other market entities, but also that this action can confuse and mislead consumers in the market, which leads to unfair commercial practices and illegal use of trademarks should be investigated not only in the context of unfair competition, but also in terms of creating an unfair commercial practice for consumers.
4. Unfair Commercial Practices Directive, being the main regulatory tool in this field, is an exemplary legal act that provides the maximum harmonization of legal acts in this field by defining the concept of unfair commercial practice, which situations lead to unfair commercial practice, and the methods and means of combating such practices.
5. Codes of conduct insufficiently focus on the general sections of the Directive and primarily concentrate on enforcing the misleading clause. Codes of conduct make merely a minimal contribution to the directive's objective of achieving harmonization. The UCPD and its implementation at the national level have limited rather than enhanced their influence on the interpretation and enforcement of the directive's criteria. In order to enhance the contribution of self-regulation to the accomplishment of the consumer protection and harmonization objectives of the directive, it is necessary to modify the directive to increase the influence of codes of conduct in the interpretation and implementation of the UCPD requirements.

6. The UCPD recognizes the significance of self-regulation methods and clarifies the role that code owners and self-regulatory bodies could play in enforcement. Member States may promote the examination of unfair business practices by code owners, in addition to enforcing the Unfair business Practices Directive (UCPD).

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SUMMARY

The main goal of this thesis is to determine the theoretical and practical issues of such practices by examining individual features of the concept of unfair commercial practice.

One of the main tasks to achieve this goal is to define a unified understanding of the concept of unfair commercial practice as a legal category.

Apart from that, another task of the research is to find out in what cases the illegal use of the trademark leads to the creation of an unfair commercial practice.

The main focus of the thesis is on determining the place and role of the Directive, which is the main regulatory instrument in the field of unfair commercial practice regulation.

The task of the research is to determine the role of codes of conduct as non-judicial and administrative institutions in combating unfair commercial practices and their impact in combating such practices.

As a conclusion of the study, it was determined that the Directive, which is the main regulator of unfair commercial practices, defines what unfair commercial practice is and the range of practices considered unfair commercial practice in each case and this Directive is an exemplary legal act that provides the maximum harmonization of legal acts in this field.

Codes of conduct have a limited impact on the directive's goal of promoting harmonization. To improve the role of self-regulation in achieving the goals of consumer protection and harmonization set by the directive, it is essential to modify the directive to boost the impact of codes of conduct in interpreting and implementing the requirements of the UCPD.

According to some court decisions, it has been determined that the illegal use of a trademark can mislead consumers, and in this regard, the illegal use of a trademark should be interpreted not only in the context of unfair competition, but also in terms of unfair commercial practice.