Legislative Aspects of Unfair Trade Practices in B2C Relationships

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Abstract
Unfair trade practices have been applied by traders against consumers who, therefore, enjoy a strong legal protection. Legislation on the EU and also on the national level in Slovakia describes the nature of unfair trading practices that should be avoided in commercial transactions. This paper aims at developing the understanding of unfair trade practices in business-to-consumer relations by reviewing the relevant legislative framework and by providing an overview of types of unfair practices that are prohibited and practices that were subject to consumers’ claims.

Keywords: consumers, unfair trade (commercial) practices, legal framework

JEL Classification: L14, K42

1. Introduction
Unfair trade practices can occur at all stages of a supply chain. Unfair practices occurring between businesses are often referred to as unfair trade practices or unfair business practices. Unfair practices occurring between a business and a consumer are referred to as unfair trade practices or unfair commercial practices. A market practice is unfair if it is in contrast with the principle of professional diligence and may influence consumers’ buying decisions (Grassie, 2006). Unfair practices arise because there is imbalance of market power and the weaker party in negotiations has no real alternatives to trade, or because one of the parties might be highly dependent on other parties (e.g. know-how or technological advantage of one party), or because there is asymmetry of information available to the parties (Sexton, 2017). Unfair practices harm at least one participant of the business relation (Falkowski, 2017) and they became the subject for scientific discussion and policy regulations, high attention is paid to practices in the food supply chain (Wolski, 2019).

Unfair trade practices in business-to-consumer relationships (B2C) are prohibited since a directive in 2005 has been adopted on the EU level (EC, 2005) and a full harmonization of the protection against unfair trade practices has been required across Member States by June 2007 (MacGregor Pelikanova, 2019). Concerns about unfair trade practices in business-to-business relationships (B2B) triggered attention to practices used in earlier stages of the supply chain (Menard, 2017). A directive governing unfair trading practices in the agricultural and food supply chain has been adopted in 2019 and it should be transposed into national law of Member States by May 2021 (EC, 2019). Although any partner of a transaction may be subject to unfair practices, consumers are considered a very vulnerable group because they have only a limited ability to protect themselves from unfair commercial practices and to take response (Paterson & Brody, 2015). This study aims to provide an overview of the legislative framework for consumers’ protection on the EU as well as national level in the case of Slovakia. It also summarises unfair commercial practices that are prohibited.
2. Data and Methods

The paper builds up on a systematic literature review conducted to identify unfair trade practices in business-to-consumer relations. It aims at summarising and providing an overview of relevant European and Slovak legislation governing unfair commercial practices and of types of these practices that should be prohibited.

3. Results and Discussion

3.1 EU and Slovak legislation on unfair trade practices in B2C relationships

The core EU regulation on unfair trade practices against consumers is the Directive 2005/29/EC, the “Unfair Commercial Practices Directive”. An unfair commercial practice is “contrary to the requirements of professional diligence and 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” (EU Directive 2005/29/EC). Except for this regulation the topic of unfair commercial practices and consumers’ protection is also included in other legal acts, the most important directives are (EC, 2022):

- Directive 93/13/EEC on unfair terms in consumer contracts
- Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers
- Directive 2011/83/EU on consumer rights
- Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services
- Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods
- Directive (EU) 2019/2161 on better enforcement and modernization of EU consumer protection
- Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers

EU Directives become law in Member States through their adoption in national legislation. The Consumer Protection Act no. 250/2007 is the main act addressing unfair commercial practices and consumers’ protection in Slovakia. Other acts include (ME SR, 2022):

- Act no. 372/1990 on offenses
- Act no. 147/2001 on advertising
- Act no. 128/2002 on state control of the internal market in consumer protection issues
- Act no. 161/2011 on consumer protection in the provision of certain tourism services
- Act no. 102/2014 on consumer protection in the sale of goods or provision of services on the basis of a distance contract
- Act no. 391/2015 on alternative dispute solution
- Act no. 170/2018 on tours, related tourism services, certain conditions of business in tourism

In January 2022 the Slovak Ministry of Economy announced a new Consumer Protection Act that has been prepared for the legislative process. Reflecting increasing online transactions the new act should introduce obligations to inform consumers about how the trader ensures
authenticity of consumer product evaluations and about the main parameters that determine the ranking of products in online search results. Double quality marketing should be considered a deceptive business practice. A new price reduction regulation should also be introduced in order to avoid price manipulations. (SITA, 2022).

The auspice and control of consumer protection is carried out by the Slovak Commercial Inspection, which is an independent authority of internal market surveillance (Act no. 128/2002). The offense of unfair commercial practices or of harming the consumer can be punished according to the Slovak criminal law (Act no. 300/2005).

3.2 Prohibited unfair trade practices in B2C relationships

Unfair trade practices against consumers are prohibited before, during and after the commercial transaction. The EU Unfair Commercial Practices Directive 2005/29/EC as well as the Slovak Consumer Protection Act no. 250/2007 distinguish two main types of unfair practices in business-to-consumer relationships:

1. Misleading commercial practices including both misleading actions and misleading omissions,
2. Aggressive commercial practices.

Misleading commercial practices mean that businesses do not give consumers enough accurate information for an informed buying decision usually through claiming false information or leaving out important information. The EU Directive 2005/29/EC and the Slovak Consumer Protection Act no. 250/2007 explicitly list misleading commercial practices that are always considered unfair and hence, prohibited. We have sorted these practices into three groups:

- Providing information that is not in line with the current state of the art:
  - Claiming to be a signatory to a code of conduct when the trader is not,
  - Claiming that a code of conduct has an endorsement from a public or other body which it does not have,
  - Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation,
  - Claiming that a trader or a product has been approved, endorsed or authorised by a public or private body when he/it has not,

- Practices of false sales and advertisement:
  - Bait advertising: making an invitation to purchase products at a specified price if the trader does not have enough stocks or possibilities to supply the products at the offered price,
  - Bait and switch: making an invitation to purchase products at a specified price and then refusing to take orders or to deliver the item to consumers, offering another product instead,
  - Falsely stating that a product will only be available for a very limited time, in order to elicit an immediate decision,
  - Promoting a product similar to a product made by a particular manufacturer such that consumers can get into confusion,
  - Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial),
- Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not,
- Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent,
- Claiming that products are able to facilitate winning in games of chance,
- Describing a product as ‘gratis’, ‘free’, ‘without charge’ if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.

Other misleading practices:
- Presenting rights given to consumers in law as a trader’s offer,
- Stating or otherwise creating the impression that a product can legally be sold when it cannot,
- Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions,
- Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer if he does not purchase the product,
- Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products,
- Falsely claiming that a product is able to cure illnesses, dysfunction or malformations,
- Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer,
- Claiming that the trader is about to cease trading or move premises when he is not,
- Undertaking to provide after-sales service while languages used prior to a transaction and after a sale differ without clearly disclosing this to the consumer before the transaction,
- Creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold.

**Aggressive commercial practices** aim to bully a consumer into buying. Harassment, coercion and undue influence belong to this category. Also for this category of practices the EU Directive 2005/29/EC and its conversion to the Slovak Consumer Protection Act no. 250/2007 provide a list of practices that are always considered unfair:

- Creating the impression that the consumer cannot leave the premises until a contract is formed,
- Conducting personal visits to the consumer’s home ignoring the consumer’s request to leave or not to return (except in justified circumstances),
- Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media,
- Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant or failing systematically to respond to pertinent correspondence,
- Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents to buy advertised products for them,
- Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer (inertia selling),
- Explicitly informing a consumer that if he does not buy the product or service, the trader’s job or livelihood will be in jeopardy,
- Creating the false impression that the consumer has already won, or will win a prize or other equivalent benefit, when in fact either there is no prize or taking any action in relation to claiming the prize is subject to the consumer paying money or incurring a cost.

Except for always unfair commercial practices directly specified by the legislation and mentioned above, any other practices that do not meet the requirements of professional diligence or distort the purchasing behaviour of an average consumer are also unfair. The average consumer is an average member of a group and it is a reasonably well-informed and reasonably observant and circumspect person (Schebesta & Purnhagen, 2020). Although Incardona & Poncibo (2007) note that when evaluating unfair commercial practices, the concept of an average consumer requiring rationality and information should be interpreted more flexibly taking into account individual consumer behaviour, it is used as a benchmark for the classification of unfair practices. Figure 1 shows all the criteria a commercial practice must fulfil to be allowed.

**Does the commercial practice:**

- fall under the black list\(^1\) of unfair commercial practices? **YES**
- constitute a misleading\(^2\) or an aggressive\(^3\) practice which is likely to distort the transactional decision of the average consumer? **NO**
- infringe professional diligence\(^4\) and is likely to distort the transactional decision of the average consumer? **NO**

**Practice is not prohibited.**

**Figure 1: Allowed and prohibited commercial practices**

*Source: EC: Commission Notice 2021/C 526/01*

Note 1: for the black list of commercial practices see Annex I of EU Directive 2005/29/EC or Annex I of Slovak Act no. 250/2007 (also listed in chapter 3.2)

Note 2: for misleading practices see Article 6-7 of EU Directive 2005/29/EC or §8 of Slovak Act 250/2007


Note 4: for professional diligence see Article 2 (h) of EU Directive 2005/29/EC or §2 (u) of Slovak Act 250/2007

Empirical studies conclude, that unfair trading practices can be observed in the markets for goods, but consumers also face these practices in other areas and service sectors, like the financial or energy sector (OECD, 2008). In Slovakia the prohibition of certain trading practices is mainly aimed at the elimination of the abuse of economic power in the supply chain (Blazo et al., 2019). This should be true not only for B2B relations but also for B2C relations as for example the retail market in food products is dominated by supermarket chains that sell more than 80% of the food sector output to final consumers with 3 biggest, foreign-owned
supermarkets, holding approximately 65% of the supermarket retail market (Blazo et al., 2019). Misleading advertisement is in general one of the most common unfair commercial practice across the economy (CUTS, 2013; CPEC, 2008). CUTS (2013) revealed the following forms of misleading advertisements: inappropriate or untrue content of advertisements, content not respecting safety issues, advertisements deviating consumers’ choices by not referring to relevant facts or product characteristics, advertisements offering sales, price discounts or free gifts with no intention to comply with such an offer. Civic Consulting collected mass claims of consumers suffering unfair practices for many sectors of the EU economy (CPEC, 2008). Law infringements reported in the food sector and in other consumer goods sectors are shown in Table 1.

### Table 1: Consumer mass claims on unfair commercial practices

<table>
<thead>
<tr>
<th>Infringement</th>
<th>Food sector</th>
<th>Other consumer goods sectors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marketing of dangerous food and drinks</td>
<td>x</td>
<td></td>
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<tr>
<td>Misleading information about food quality</td>
<td>x</td>
<td></td>
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<tr>
<td>Failure to deliver ordered and prepaid goods/products</td>
<td>x</td>
<td>x</td>
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<tr>
<td>Significant delay in delivery of goods</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Unfair commercial practices in offering products/services - aggressive solicitations by telephone</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Personal injuries caused by dangerous food services/products</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Misleading information about discounts of goods in supermarkets</td>
<td>x</td>
<td></td>
</tr>
<tr>
<td>Misleading advertising</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Selling defective or goods that do not meet standards</td>
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<td>x</td>
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<td>Non-conformity of goods</td>
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<td>x</td>
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<tr>
<td>Refusal of price refund for defective goods</td>
<td>x</td>
<td></td>
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<tr>
<td>Lack of response to consumers’ demands/lack of contact with seller</td>
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<tr>
<td>Refusal of reparation during the warranty term</td>
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<td>x</td>
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<tr>
<td>Providing warranty shorter than two years</td>
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<td>x</td>
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<tr>
<td>Unfair contract terms imposing additional costs/fees/charges on consumers</td>
<td></td>
<td>x</td>
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<tr>
<td>Sending invoices for unsolicited goods</td>
<td></td>
<td>x</td>
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<tr>
<td>Other unfair commercial practices - false impression that a prize was won</td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Infringements of data protection law by installing unsolicited software (digital rights management)</td>
<td></td>
<td>x</td>
</tr>
</tbody>
</table>

Source: CPEC (2008)

### 4. Conclusion

The existence of unfair commercial practices has a negative impact on prices and quality of goods and services, on competition in the market, and on consumers’ rights and buying decisions (CUTS, 2013). The understanding of unfair practices is still very limited. The reasons are that many factors potentially influencing unfair trading or unfair commercial practices have
not been studied yet, in contrary, existing evidence and findings are very heterogeneous and little data are available (Falkowski, 2017). It is important that consumers are aware of practices that are considered unfair such that they can stay resistant when facing those practices in their purchasing decisions and that they can contact responsible authorities if they have a suspicion of an unfair practice. On the other hand, it is also important for researchers and policy makers to observe practices in the markets, to provide evidence and to reflect the findings in establishing new policies and amending the legislative framework ensuring protection to consumers.

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