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Question B: Under which circumstances and to what extent should the positive obligation of providing information be imposed by regulation on advertisers?

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Background

The present report is based on national reports that have been submitted by the national groups and national rapporteurs as listed in the table below. I would like to thank the national groups and the national rapporteurs for their comprehensive and high-quality work. Needless to say, any failure to correctly perceive and represent the information in the national reports is mine alone.

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Belgium	Louise Depuydt
Czech Republic	Vlastislav Kusák
France	Charlotte Dekeyser, Charlotte Grass, François Laforgue, Joffrey Sigrist and Erwann Mingam
Germany	Prof. Dr. Helmut Köhler
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Introduction

At first sight the question of imposing positive obligation of providing information on advertisers seems to be of a deceivingly simple and technical nature. It leads the thoughts to long catalogues of information specifications normally found in special administrative statutes, which few lawyers are keen to read and comprehend. Yet, under the surface of technicality, we uncover a regulative area of great practical importance and considerable legal complexity.

With the advent of consumerism in the 1960s and 1970s and the recognition of consumer protection as a policy in its own right, the consumers' right to information was brought high on the agenda of national governments in the industrialised countries across the world. In the catalogue of consumer rights proclaimed in US President John F. Kennedy's famous Special Message to the Congress on Protecting the Consumer Interests of March 15, 1962 the right to be informed comes second only to the right to safety. The Message was echoed in policy documents at the European level such as the Consumer Charter of the Consultative Assembly of the Council of Europe of 1973 as well as in the First Preliminary Programme of the EEC for a Consumer Protection and Information Policy of 1975.

Imposing positive information duties was identified as a major instrument of consumer information policy and a relatively cost-efficient way to compensate for identified market failures of information uncertainty and asymmetry. For regulators information obligations seem to appear attractive since they are less intrusive than sheer product and marketing bans and since their enforcement is relatively simple and clear-cut. At the European level, imposing information duties has often been promoted by the European judiciary as a more acceptable and market-conform way for accommodating national concerns about consumer health and safety and environmental risk, while not compromising the objective of a functioning Common market.[1]

At the same time information obligations are not costless. For business, compliance with such obligations implies changing packaging and communication strategies, possibly abstaining from more efficient media and design for their commercial communication. For consumers, excessive information may be perceived as onerous and counterproductive. Moreover, as a policy instrument, information disclosure duties may imply delegating risk assessment to consumers who are not always equipped with the expertise to interpret complex and abundant product information. I will return to these arguments at the end of the report. Here I just want to indicate that selecting the instances of imposing such information duties is not a simple matter but requires careful scrutiny and sensitive policy-making.

Legally, positive information duties reveal considerable complexity since they do not easily fit established legal categories and often intersect several legal and non-legal disciplines. The comparative analysis is further complicated because different countries choose to approach this matter from different angles, which results in widely divergent classifications. Mandatory information disclosure rules may be included in consumer law, criminal law, unfair competition law and general civil law with respective repercussions on patterns of enforcement and actors involved. It should be reminded, however, that the question as formulated by the League is restricted to information obligations imposed on advertisers, or in

[1] Case C-120/78 *REWE v Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon') [1979] ECR 649; Case C-178/84 *Commission v. Germany* (beer purity) [1987] ECR 1227; Case C-261/81 *Walther Rau* [1982] ECR 3961.

other words it relates to obligations in the process of market communication and of pre-contractual relations.

Further on, it should be kept in mind that regulation of advertising is normally spread among variety of statutes of general, horizontal, as well as of vertical nature. In order to make the picture more transparent, a non-exhaustive table of relevant national statutes of a horizontal nature is provided below.

Austria	Act Against Unfair Competition of 1984 (Budesgesetz gegen den unlauteren Wettbewerb) Consumer Protection Act (Konsumentenschutzgesetz)
Belgium	Act on Commercial Practices and the Information and Protection of Consumers =Commercial Practices Act, CPA (Loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur) Belgian Civil Code
Czech Republic	Law no. 634/1992 on Consumer Protection as amended by Law no. 36/2008 Law no. 40/1995 on Regulation of Advertising as amended by Law no. 36/2008
Denmark	Danish Marketing Act of 20 December 2006
France	Consumer Code (Code de la consommation) French Civil Code (Code civil)
Germany	Act Against Unfair Competition of 2004 (Gesetz gegen den unlauteren Wettbewerb, UWG)
Hungary	Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices (Unfair Commercial Practices Act) Act CLV of 1997 on Consumer Protection (Act on Consumer Protection) Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Competition Act) Act XLVIII of 2008 on the Essential Conditions of the Business Advertising Activity (Act on Business Advertising Activity) Act IV of 1959 on the Civil Code (Civil Code)
Italy	Legislative decree no. 206 of 6 September 2005 on a Consumer Code as amended by Legislative decree no. 146 of 2 August 2007 (Codice del consumo).
Spain	General Advertising Law 34/88 Law on Consumer Protection Unfair Competition Law 32/88
Sweden	Marketing Practices Act of 2008 (SFS 2008: 468)
Switzerland	Federal Law Against Unfair Competition (Loi fédérale contre la concurrence déloyale, LCD) Federal Ordinance on the Indication of Prices (l'Ordonnance fédérale sur l'indication des prix, OIP) Federal Law on Consumer Information (Loi fédérale sur l'information des consommatrices et des consommateurs, LIC)
UK	The Consumer Protection from Unfair Trading Regulations 2008 The Business Protection from Misleading Marketing Regulations 2008 The Control of Misleading Advertisements Regulations 1998 (CMAR) (revoked) Advertising Standards Codes (AS Codes) of the Advertising Standards Authority (ASA)

The report seeks to map out the legal situation in the countries for which a national report was submitted, but inevitably has to tackle legal developments at European Union level. With the exception of Switzerland, all countries that submitted national reports on this question are members of the European Union. It should therefore be emphasized already at the outset that this report was written in a time of substantial reform in the laws of the countries members of the European Union in regard of the subject matter under investigation. As is well known, on 11 May 2005 the European Community adopted Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive', hereinafter UCPD). The Directive sets out important requirements concerning traders' advertising, marketing and commercial practices in general. It introduces far-reaching information disclosure obligations, and is therefore of central importance for this report.

In the following the report will seek to navigate through this complex area of legal regulation and to critically analyze the main trends of legislative and institutional change triggered by European harmonisation. In a first step the situation in the countries that have submitted national reports prior to transposition of the Directive will be reviewed. Then the relevant provisions of the Directive will be presented and the way the Directive is implemented in national law. Finally, the pros and cons of information obligations will be discussed, generally, and in the context of the UCPD. Although the report focuses chiefly on the developments at the European level, it is hoped that it will provide food for reflection also for law makers and stake holder in countries not belonging to the EU.

1. Positive obligation of providing information imposed on advertisers

In this report a distinction is made between a positive and a negative obligation to provide information to consumers. Whereas a positive obligation requires in an affirmative manner disclosure of material information in the marketing to consumers, a negative obligation usually implies that upon failure to provide material information the advertisement may be considered misleading or unfair.[2] The distinction is admittedly somewhat artificial. Legal doctrine and preparatory works at European and national level point out that we have to do with two concepts mirroring each other.[3] In some national reports the prohibition of misleading advertisement by omission is qualified as a positive information obligation (Asutrian and Belgian report). Consequently, the UCPD is by many national rapporteurs considered to impose a positive information obligation (see national reports Austria, Germany, Hungary, Italy).

Certainly, the comprehensive approach to misleading by omission in the UCPD, and in particular the enumeration of specific points on which information has to be provided upon so called 'invitation to purchase', come very close to a positive information obligation. Yet for the sake of clarity, considering the broad comparative context of this analysis, I prefer to stick to this distinction, in order to be able to capture the variety of approaches to information disclosure duties in a historical and cross-national perspective.

a. Positive obligation of a general nature

[2] In a similar way see Schulze/Schulte-Nölke, Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices, 2003, Study for the European Commission.
[3] See Swedish Government Investigation Unfair Commercial Practices (SOU 2006: Otillbörliga affärsmetoder., Government Bill Prop. 2007/08: 115, Legislative Commission Report.

A general positive obligation on advertisers to provide relevant information to consumers is a rare case. If advertising is broadly defined to encompass all commercial communication, including brand promotion, it would be difficult to require in an unqualified manner that all advertising shall contain essential information for consumers (see Belgian report). Such a comprehensive requirement would in effect imply prohibition of advertising campaigns that aim at creating brand awareness rather than informing consumers. Consequently few countries set out general information requirement attached to advertising as such.

In the European context the earliest and most wide-ranging positive information obligation to provide information in advertising and marketing is probably the one stipulated in the Swedish Marketing Practices Act of 1975 and then reproduced in the Marketing Act (MFL) of 1995 (repealed by the MFL of 2008). It formed the second limb of the general clause in this act, parallel to the duty of good marketing practice (Art. 4(2) MFL (1995:450) and stated:

> In their marketing traders shall provide information which is of particular importance from a consumer point of view.

The rule was limited only to the relations of traders with consumers and sought to enhance the positive flow of important consumer information. The information obligation was remarkable in that it extended to all marketing and stipulated no (express) limitations in regard to specific products, circumstances or advertising medium. In practice, however, certain limitations were acknowledged.[4] The information duty was fleshed out with more detail through guidelines issued by the National Consumer Board as well as by case law. The guidelines specified the information that had to be provided in certain transactions, e.g. by the sales of used cars, gasoline, etc. A positive information duty of a general and horizontal nature (i.e. valid without distinction of industry sector, type of goods or media) exists also in Norway. In the other Nordic countries positive information duties were either limited to selling offers (Denmark), or to certain health and safety aspects of products (Finland).

General and rather sweeping positive information obligations can occasionally be found in some of the more recently enacted consumer codes and statutes in the CEE countries that recently joined the European Union, partly as a result of the ambition to ensure high level of consumer protection corresponding to EU requirements. Example of a positive information obligation provides Section IV of the Hungarian Consumer Protection Act (Hungarian CPA) and in particular, Art. 8 CPA, which laid down a general positive obligation of traders to provide information to consumers. An extensive information duty was likewise imposed in Art. 9 Czech Consumer Law. These rights have, however, been mostly addressed to sellers and not to advertisers. They have not been supported by effective instruments for enforcement and have largely remained a dead letter. (Czech report)

b. Positive obligation limited to invitation to purchase (selling offers)

More common are positive information obligations that are closely related to the conclusion of a contract and are correspondingly located in or linked to contract law. Positive duties for sellers to disclose information on essential product characteristics were stipulated in the Consumer Codes of France and Italy, (see Art. L 111-1 *Code de la consommation*, in its fashion before the transposition of Directive 2005/29) however, they did not extend much beyond the information requirements derived from the general rules of contract law (e.g. Art. 1602 *Code civil* which imposes on the seller a duty to disclose). Moreover, this sort of

[4] For instance information on price was considered mandatory under this provision only in case of marketing of a specific product and not in general advertisement of a business activity. See MD 1981:5 McDonald's.

obligations was imposed on sellers and service providers and not generally on advertisers and on advertising agencies.

Under Belgian law, traders are held liable to provide relevant information to consumers in a bifurcated way. On the one hand, there is a specific obligation developed by the courts through standing case law (so called jurisprudential obligation, see Belgian report). It is considered to be based on the general principle of good faith in contract law and is thus by many authors regarded as located in general civil law. On the other hand Art. 30 Belgian Commercial Practices Act (CPA) stipulates a duty for traders to provide information to consumers in any advertisement that constitutes an offer. This obligation is located in consumer law. Both the jurisprudential information obligation and Article 30 CPA require that information must at the latest be provided in the offer. Whether the advertisement constitutes an offer or not will depend on the circumstances of the case.

c. Other positive information duties

In Spain Article 18 para. 2 of the Law on Consumer Protection imposes comprehensive obligations on traders concerning the information on labels and trade dress. In Switzerland, a special Law on Consumer Information, which entered into force in 1992, requires indication of the essential characteristics of certain goods and services to be designated by the Federal Government (Art. 2(1) LIC). According to the Swiss report, however, this provision has remained a dead letter. Apparently the implementation of the law required further regulations by the federal government based on agreements between consumer organisations and businesses and only two such agreements materialized. A project to partly revise the law was abandoned by the Federal Government on 21 December 2005.

2. Negative obligation of providing information (misleading by omission) prior to the UCPD

While a positive information duty has been only rarely recognized in national law and regulations, a sort of indirect, negative, information obligation is well established in most countries that have submitted national reports, although its systematic place and scope has varied significantly. According to this negative information obligation, the omission to provide certain type of information could be considered a misleading or unfair commercial practice.

a. Explicit prohibition of misleading by omission

Negative information obligations are occasionally explicitly stipulated in unfair competition law or consumer law statutes. In Germany, pursuant to § 5 para 2, 2nd sentence German UWG the omission of information to consumers is qualified as an act of unfair competition, however, only if the consumer may be mislead about an important aspect, which can influence his or her purchasing decision. According to preparatory works, prevailing doctrine and standing case law, this provision does not amount to a true obligation to inform (German report).

In Belgium the Commercial Practices Act (CPA) prior to its amendment in view of transposing the UCPD prohibited in Art. 23.4 advertising, which omitted material information with the purpose of misleading consumers on relevant aspects of the product, the trader etc.

In Hungary, the Competition Act defines as consumer deception among others the concealing of important information, notably that the goods fail to meet legal or other usual requirements, or that their use requires conditions which are significantly different from what is customary (Art. 8 Competition Act). More generally, Article 10 of the Hungarian Competition Act prohibits business methods that restrict, without justification, the freedom of choice of consumers. In the UK the British Code of Advertising Sales Promotion and Direct Marketing ("AS Code") qualifies the notion of misleading advertising by expressly including "omission" among its causes (Article 7.1).

b. Implicit prohibition of misleading by omission

In other countries, while there was no explicitly stipulated rule on misleading by omission, the general prohibits of misleading advertising were interpreted by the judiciary and in legal doctrine as encompassing statements and presentations that are misleading by omitting material information. This is the case with the general clause on misleading advertising in the Austrian UWG (see Austrian report) and in the Swiss Unfair Competition Law (Swiss report).

In France omission of relevant information was qualified as deceptive advertising by the judiciary on the basis of Art. L. 121-1 *Code de la consommation* (repealed), as well as on the basis Art. L. 213-1 *Code de la consommation* concerning deception in contractual relation. Pursuant to standing case law it is likewise recognized that misleading advertising, including misleading omissions, can constitute an act of unfair competition, to the extent that it prejudices the interests of honest competitors who do not use similar practices[5] (French report).

In the UK a failure of an advertiser to provide relevant or sufficient information can be considered to be misleading advertising under the CMARs. This was established already in case law preceding the CMARs which advanced a broad interpretation of the concept of misleading advertising. In addition, the general requirement of "*legal, decent, honest and truthful*" marketing and communication "*prepared with a sense of responsibility to consumers and society*" (Articles 2.1 and 2.2 of the BCA) is interpreted to imply that misleading advertising can arise from omission of important details (UK Report).

c. Information, the omission of which was considered misleading

Given the broad and non-limitative character of information obligations prior to the transposition of the UCPD, the specification of the information that is considered essential or, the omission of which can result in deception, was very much left to the judiciary. Case law has confirmed that omission of the information on the following aspects can constitute misleading advertising:

- substantial qualities of the product (for instance that it is a question of second-hand and not new products);
- the composition of a product, e.g. omitting to indicate that it contained sugar (French report);
- lacking attributes necessary to use the product (UK report);
- especially attractive prices, or the way of calculating the price (e.g. not indicating that there are costs to be added for a subscription apart from an entry fee);
- conditions to use the good or the service (e.g. limitations and exclusions in insurance contracts);

[5] The action is based on Articles L. 121-1 *Code de la consommation* and Article 1382 Code civil.

- the duties of the seller (e.g. lack of precision when announcing return policies) (French report);
- the nature and extent of any additional rights provided by the guarantee, over and above those given to them by law (Art. 17 of the BCA, UK report).

In Hungary the Competition Council has declared in several of its resolutions, that information shall be regarded as material if it is relevant to choosing between competitors or competing products. When advertising special offers, it is a basic requirement to provide consumer information on the special offer, the conditions of participation therein, and the products involved (for references see Hungarian report). In Italy the general duty to provide information is interpreted and concretized by secondary legislation (according to article 10 of the Italian consumer code) by administrative and civil case law (according to article 27 of the Italian consumer code) and by self regulation (according to article 27 *ter* of Italian consumer code).

The principles developed in case law and administrative practice will most probably continue to serve as guidance even after the transposition of Directive 2005/29/EC, having in mind the general and open character of the Directive's provisions.

3. Information obligations in Directive 2005/29/EC (UCPD)

As mentioned above, for the countries members of the EU the regulation of information obligations comes in a new light after the adoption of Directive 2005/29/EC on Unfair Business-to-Consumer Commercial Practices (UCPD) and its transposition in national law. One of the major innovations of the UCPD is the explicit rule on misleading omissions and the introduction of specific information requirements for the case of commercial communication which constitutes invitation to purchase. In the course of drafting of the Directive an even more radical positive information duty on traders to provide all material information to consumers was discussed by the Commission.[6] In the Impact Assessment carried out by the GFA the adjustment effort this rule would imply for most countries of the EU was however, estimated to be high for most Member States of the European Union with the notable exception of the Scandinavian countries.[7] Instead, the Directive accepted a compromise. It introduces a general prohibition of misleading omissions of material information for consumers (Article 7(1) UCPD) and then contains a positive list specifying the information that is material in the case only of invitation to purchase (Article 7(4) UCPD).

a. Scope of the provision

Following the limitations in the scope of the UCPD, the provision on misleading omissions applies solely to B2C commercial practices. Also by way of general limitation of scope, it is only omissions that negatively affect the economic interests of consumers that are within the scope of the Article 7. By contrast, an extension of the scope of the provision stems from the concept of commercial practice adopted in the Directive. This concept encompasses "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers." (Article 2(d) UCPD). The provision thus applies not only in pre-contractual relations but also to commercial practices before, during and after a commercial transaction (Article 3(1) UCPD).

[6] See Green Paper on Consumer Protection, COM ...

[7] See GFA, Ex-ante Impact Assessment of the options outlined in the Green Paper on EU Consumer Protection, Final Report, B5-1000/02/000074, 25.

Article 7 UCPD stipulates that:

> …a commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

The provision centres around the notion of "material" information, without specifying what information should be regarded as material. This approach leaves a relatively wide margin of appreciation in the application of the rules to national judiciaries and administrative authorities. It can be discerned that factors such as the character of the product, its value and price, its complexity and possible effects on the health and safety of consumers and on the environment, will continue also in the future to be among the factors that will influence the decision on whether certain information is material within a particular context. (French report)

What is more certain is that information requirements established by Community law in relation to commercial communication including advertising or marketing shall be regarded as material (see Art. 7(5) UCPD). Such requirements are typically to be found in consumer law directives, a non-exhaustive list of these is included in Annex II of the Directive. Stricter standards are also set in respect of commercial communication that constitutes invitation to purchase (see below).

b. The benchmark consumer

As in the rest of the Directive the assessment of a commercial practice has to take as a benchmark the average consumer. The Directive does not give binding definition of the average consumer in its provisions, but in the preamble refers to the definition elaborated in the case law of the ECJ, namely the average consumer who is reasonably well-informed, and reasonably observant and circumspect[8], taking however into account social, cultural and linguistic factors.[9] The Directive provides, however, that if the practice targets particular section of the consuming public it is the average consumer form this group that is relevant (Article 5(2)(b) UCPD). Furthermore, in the general clause against unfair commercial practices, the Directive devotes special attention to the needs of enhanced protection of consumer groups (children, elderly, sick) who are particularly vulnerable to a particular practice and a product. This, however, applies only if the group is clearly identifiable and the trader could be reasonably expected to foresee its vulnerability (Article 5(3) UCPD).

c. Flexibilities

The prohibition of misleading omissions in the Directive is mitigated by a number of provisos that obviously aim at introducing sufficient flexibility and at preventing the Directive from exerting an unnecessarily hampering effect on business communications and commercial activity. First, the general threshold of appreciable influence on consumers' economic behaviour, which is introduced in the Directive applies also to misleading omissions. A commercial practice is prohibited as a misleading omission only if it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

[8] See the case law of the ECJ in the following cases: C-210/96 *Gut Springenheide* [1999] ECR I-4657; C-362/88 *GB-INNO*; C-373/90 *Nissan*; C-470/93 *Mars;* C-220/98 *Esteé Lauder* [2000] ECR I-117.
[9] See decisions of the ECJ in C-313/94 *Graffione* [1996] ECR I-60; C-315/92 *Esteé Lauder (Clinique)*.

Furthermore, at several junctures the role of context and of the circumstances of the individual case is underlined. Pursuant to Article 7(1) UCPD a commercial practice shall be assessed "in its *factual* context, taking account of *all its features* and *circumstances*…". The practice is considered an infringement if it "omits material information that the average consumers needs, *according to the context*, to take an informed transactional decision." (my italics) The context thus plays a role at two stages: to ascertain whether there is a relevant omission of information, and to ascertain whether the omitted information is needed by the average consumer. In the first stage the enforcement bodies have to determine whether with regard to the limitations of the communication medium or other circumstances, for instance previous advertising and wide-spread consumer knowledge, provision of the information should not be required. In the second stage, one should determine whether the omitted information can be regarded as important for the consumer purchasing decision.

d. The importance of the communication medium

Finally, special attention is devoted to the limitations of the communication medium. The communication medium is first mentioned in a general manner in Article 7(1) UCPD as one factor that has to be taken into consideration when assessing the misleading character of the omission. Then Article 7(3) UCPD elaborates further on this issue. According to this proviso:

> Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

The provision thus opens a possibility to exonerate the trader if he has provided information to the consumer by alternative means, e.g. internet pages, information on the premises etc. Obviously the ambition is to take into account modern communication strategies, using new media and technologies. As a whole the provision seems to grant traders a relatively broad margin of appreciation to adjust the information to the specifics of the advertising medium.

e. Enhanced information obligation for invitation to purchase

The Directive introduces more specific information requirements but only for the case of commercial communication that constitutes an invitation to purchase. The Directive defines the concept 'invitation to purchase' as "a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase." (Art. 2 (i) UCPD).

The concept 'invitation to purchase' has stirred considerable debate in the course of drafting and implementation of the Directive. In particular the relation of this concept to well-established concepts of national contract law such as 'offer' and *invitatio offerendi*, has been under discussion. Among scholars and policy makers a consensus exists that the difference between the concepts is substantial. Whereas 'offer' and '*invitatio offerendi*' refer to stages in the conclusion of a contract or a transaction, 'invitation to purchase' refers to commercial communications. It applies to communication messages and is thus directed at the pre-contractual phase.

The purpose of introducing this concept into the Directive seems to be to draw a distinction between two methods of advertising and marketing. The first one, which is most widely

spread and to which the majority of commercial communication in TV, radio and the press belongs, consists of general brand or product awareness marketing. It would not meet the definition of an invitation to purchase and would not need to include the detailed information items listed in Art. 7(3) UCPD. The second method refers to communication messages where the trader chooses to communicate the basic elements necessary for a consumer in order to decide on entering a transaction, i.e. specifying the product and the price. For this category of communication, the Directive sets out a detailed list of information items, which the trader will need to disclose in order to avoid committing a misleading omission. [10] The obligation exists only if the information is not apparent from the context.

Pursuant to Article 7(4) UCPD "in the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

> (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
> (b) the geographical address and the identity of the trader…;
> (c) the price inclusive of taxes, or … the manner in which the price is calculated …
> (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
> (e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

While the enumeration of information that has to be provided appears rigorous at first sight, also in this respect the Directive introduces mitigating factors. The information has to be provided only "if not already apparent from the context" (Article 7(4) UCPD) and, in the case of the main characteristics of the product, "to an extent appropriate to the medium and the product" (French report).

4. Transposition of the Directive in the Member States of the EU

The time for transposition of the UCPD expired on 12 June 2007 and the time for entry into force of national measures implementing the Directive – on 12 December 2007. By now most countries have indeed introduced changes in their national laws to ensure compliance with the Directive.[11] In the few remaining countries, which are still lagging behind such as Germany, Finland, Luxembourg, Netherlands and Spain, transposition is imminent. But even if the implementation process has not been finalized, the Directive is already capable of producing vertical direct effect. Moreover, past the deadline for implementation, national law shall be interpreted in the light of the Directive (indirect effect).[12]

As a result from transposing the Directive most Member States of the EU have introduced a provision on misleading by omission in line with Art. 7 UCPD or have adapted their already existing rules accordingly. These national provisions reproduce almost literally Art. 7 UCPD, but there are also deviations to be discussed below. Generally, Member States have chosen different ways of transposing the Directive. As suggested in earlier comparative studies on fair trading law[13], several models of law and regulation in this area can be identified in Europe and the mode of transposition depends essentially on national tradition and domestic conceptual and systematic considerations. Particular difficulties have been experienced by countries treating B2B and B2C commercial communications in a joint and integrated

[10] See COM (2003) 356 final; cf. Swedish Government Bill Prop. 2007/08:115.
[11] For an updated list see the website of the Commission, Directorate Consumer Protection.
[12] Craig/De Burca, EU Law (Oxford, OUP, 2007).
[13] Schulte/Schulze-Nölte (2003).

manner. These countries faced the hard choice of either splitting the regulative area or preserving the integrated approach, but then extending the rules of the UPCD to B2B relations or grappling with fine-grained distinctions to define the scope of the rules stemming from the Directive (this is the situation of e.g. Sweden and Germany; see also national reports Hungary, Spain;).

(1) In countries that have special laws on unfair competition, the Directive is transposed by comprehensive amendments to these laws. In Austria the provision on misleading by omission is now taken over in § 2 Austrian UWG (Austrian report). Similar approach will be employed in Germany where the transposition will lead to amendment of the German UWG of 2004.

(2) In countries featuring special legal acts on marketing practices, notably the Nordic countries, the Directive has brought about amendments or full re-conceptualization of these acts. In Sweden the notion of misleading omissions is integrated in the provision on misleading commercial practices in a new Marketing Practices Act (§ 10 MFL), applying to both B2B and B2C commercial practices.

Within this group one should probably also classify Belgium, where the legislator proceeded to amend the Act of 14 July 1991 on commercial practices and on the information and protection of the consumer, which entered into force on 1 December 2007. This law governs both B2B and B2C commercial practices, but devotes different chapters to these two types of practices. Consequently a prohibition of misleading by omission in the relations between traders and consumers has been introduced in the new Art. 97/7 CPA. A provision on misleading omissions, but in the relations between traders, is included in Art. 94/2, nr. 4. It corresponds to the previously existing rule in Belgian law.

(3) Countries, which lack a special legislative act on unfair competition or marketing practices, treat instead the regulation of commercial practices as a subject-matter pertaining to consumer law and to general civil law. In France and Italy the transposition has been carried out by amendments to their respective Consumer Codes. The French Law on the development of competition in the service of consumers[14] repeals Article L. 121-1 *Code de la Consommation* concerning misleading advertising and creates a new Article L. 121-1 on misleading commercial practices. The new Law takes on the distinction between misleading actions and misleading omissions as defined in Articles 6 and 7 Directive 2005/29 in paragraph I and II of Article L.121.[15] In Italy Art. 7 UCPD has been integrated in Art. 22 Consumer Code. In the Czech Republic amendments have been introduced in the Consumer Act and in the Advertising Act.

(4) Finally, a number of countries have cut the 'Gordian knot' of implementing the UCPD by simply enacting a separate act on unfair commercial practices seeking maximum compliance with the Directive. The task of achieving congruence between different and partly overlapping fields and statutory provisions of national law is either faced by the law maker through detailed review of previously existing laws and regulations, or is left foremost to the national judiciary. This has been the approach in the United Kingdom, as well as in some of the new EU Member States from Central and East Europe (e.g. Hungary, Poland, Latvia, Lithuania).

[14] See Article 39 of the Law on the development of competition in the service of consumers of 3 January 2008 (la loi 2008-3, *Loi pour le développement de la concurrence au service des consommateurs*).

[15] A titre d'exemple : L'existence, la disponibilité ou la nature du bien ou du service, les caractéristiques essentielles, le prix, l'identité, les qualités, les aptitudes et les droits du professionnel, etc.

In Hungary the general disclosure requirements are regulated by the Competition Act and the Act on Business Advertising Activity. Requirements in respect to B2C practices are governed by the Unfair Commercial Practices Act, which aims to implement Directive 2005/29/EC. The Act on Business Advertising Activity governs B2B relations. The regulatory concept regarding misleading by omission pursuant to section 7 of the Unfair Commercial Practices Act is the same as in EC Directive 2005/29 (Hungarian report).

In the UK two new Regulations implement the UCPD (CPRs and BPRs). These Regulations come to replace the CMARs. Article 7 of the UCPD is implemented in Section 6 of the CPRs. Even though the text in the new CPRs is not identical with that of the Directive due to formal adjustments to the English legislative style, all the elements contained in Article 7 UCPD are transposed (UK report).

a. Impact on previously existing information obligation

For those countries where general positive information obligations existed, it seems that Directive 2005/29/EC has had a liberalizing effect by lifting and modifying such general positive duties. In Sweden, a legislative committee first proposed to retain the Swedish general clause on positive information obligations and to add the specific information requirement in respect to invitation to purchase verbatim. This proposal was met by massive criticism, mainly on the part of industry. Eventually, in the new Swedish Marketing Practices Act of 2008 (SFS 2008: 468), the positive information duty is substituted for a provision on misleading omission in the sense of Article 7 UCPD.[16]

In a similar way, in Hungary the general obligation on information disclosure in the Act on Consumer Protection will be repealed. According to the Hungarian report in the new regulatory system, the Unfair Commercial Practices Act will govern the general obligations of disclosure, and the Act on Consumer Protection shall contain special requirements, such as price indications of products, or conformity assessment. Also the Spanish report notes that the provision on information obligations for advertisers will have to be adjusted to the provisions of the UCPD.

Positive information obligations that are limited to the invitation to purchase are mostly in harmony with the UCPD but have had to be adapted to the specific requirements of Art. 7 UCPD (see below). Yet in Belgium, the information obligations, both the jurisprudential one and the one set out in Art. 30 CPA, have remained unaffected by the transposition of Directive 2005/29. The national report questions the conformity of these provisions with the Directive to the extent their scope overlaps with the scope of the Directive.

b. Scope of the provision on misleading omissions

The scope of the national provisions transposing Article 7 UCPD seems as a whole to correspond to the scope of the obligation as defined in the Directive. One important difference concerns, however, the applicability of the prohibition to B2B commercial practices. Whereas most countries have reserved the protection against misleading omissions only to consumers, there are also countries where the same protection is extended also to traders. Sweden and Austria are cases in point (Austrian report). One can of course question whether information obligations are equally justified viz. traders, who as a rule are professional market actors, are well informed and furnished with adequate resources to retrieve the necessary information

[16] See Prop. 2007/08:115.

and advice (French report, Austrian report). In defence of extending the rule to B2B relations, it has been argued that many small businesses are carried out by traders, whose situation does not differ much from that of consumers. In any case this may be a question the League should take a stand on.

Another source of divergence is the extent to which the flexibilities envisaged in the Directive are taken over in national law. For instance, as mentioned above, the Directive at a number of instances mitigates the positive information obligation and the prohibition of misleading omissions, stressing the importance of the "factual context", of the characteristics of the commercial practices, the circumstances and the limits of the communication medium (Article 7(1) and (4) UCPD). The notion of "context" allows determining in each case whether the information has been material or not.

These "safety valves" are built into the text of the Directive and aim at a flexible balance of interests. They are, however, not always taken over in the national legislation transposing the Directive. Thus, the French report points out that the Consumer Protection Code leaves less margin of appreciation, since it only mentions the limits of the communication medium used. The references to "context" and "circumstances" are omitted in the French Law.

Furthermore, the notion of the 'average consumer' may give rise to divergent interpretations at national level. Since a definition of this notion was not included in the provisions of the Directive but only in its preamble, many Member States have preferred not to introduce the definition in their national law. This is certainly wise in view of dynamic development of markets and case law, but opens for incongruence in the application of the substantive rules.

In addition, in some countries the definition of material information does not encompass only the Directives listed in Annex II UCPD, but also the special regulations implementing mandatory Community rules or special provisions governing information outside the scope of the UCPD (Hungarian report).

c. The importance of the communication medium

The importance of the communication medium for assessing the misleading character of an advert, and the misleading character of an omission in particular, has been widely recognised in statutory law and in case law already before the implementation of the Directive. According to the Spanish report TV and radio advertising legislation laid down statutory provisions, generally relaxing the obligation to provide information in the above means of communication. In the UK, while no formal provision in this sense existed under the CMARs, the TV Advertising Standards Code and Radio Advertising Standards Code specifically regulated the advertising practices in television and radio taking into account the specific character of these media. The scope of the obligation to provide information is said to be extended in respect to TV and radio advertising.

Many national courts did allow for certain flexibility depending on the medium where an advertisement is communicated. The French report refers to extensive case law where the size of billboards, the speed of public buses and other limitations of the medium by which an advertising message is communicated have been taken into consideration when judging the clarity and consumers' perception of the information provided. Also in Hungarian legal practice related to the former provisions of the Act on Business Advertising Activity and of the Competition Act, the HCA established in various cases that there was a difference between the means and the channels of marketing communication depending on their transmitting capacity. For advertisements published in the mass media, and more precisely in

the press, placement, accentuation and formal layout of the information were found significant, as headlines and highlighted parts have a much more important role than small print. Regarding the internet as an advertising medium, the extraordinary detailed and large amount of information it can provide had been stressed, as well as the consumer's opportunity to obtain more extensive information within a short time by a simple mouse clicking on links.

Despite this flexibility, the judiciary in a number of countries applied relatively strict criteria, not allowing the choice of communication medium to give a free ticket for confusing information. As indicated in the Hungarian report, the Hungarian Competition Council had insisted that a communication portraying or emphasizing an essential circumstance must do this accurately, so that the consumers can apprehend the connected and inseparable details of an advertisement simultaneously. The Council had refused to treat so-called integrated marketing campaigns as a homogeneous unit, although this kind of campaign may consist of inseparable communication elements (Hungarian report).

In Austrian case law there is a general rule that additional information which is necessary in order to avoid a deceptive impression, shall have the same value of attraction as the main message. If no risk for deception exists, the small print should only be legible (Austrian report). Likewise the Swedish Market Court when judging TV advertisements of special offers for mobile phones had found advertisers to be in violation of their information duties when the full conditions of the offer, essentially neutralizing or reversing the main message, appeared only in a few-second long snap-shots in the video clip and in illegible small-print. The Court dismissed arguments that more detailed information was available to consumers by other means.[17]

Following the transposition of the UCPD this judicial and administrative practice may have to change. The transposition of Artcle 7(3) UCPD into the national law of the EU Member States has for the most been literal.[18] Accordingly, where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations shall be taken into account in deciding whether information has been omitted. Moreover, the Directive prescribes that any measures taken by the trader to make the information available to consumers by other means shall likewise be taken into account. The assessment in the Hungarian report is that in the future the HCA will have to adapt its practice and in particular reassess its attitude to integrated media campaigns.

Some national reports, however, testify of incompleteness of the transposition. The Czech national report states that the provision of Article 7(3) UCPD does not seem to have been transposed in the Czech Consumer Law. The French report notes that Art. L. 121-1 II (1) *Code de la Consommation* does not explicitly require attention to be paid to measures taken by the trader to make the information available to consumers by other means. According to the French rapporteur this can be problematic for advertising on new means of communications such as SMS, MMS, WAP Internet mobile, etc.

There is so far no case law that clarifies the exact scope of this exemption from the obligation to provide essential information. It can be expected that for advertising in TV, or on mobile phones, the limitations of the media will have to be taken into consideration. Reference to

[17] See MD 2004:16 ("Vodafone"); MD 2000:4.
[18] See § 2 para 4 Austrian UWG; Art. 94/7 § 3 Belgian CPA; Art. 7 Hungarian Unfair Commercial Practices Act; Art. 22.3 of the Italian Consumer Code; 11 § Swedish MFL; Art. 6.1 and 6.2 CPRs in the UK, in line with the Directive but adapted to the English statutory style.

more detailed information on websites or other media would probably suffice for the information duty to be considered fulfilled. Still, it remains to be seen whether certain media may simply be considered inappropriate for certain types of more complex and sophisticated advertising claims. To allow promotional claims in a TV advert that are misleading by omitting essential information simply because consumers are referred to information elsewhere, appears shifting the burden to consumers. It appears that in such cases the limitation of the media should not be allowed to serve as an excuse.

Interestingly, after the transposition of the UCPD in Belgian law and after introducing a provision on the importance of the advertising medium corresponding to Article 7(3) UCPD, the President of the Commercial Court of Brussels has held that the misleading character of an advertisement is to be judged for each medium separately. Following this judgement the misleading character of advertisement in one medium (radio) cannot be remedied by information available in other media (in this case information provided in the business premises). According to the Belgian report the judgement is now under appeal and it would be interesting to see if it would possibly clarify the scope of Article 7(3) UCPD.

d. Invitation to purchase

Most Member States have chosen to take over Article 7(4) UCPD and the definition of the concept 'invitation to purchase' almost literally in their national legislation.[19] However, there are also deviations. The French report indicates critically, that Art. L-121-1 II *Code de la Consommation* does not give separate definition of the concept 'invitation to purchase' but instead integrates the definition into the very provision, which sets the specific information that shall be provided in case of invitation to purchase. Art. L-121-1 II thus requires the information listed in Article 7(4) Directive to be provided "in all commercial communication that mentions the price and the characteristics of the goods or services offered". By this conflation the scope of the obligation appears to become wider than that of Art. 7(4) UCPD, since the other elements of the definition are omitted.

Similar has been the implementation in Swedish law, where no separate definition of 'invitation to purchase is included. The Swedish provision (12 § MFL) reads:

> The marketing is considered misleading if a trader in a presentation offers a specific product with a price to consumers whereby the following material information is not apparent…

This mode of implementation indeed seems to result into a broader scope of the provision referring to all commercial communications and not only to those that urge consumers to buy. Also the Czech national report remarks that the transposition does not seem to be correct.

Furthermore, in the French law in respect to invitation to purchase, all requirements listed in Art. 7(4)UCPD are reproduced but in a rigorous manner, allowing no flexibility in terms of taking account of context and the character of the product (cf. Art. 7(4)(a) UCPD).

In consultation documents in the course of implementation of the UCPD at the national level the opinion has been expressed that an 'invitation to purchase' should, apart from indicating the product characteristics and the price, also incorporate a mechanism through which a

[19] See § 1(4) Nr. 4 in connection with § 2(6) Austrian UWG; Art. 22.4 Italian *Codice del Consumo*; Art. 94/7(4) LCD (Belgium); Art. 6(4) The Consumer Protection from Unfair Trading Regulations 2008.

consumer could actually realise a purchase.[20] It will ultimately rest upon the ECJ to provide authoritative interpretation of the meaning of the Directive. However, it appears that a loyal transposition will require also taking on board the flexibilities that are built into the concept as it appears in the Directive. Such transposition will also ensure that the balance between the interests of consumers and the general public interest in market transparency, on the one hand, and the interests of traders in efficient commercial communication, on the other, will be upheld.

5. Relationship between information obligations and contract law

Article 3 (2) UCPD expressly states that the Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract. However, in some countries, the link between a seller's advertisement and information duties and contract law is explicitly established in general or consumer contract law (cf. 13 § Consumer Sales Act (1990:932) in Sweden and Sections 277 (1) on defective performance of contracts and Section 248 on warranty liability in the Hungarian Civil Code in Hungary).

In other countries, while there is no statutorily established link between information duties in advertising and contractual rights and duties, such link is generally recognized in case law and doctrine. Consequently, infringement of information duties can give rise to claims for non-conformity and warranty liability according to general civil law, including claims for nullity of the contract and damages (see national reports Austria, Belgium, Germany, France).

Under English law, the normal type of advertisement that draws consumers' attention to the features and price of advertised goods and services does not generally amount to an enforceable offer to sell those goods or services at that price. Thus, claims made in advertisements will usually not become terms of any contract entered into in reliance on those claims. Nevertheless, there may be liability for false trade descriptions or misleading price indications. In Italy and Spain contract law will apply on an ancillary basis. In this regard, whilst advertising legislation will govern the substantive aspects of the obligation to provide information in fair trading, contract law will govern the basic aspects relating to the claims to seek redress against the advertisers based on contractual liability or based on civil liability.

Summing up, contrary to the claim in Art. 3(2) UCPD, the information obligations introduced as a result of the implementation of the UCPD will most probably have serious repercussions on Member States contract law.[21]

6. Specific information obligations

The national reports demonstrate that, separate from the general information obligations, there exist numerous information obligations laid down either in a horizontal way, or in a vertical, industry-, product-, and media-specific manner. As wittily quoted in the Belgian national report "the difficulty arises, not from the absence of legal instruments, but, paradoxically, from their multiplicity."

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[20] See Response of the Advertising Association, 13 January, 2008, available at: http://www.aigeurope.org/AA_response_to_the_Better_Regulation_Executive_review_of_the_consumer_protection_regime_in_the_UK_180108.doc

[21] Whittaker, The relationship of the Unfair Commercial Practices Directive to European and National Contract Laws, in: Weatherill/Bernitz (eds) *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Oxford: Hart Publishing, 2007).

A comprehensive comparative review of all positive obligations for advertisers to provide information in individual industries and concerning individual products or media would be prohibitive and goes beyond the scope of this report. The objective here is rather to get an orientation about the main areas where such specific information duties exist and to identify the underlying rationale for such regulation. For a country by country overview the reader is referred to the national reports.

Specific information duties are usually laid down in statutory provisions spread out among a variety of laws and administrative regulations: unfair competition law, contract law, administrative law (German report), in consumer law and advertising law (national reports Austria, Belgium, Czech Republic, France, Hungary, Italy, Spain) and in self-regulatory codes of conduct (the AS Codes in the UK). For the countries members of the European Union most information rules have their origin in European Directives. Thus, as mentioned above, Directive 2005/29 itself refers in Annex II to a number of Community Directives, which lay down specific information obligations, stressing that the list is not exhaustive.

6.1 Specific information obligations of a horizontal nature

a. Name, address and capacity of advertiser

In most countries there is no general obligation for advertisers to state their name, address and identity. The exception seems to be France where the advertisers are obliged to indicate their identity number SIREN, corresponding to the number in the Register of Commerce and of Commercial Companies in all advertising documents (French report). Likewise according to the Austrian report the name or the firm of the publisher and the manufacturer have to be disclosed in any media (§ 24 Austrian Media Act (MedienG). The Spanish report refers to Article 18 (2)(a) of the Law on Consumer Protection, where stating the identity of the "producer" in the sense of the entity advertising the goods (the advertiser) is required.

Furthermore, stating the advertiser's name is expressly required by a number of Community Directives, especially those dealing with new media like the E-Commerce Directive and those addressing distance selling. For these situations the anonymity of the seller and the detachment between the moment of communication and the moment of transaction, create spaces for opportunistic behaviour and a need for legislative intervention.

Apart from harmonized Community law, national rules exist requiring identification for specific activities: for instance institutes offering adult education in Hungary.

b. Price

Generally, there is no obligation to indicate price in the advertisement. However, following Article 3(4) of Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, any advertisement which mentions the selling price of products sold by traders to consumers shall also indicate the unit price subject to some exceptions.[22] The Swiss Ordinance on the Indication of Prices (OIP) follows similar principles. Traders are not under obligation to indicate their prices, but once they choose to do that the advert has to indicate the price to be paid effectively (art. 13(1) OIP). Positive information obligations in contract and consumer law in a number of countries envisage that

[22] For national implementation of this Directive see German Price Indication Ordinance (Preisangabenverordnung), Belgian Royal Ordinance on Price Indications; Art. 13 lit. b and article 22 lit. c of the Italian Consumer Code, French Decree (Arrêté) of 3 December 1987 on the Information of Consumers about Prices, etc.

the price should be communicated to the consumer prior to conclusion of the contract (§ 5c Austrian Consumer Protection Act).

Additional information obligations concerning price are attached to distance selling contracts, and electronic commerce. Package tours pose likewise specific challenges in the indication of a complex price and are subject to disclosure requirements.

Beyond harmonised European requirements, national specificities seem to exist as well. For instance in Germany driving school teachers are under special statutory obligation to indicate prices in a particular way (see German national report). In France, a number of decrees set specific obligations for the way to indicate prices concerning specific products such as bread, meat, repairing and maintenance services in the housing and household electrical appliances sectors (French report). More generally, a Decree of 2 September 1977 (Arrêté 77-105/P) stipulates information obligations in advertisement in the case of price reductions. Similar information obligations were set in the Swedish Marketing Practices Act of 1995 (§ 13 MFL).

In the UK apart from general obligations to state the price in a clear manner set in the AS Code, the Guidance Notes specifies areas where price information is particularly relevant including flight and cruise advertising.

c. Selling methods

A horizontal approach is taken in Community directives and national legislation, which refer to certain selling methods irrespective of the product involved. Here belong the Directives on Doorstep Selling and Distance Selling.

The most wide-reaching Community instrument in this regard is the **Distance Selling Directive** (see Articles 4 and 5 of Directive 97/7/EC). As a result of European harmonisation, Member States have been obliged to introduce specific information duties for sellers concerning (a) the identity of the supplier (b) the main characteristics of the goods or services; (c) the price of the goods or services including all taxes; (d) delivery costs, where appropriate; (e) the arrangements for payment, delivery or performance; (f) the existence of a right of withdrawal; (g) the cost of using the means of distance communication, where it is calculated other than at the basic rate; (h) the period for which the offer or the price remains valid, (i) where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently. In addition, the Directive sets out requirements as to the manner in which the information has to be provided. These requirements have been transposed almost literally in the national legislations of the EU Member States.[23]

Pursuant to the **Doorstep Selling Directive** (Directive 85/577/ECC) traders are required to give consumers written notice of their right of cancellation. In Spain the obligation to inform consumers of withdrawal rights is extended to contracts executed outside the traders' premises, at the consumers' domicile or on public transportation.

When it comes to different methods of sales promotion the state of harmonization of Community law is less certain. In this respect a review of the national reports demonstrates

[23] See § 5c Austrian Consumer Protection Act; Art. 78 Belgian CPA; § 312 c German BGB in conjunction with § 1 Regulation on the Information and Advisory Obligations under Civil Law (Verordnung über Informations- und Nachweispflichten nach bürgerlichem Recht, InfBGV) the respective AS Codes in UK; Articles 50-61 of the Italian consumer code.

wide regulatory divergence with some countries, offering particular abundance of regulations and information requirements concerning such offers. Whereas part of these requirements may be seen as concretisation of the general information obligations of Article 7 UCPD, others may be more questionable in terms of compatibility with the Directive (cf. Belgian report with reference to Art. 64 CPA; German report with reference to § 4 Nr. 4 and 5 German UWG; 12 § 3, 13-15 §§ of the new Swedish MFL).

6.2 Specific information obligations of a vertical nature

a. Product-specific (goods)

Typically, sectoral legislation exists in areas of particularly sensitive products with impact on human life and health such as pharmaceuticals, foodstuffs, cosmetics, dangerous substances etc. The common denominator for these provisions is that they give expression of an increased public interest and concern for consumer health and safety. By way of example extensive information obligations in the sphere of **medicinal products** for human use can be found in Articles 86 to 100 of Directive 2001/83/EC, distinguishing between non-prescription medicines, where advertising to the public is allowed under strict conditions and prescription medicines where advertising is allowed only to professionals. These rules are transposed and expanded at the national level and are enforced through a variety of administrative and soft law tools.[24] Similar logic and structure follows also the Swiss legislation on pharmaceuticals (Loi fédérale sur les médicaments et les dispositifs médicaux) and the Ordinance on advertising of medicines (l'Ordonnance sur la publicité pour les médicaments).

The marketing of consumption products which knowingly involve considerable risks to consumer health is generally subject to serious restrictions and outright bans. In those instances when marketing is allowed, ever growing requirements of indicating the risks associated with the product have been introduced. This is in particular the case of **tobacco** advertisements (see national reports Hungary, Germany, Switzerland[25]), but also of advertising of **alcoholic** drinks (for specific examples see national report Belgium). Community rules also mandate the provision of information on the risks of smoking and alcohol consumption. Additional products the marketing of which is subject to information requirements chiefly for safety reasons are dangerous products such as firearms (French report) as well as hazardous materials (German report), including pesticides, biocides and similar substances.

Rules on the advertising of **foodstuffs** are set in Directive 2000/13/EC of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs. The information requirements in this Directive (concerning composition, 'best before' date, etc.) relate however, mostly to the labelling of foodstuffs and not to the advertising, narrowly construed.[26] Similar detailed labelling requirements on foodstuffs are set in the Swiss Federal Ordinance on Foodstuffs and Articles of Daily Use (ODAlOU).

Beyond harmonised Community law, in some countries information obligations are introduced for certain categories of foodstuffs in view of enhancing healthy consumption

[24] An example of the latter is the Pharmig Code of Conduct for Pharmaceuticals as well as AS codes in the UK, supported by the Medicines Act 1968. For indicative list of requirements see the national reports of Belgium and of Germany with reference to Arzneimittelgesetz (AMG) (producer, description of the product, authorisation number, content, active substances, etc.); in France with references to *Code de la santé publique*.

[25] Ordonnance sur le tabac, Otab, RS 817.06.

[26] The approach is retained in Proposal for a Regulation on the provision of food information to consumers, 2008/0028 (COD). For national transposition of these rules see German and Austrian reports.

habits and raising consumer awareness about products that cause obesity or are associated with health risks. Interestingly, in France, the Law Concerning Public Health Policy of 2004 (Loi relative à la politique de santé publique) prescribes in Article 29 that all manufactured foodstuffs and beverages containing added sugar or salt, or artificial sweeteners, shall bear in their publicity a warning text: "For the sake of your health consume minimum five fruits or vegetables per day" and "For your health, avoid to eat too much sweet and salty food". Alternatively, advertisers are required to pay a tax of 1,5% of the costs of the advertisement in the budget of the National Institute for the Prevention and Education for Health (Institut national de prévention et d'éducation pour la santé (INPES)).

A number of product-specific information obligations are introduced with a view of enhancing **environmentally-friendly** consumer choice and ultimately sustainable development. A good example is Directive 1999/94/EC, requiring provision of consumer information on fuel economy (fuel consumption) and CO2 emissions in the marketing of new passenger cars. The Directive introduced a standardized label for these purposes, however with disappointing results.[27] Related to environmental protection are information rules governing the labelling and advertising of biological foodstuffs (see Swiss and Spanish reports). Further-reaching soft law rules on environmental marketing are applied in Belgium under the Environmental Advertisement Code of the JEP and in the UK pursuant to Art. 49 AS Code (Belgian and UK reports).

b. Product-specific (services)

Other product-specific information rules concern **complex services**, where an information imbalance is the typical situation, and where considerable economic interests of consumers are at stake. Examples of these rules are Article 3 of the Package Travel Directive (Directive 90/314/EEC) and Article 3(3) of the Timeshare Directive (Directive 94/47/EC), setting detailed requirements on the information to be provided in brochures of package holidays and on the contents of advertisements for timeshare contracts.[28] These rules have been transposed in all Member States of the EC.[29]

Particular attention deserves the myriad of information requirements accompanying the regulation of the **financial services** sector. Here count the information requirements in Community Directives on consumer credit (Directive 98/7/EC amending Council Directive 87/102/EEC), on the distance marketing of consumer financial services (Directive 2002/65/EC), on collective investment in transferable securities (Directive 2001/107/EC amending Council Directive 85/611/EEC), on life assurance (Directive 2002/83/EC), etc. Apart from formally binding Community instruments, information duties in national law occasionally stem from soft law instruments of Community law, such as Commission Recommendation of 1 March 2001 on pre-contractual information to be given to consumers by lenders offering home loans. The recommendation proposes certain standardized

[27] In a recent study on the effectiveness of this Directive the Commission reports on labels of strongly varying quality in different Member States. While the labelling scheme is considered a useful tool to raise awareness about the climate change impacts of passenger cars, no evidence is found that labelling provided a tangible contribution to reductions in the average CO2 emissions of new cars sold in the EU. Commission staff working document, Impact Assessment, COM(2007) 19 final [SEC(2007) 61].

[28] For critical analysis see Haupt, An Economic Analysis of Consumer Protection Law, *German Law Journal*, (4) (11)(2003), 1137-1164.

[29] See for package travels e.g. Austria, §§ 4 to 11 BGB-InfoV (Germany), Art. 7 (1) a) Unfair Commercial Practices Act (Hungary); Article L211-5 Code du tourisme (France); articles 82-100 of the Italian consumer code. Cf. for timeshare contracts § 482 Abs. 2 BGB in conjunction with § 2 Abs. 1 Nr. 1 BGB-INfoV (Germany);

information to be provided on the purpose, type, credit rates and cost of home loans. These rules have been taken over by some Member States of the EU in their national laws (see e.g. German report, French report). Detailed information rules exist in most countries in respect to collective capital investments, in particular on the content of the prospectus.[30] On financial services specific obligations are foreseen in Italy by law September 1 1993, n. 385.

In Switzerland the Federal Law on consumer credit[31] remits to the Law Against Unfair Competition, which contains a detailed catalogue with provisions on consumer credit (Art. 3 lit. k-n LCD). A number of information omissions are specifically identified as acts of unfair competition.

Many national reports refer to additional rules on specific services, such as real estate services (Austrian report, Spanish report, Italian report), employment services and health and beauty therapies (UK report).

c. Media-specific

Some information requirements are only confined to certain media. Such is the case with the information requirements in Articles 5 and 6 of Directive 2000/31/EC of the Electronic Commerce Directive. Generally, it is considered that new media such as the Internet have greater flexibility and capacity of allowing consumers to get the information they need, without imposing serious burden on advertisers. A hyperlink can always in a cheap and cost-efficient way lead the consumer to a new level of all sided information if the consumer wants to invest the time and effort of retrieving the additional information.

Following the transposition of the **E-Commerce Directive** 2000/31/EC all countries of the EU have introduced the information requirements set out in the Directive in respect to information society service providers when entering electronic commercial transactions. Furthermore, pursuant to Art. 5 Directive 2000/31/EC service providers are required to render easily, directly and permanently accessible to the recipients of the service and competent authorities information on their identity, address, possible authorisations and registration numbers etc. Commercial communications which are part of, or constitute, an information society service have to comply with requirements on identifying the commercial communication as such as well as with specific information obligations on promotional offers.

For electronic media (TV and radio) the marketing of alcohol or medicines or other products and services, associated with risks to consumer health is subject to stricter information duties (see European TV Directive and Swiss report). The Italian report names the existing explicit provisions laid down in statutory law with reference to television sales (article 29 to 32 of Italian consumer law) and concerning advertising in TV and radio.

6.3 Logic and rationale

The above overview, which is far from exhaustive, demonstrates that the picture of specific information duties is still very much of a jig-saw of bits and pieces, where transparency and coherence are hard to achieve. Despite the attempts at consolidation and streamlining of the Community *acquis* the area is still marked by considerable fragmentation. The coherence is further impeded by the fact that the underlying logic of individual information disclosure

[30] For detailed description see Swiss national report with reference to Loi fédérale sur les placements collectifs de capitaux (LPCC), RS 951.31, and Art. 106 Ordonnance sur les placements collectifs de capitaux, OPCC, RS 951.311

[31] La loi fédérale sur le crédit à la consommation (LCC).

duties differs substantially and relates to so diverging issues as protecting consumers' health and safety, enhancing sustainable development and promoting market transparency.

Whereas the UCPD aimed at full harmonization and overcoming the fragmentation in the regulation of commercial practices at both national and European level, the Directive opted for a *lex specialis* principle in respect to the relationship between special information duties and the general rules of the Directive. Pursuant to Article 3(3) UCPD "in case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects. the specific provisions." This principle has been taken over by national legislations transposing the Directive (see e.g. Hungarian report).

Certainly, by qualifying all information duties in Community law as material information, the omission of which is prohibited as an unfair commercial practice on the basis of Article 7 UCPD, a move towards consolidation is made (cf. Article 7(5) UCPD). However, when even the Community legislator cannot list in an exhaustive manner all existing information obligations, then the difficulty for both traders and consumers to navigate in the normative thicket is apparent. Put in another way, the quest for market transparency has hardly been met by regulative transparency. The League may wish to take a stand on the need for better and more transparent law making that would enhance certainty and predictability on the market in the interest of both business and consumers.[32]

7. Enforcement of statutory information obligations

Another source of regulative divergence, and ensuing uncertainty for market actors, relates to the considerable differences between national legal systems in terms of remedies, right of action, procedural avenues and actors involved in the enforcement of the relevant substantive provisions. Theses differences persist despite the attempts at uniformity made at the European level through the UCPD since the Directive addresses first and foremost substantive rules and leaves a large margin of discretion to the Member States concerning institutional and procedural aspects.

Presenting a full-blown comparative analysis of different models of enforcement is clearly beyond the scope of this report. Moreover, neat systematisations are hardly possible, since also within each national legal system, a variety of remedies and enforcement mechanisms exists. Here I will limit myself to only sketching out a few most characteristic models of enforcement as they transpire from the national reports. The objective is solely to stress the crucial role of enforcement for the practical scope and impact of normative information obligations and for the extent to which traders and consumers experience the existing rules as facilitating or constraining market activity. Valuable information in on national patterns of enforcement can be found in the national reports.

Also in terms of enforcement the four main models of regulation of commercial practices mentioned above provide a helpful analytical grid.

a. In the countries belonging to the **unfair competition** model, taking the German UWG as a precursor, enforcement in cases of misleading omissions and breach of statutory information duties builds chiefly on injunction proceedings initiated by private actors – competitors,

[32] See Mankowski, Information and Formal Requirements in EC Private Law (6) (2005) European Review of Private Law, 779-796.

business associations and consumer associations. The proceedings are instituted before the ordinary courts and can lead to court decisions ordering the cessation of the commercial practice under penalty of a fine and even detention for breach of court order, as well as awarding damages. The most efficient instrument, at least in the German system, however, seems to be the institute of the warning brief (Abmahnung) whereby the trader is urged to enter a voluntary commitment to cease and desist from an unfair competitive practice and thus to avoid court proceedings. The agreed penalty is thereafter enforced as a contractual penalty for the case of subsequent violation of the trader's commitment to cease and desist (German report). The involvement of public authorities is kept to a minimum, whereby publicly funded umbrella consumer organisations are entrusted with protection of the collective consumer interest (see German report, Austrian report, Swiss report).

b. In the countries belonging to the **Scandinavian model** of marketing practices law, the injunction is also the main remedy. There is, however, also the possibility for a positive injunction, whereby the trader is required to submit the missing information or undertake other positive action. The model is based on parallel private and public enforcement of the marketing practice acts, including the information duties. Competitors, trade associations and consumer association are all given a right of action. The collective consumer interest is, however, foremost enforced by the Consumer Ombudsman who can issue cease-and-desist orders in cases of minor importance and institute injunction proceedings before the competent Market Court.

c. In the group of countries building on a combination of general **civil law** and **consumer law**, consumer law is enforced chiefly by way of criminal and administrative sanctions. Various public authorities have as their chief function to monitor the market and prosecute violations of the collective consumer interests, including the interest in information (See in France the General Agency of Competition, Consumption and Repression of Fraud, in Italy the Italian Competition Authority, in Belgium the Minister of Economic Affairs, Director General of the General Direction Mediation and Control).[33] The courts can also order termination of the infringement in a pre-emptive manner, as well as dissemination of corrective statements. Private consumer associations have a right to step in criminal procedure and claim damages on behalf of the consumer collective. Different possibilities exist also for enforcing positive obligations to provide information by way of positive and negative injunctions in civil proceedings brought against traders by affected parties. Competitors can sue on the basis of civil law rules on unfair competition, or for Belgium on the basis of the CPA (Spanish report, Italian report, Belgian report, Czech report).

d. The UK advertising control system is essentially self-regulated. The Advertising Standards Authority (ASA) and the Committees of Advertising Practices are the most active bodies in this area, composed by representatives of the industry, consumer associations, independent consultants, etc. In this model, complaints are lodged before the ASA or respective specialized bodies. The adjudication can be appealed before adjudicators designated by the ASA. Final decision can be further subject to judicial review. Following the implementation of the UCPD in the UK certain offences under the relevant Regulations are criminalized. Moreover, the prohibitions on misleading actions and omissions, aggressive practices and the specific unfair practices prohibited in the Annex of the UCPD are offences of strict liability as is the prohibition of misleading advertising in the BPRs. The duty to enforce the Regulations is placed chiefly on the OFT.

[33] Direction générale de la concurrence, de la consommation et de la répression des fraudes (D.G.C.C.R.F).

According to the UK national report the introduction of criminal sanctions under the implementing regulations of the UCPD had raised some concern within the UK business community that such criminal sanctions would weaken the effective self-regulatory system currently undertaken by the ASA and the CAP. Yet the report's preliminary assessment is that the advertising industry's self-regulatory regime is unlikely to be altered by the introduction of the UCPD because the OFT will continue to act only in cases where the non-statutory bodies (ASA) have been unable to take effective action. The notion of complainant before the ASA is very broad and includes consumers, consumer associations, competitors or public agencies.

e. Finally, there are a number of idiosyncratic mixes of public and private enforcement that fit only difficultly within the above four models. Here belong not surprisingly many of the legal systems of the New Member States from Central and Eastern Europe, which during the last years experience impressive institutional dynamics and innovation, not least under the sign of transposing the *acquis communautaire*. In Hungary, the enforcement is mainly of an administrative law character, whereby the main sanctions are administrative injunctions and penalties. Previously, the main public agency authorized to enforce the prohibitions of unfair marketing and advertising and consumer fraud was the Hungarian Competition Council (HCA) on the basis of the Competition Act and the Act on Business Advertising Activity. The new Unfair Commercial Practices Act will, however, bring a change in the distribution of competences. As a main rule, the National Consumer Protection Authority (NCPA) will have the general competence to enforce the provisions against unfair market practices. The HCA will in the future be competent to control both B2B and B2C practices, but only if they are capable of distorting competition.[34] Competitors and their associations, as well as consumer associations can lodge a complaint against unfair commercial practices before the competent public authority. For traders there is in addition the possibility to file a lawsuit against a competitor before the ordinary courts on grounds of acts of unfair competition. Consumer organisations are also entitled to commence an action in the public interest.

Common for all enforcement models sketched out above is that special information duties envisaged in vertical product- and industry-specific legislation are typically enforced by way of penalties and administrative cease-and-desist orders imposed by various governmental agencies and public authorities such as Agencies on Foodstuffs and Pharmaceuticals, Drug Administrations, Financial Inspections, and the like. Another common feature is that individual consumers are only rarely empowered to claim injunction on the basis of infringement of commercial practices legislation. There are, however, exceptions and some innovations in this respect (see Austrian report, Hungarian report). Some national reports also mention possibilities of collective and group proceedings, or possibilities for public authorities to step in civil proceedings as amicus curia (Hungarian report, cf. Swedish Group Proceedings Act of 2002).

8. The role of self-regulation and of voluntary advertising codes

Apart from the system in the UK which is almost entirely based on self-regulation, voluntary codes of conduct and self-regulatory bodies for enforcement of such codes are customary also

[34] According to Art. 11(2) UCPA as a rule f thumb the competition is considered affected if the practice is performed in a nationwide periodical that is published in three counties, or is directed at customers and occurs on places of sale in at least three counties.

in other jurisdictions, where they play a more complementary and supportive role to other public and private schemes of enforcement. Following the implementation of the UCPD, the role of such codes is additionally enhanced (see Article 6(3) UCPD). A detailed description of the elaborate self-regulatory schemes in Belgium, France, Hungary and Italy can be found in the respective national reports. More limited seems to be the role of self-regulation in In Germany and Switzerland.

9. Liability of advertising agencies and intermediaries

The national reports confirm that information obligations imposed on advertisers have "spill-over" effects on a variety of agents involved in the process of creating and disseminating of commercial communication, notably advertising agencies and media. The latter can in most countries be held liable for violation of fair trading standards in advertising and of information obligations in particular, but the liability is usually subsidiary to that of the advertiser. Until only recently, in countries that regulated advertising and marketing by way of unfair competition acts, such liability had been excluded since there was a requirement of a competitive relationship, which the agencies did not fulfil. However, following the transposition of the UCPD this limitation can no longer be sustained. Certainly, the liability of advertising agencies and media depends on the extent of participation and contribution to the alleged violation and may be limited in certain respects (see national reports Austria, Belgium, France, Germany, Hungary). In particular, the liability of media is more carefully treated due to considerations of free speech (German report).

There appear also to be countries where the liability of intermediaries is seriously curtailed or non-existent. This is reportedly the case in the Czech Republic. In Italy, the previously existing subsidiary liability for violations of information obligations of the owner of the broadcasting company and of the author of the TV or radio show has recently been repealed (Italian report). In Spain, it appears that advertising agencies and media would be held liable only in respect to breaches specifically attributable to them (e.g. advertisements made or published in clear breach of traders' instructions). In Switzerland the Rules on fairness of commercial communication within the system of self regulation place the main responsibility for the truthfulness and legality of commercial communication on the advertiser. Advertising agencies (Berater, publicitaires) are responsible only for the legality of the message, whereas other agents and intermediaries have to follow the instructions and are held liable only in case of grave and intentional violations.

10. Arguments for and against imposing positive information duties on advertisers

In this last part of the report a summary of arguments for and against extended information obligations will be presented. The discussion is partly based on the national reports and partly on the mounting legal and economic doctrine concerning information obligations as a regulative tool.

10.1 The pros

The cursory review of general and specific information obligations existing so far at national and European Union level has demonstrated that such obligations are prompted by a variety of policy considerations. The main rationale for introducing information obligations for advertisers seems to lie in attempts of governments to regulate the marketplace in direction toward increased market transparency and protection of consumers' economic interests.

However improved consumer information is also expected to serve other purposes of more general, public interest character.

a. Market transparency

The theoretical and policy debate on the pros and cons of consumer information policy and of information obligations is strongly influenced by economic theory, and in particular by a number of contributions to this theory that are usually referred to as information economics. As early as in the 1960s information economists focused on the importance of information for efficient markets. They drew attention to the existence of considerable price and quality uncertainty on a variety of markets and on the adverse effects of the existing information asymmetry between consumers and traders in terms of knowledge about price and quality of goods.[35]

Against this backdrop, imposing information obligations on advertisers is obviously seen as a way to compensate for information asymmetries and to restore the equilibrium in the market. Improved information is expected to enable rational consumer choice allowing consumers to steer production and supply according to their preferences in line with classical theories of competition. Informed consumer choice as a means of enhancing competition, economic growth and ultimately welfare, is explicitly put in the basis of Directive 2005/29/EC and is underlined in a number of national reports (see Belgian, Hungarian and Italian report, cf. Swiss report quoting the Explanatory memorandum to the Bill of 14 July 2005 on amendment of Law on information of consumers). Placing the burden of providing information on advertisers is also in line with economic principles of the cheapest cost-avoider. Advertisers are anyway in a possession of the information required (normally concerning their own products) and are consequently not particularly burdened by having to search for the information.

Economic theory occasionally lurks behind a number of specific product-related information obligations. In particular, some distinctions employed by information economists seem to have found their way to law and policy makers. One suggested distinction in analysing the efficiency effects of market information is that between search, experience and credence goods. In the group of search goods economists classify product qualities that consumers can ascertain by simple search and inspection (e.g. the colour of a pair of shoes). In the group of experience goods fall goods, whose qualities can be ascertained only by experience i.e. by trying and using the product (e.g. the taste of a tuna can).[36] The third group covers goods characterized by qualities, which consumers can hardly ever ascertain independently, even after long-term use. Here belongs the degradability of a detergent, but also the very need of a car repair service or even of a surgical operation.[37] For this latter category of qualities consumers can only rely on the information provided by sellers or, alternatively, undertake expensive expert advice. Other distinctions used in information economics are those between high- and low-value products and between rarely and frequently purchased goods.

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[35] Stigler, The Economics of Information, Journal of Political Economy, 1961, 213; Mackay, E., Economics of Information and Law, 1982; Stigler, The Economics of Information; Akerlof, The Market for "Lemons": Quality Uncertainty and Market Mechanism, in: Akerlof, *An Economic Theorist's Book of Tales*, 1984; Hadfield, Howse, Trebilcock, 'Information-Based Principles for Rethinking Consumer Protection Policy' (2004) *Journal of Consumer Policy*, 131-169.

[36] Nelson, 'Information and Consumer Behaviour' (78) (1970) *Journal of Political Economy*, 311.

[37] Darby/Karni, 'Free Competition and the Optimal Amount of Fraud' (1973) *The Journal of Law and Economics,* 67.

The distinctions in product qualities highlighted by information economists suggest that the problem of information asymmetry may be more acute and hard to cure by market forces in the case of rarely purchased experience and credence goods (see in this sense Hungarian report). Complex products and services seem likewise to pose more serious problems and possibly require intervention. Indeed, many of the specific information obligations imposed on advertisers concerning pharmaceuticals, foodstuffs, cosmetics, financial and real estate services are associated with such products and product qualities. Imposing specific information obligations for certain marketing methods and media, such as distance selling and e-commerce, is also based on characteristics of these methods, which prevent consumers from examining the product and increase information asymmetries. Finally, whereas price is generally a pretty straight forward characteristic, it is often artificially complicated by traders in order to perturb consumers' ability to compare and exercise rational choices. General indication of comparable per unit prices is expected to allow consumers to compare and act more confidently on the market.

This, admittedly over-simplified summary of some main findings of information economic theory suggests that information asymmetries are behind the prevailing number of information obligations existing in European and national law.

b. Protection of non-economic consumer interests and general public interests

Information asymmetry is a main reason for intervention also in sensitive areas such as health, safety and environmental protection. Information obligations are also here expected to compensate for the inherent inability of consumers to ascertain product quality prior (and sometimes even after) purchase. The health and safety effects of medicines and foodstuffs, the environmental characteristics of foodstuffs or of passenger cars are examples in point. However, the policy objectives underlying these last mentioned instances of intervention go far beyond the protection of consumer economic interests and intersect with overarching general interests in public health and sustainable development. In this context information obligations are supposed not only to help consumers to protect themselves, but also to encourage them to engage in promotion of other societal values (e.g. clean air, social responsibility, see Swiss report with references). Moreover, the consequences of inadequate information in these areas can be irrevocable and detrimental for the consumer, as well as for society at large.

c. Protecting consumers against themselves

Finally, as pointed out in the Belgian report, occasionally information obligations have the objective to protect consumers from themselves. This is certainly the case of mandatory warnings in advertising and packaging on the dangers of tobacco, of alcohol consumption or of fast driving. Here we identify a paternalistic distrust in the ability of consumers to cope themselves with temptations and an attempt to steer consumers into sound consumption habits. By imposing positive information obligations on advertisers the latter are effectively required to share part of society's responsibility for allowing certain unsound consumer products on the market, given that it is advertisers who profit from this consumption.

As a general point of departure, correcting information asymmetries does not seem to meet major objections in the policy discussion in the countries that have submitted national reports. Obviously, advertisers are in a superior possession when it comes to knowledge about the value and quality of their products, which makes them a cheaper information provider. Placing the information obligation on them implies synergies and appears, at least prima facie,

economically rational and sensible. As mentioned in the introduction to this report, information obligations are a less onerous way of regulating consumer markets than mandatory product standards or bans. Seen from this perspective it is not surprising that informed consumers have become the darlings of European integration and information duties - a preferred instrument of consumer policy. It is also emphasized in national reports that a serious protection of consumers against unfair marketing practices is also necessary and useful for the protection of fair enterprisers against unfair behaviours of their competitors (Italian report).

10.2 The cons

While it can safely be said that imposing certain information obligations on advertisers is in principle accepted as a tool of consumer policy, the intensity and instances of intervention, the number of information duties, the scope and content of information obligations and the way of their enforcement are issues provoking serious debate. Not surprisingly, the strongest objections that are raised against wide-reaching information obligations come from the affected industries. Yet it would be simplified to see a dichotomy along the lines industry (against information obligations) versus consumer advocates (pro information obligations). In fact, many scholars and policy makers question the wisdom of exaggerated information duties not from industry, but from a consumer perspective.[38]

a. Costs of information obligations

Although information obligations normally do not involve costs of finding and retrieving the information, the latter being generally known to the advertiser, there are still costs associated with redesigning and adapting packaging and commercial communication to changing information requirements. Moreover, extensive information duties may imply that certain particularly effective media or communication strategies have to be abandoned. These less apparent costs of information obligations are seldom addressed in the policy debate. In particular in the process of transposing the UCPD a discussion seems to unfold as to the scope of the obligation to provide information. In countries where this obligation is a novelty there is concern that traders are overburdened with information duties without achieving the desired positive effect for consumers (Austrian report).[39]

b. Effectiveness of information obligations

Importantly, the effectiveness of information obligations is questioned from both industry and consumer quarters. Economists and legal scholar also voice scepticism as to the capacity of information obligations to achieve the desired change in consumer conduct. Information economists themselves were quick to emphasise that information asymmetry does not necessarily call for government intervention. In many situations the market itself would provide the necessary information, either by voluntary disclosure by competitors, by building reputation mechanisms such as trademarks, advertising or goodwill, or alternatively by third parties, who specialize in information provision. From a different theoretical angel attention is drawn to failures in government regulation and to the difficulty of matching the dynamics of markets by directing market communications through administrative prescriptions.[40]

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[38] Howells, 'The Potential and Limits of Consumer Empowerment by Information' (32) (2005) *Journal of Law and Society*, 349-70.
[39] Mankowski (2005).
[40] Beales/Craswell/Salop, The Efficient Regulation of Consumer Information (1981) *Journal of Law and Economics*, 491; Rubin, The economics of regulating deception (10) (1991) *CATO Journal*, 667.

In a somewhat different vein, it has been argued that mandatory information disclosure rules can hamper a market-driven voluntary information provision and lead to decrease in the amount of truthful information in the market. Authors point to sometimes paradoxical effects of government programmes on mandatory information disclosure. In a less transparent market, competitors may also be uncertain about prices and quality of competitive products, but this uncertainty might be beneficial to consumers. In such environment, mandatory disclosure requirements may have the adverse effects of contributing to collusive behaviour, price-fixing and stiffening of competition.[41]

Again with support of information economics and behavioural economics, it is argued that an excessive amount of information can have counter-productive effects of reducing rather than increasing market transparency, making it more difficult for consumers to actually find the information they are interested in (Austrian report, see also Hungarian report on the question of information overload).[42] Consumer advocates bring forward a number of factors that set limitations to information as a tool for consumer empowerment, such as: lack of time, lack of alternatives for low-income consumers and various market impediments to reacting to information by switching. The use of mandated information foremost by middle and upper-class consumers is also a matter of criticism.

Furthermore insights from behavioural economics are brought to highlight the substantial deviation of real-life consumers from the model of the rational average consumer accepted in classical economic theory and basically taken as a benchmark by the jurisprudence of the ECJ ("the reasonably well informed and reasonably observant and circumspect average consumer"). In sharp contrast to this model behavioural economics has produced abundant empirical evidence of the limited ability of consumers to understand and process information, of tendencies to following self-serving interpretations, to over- or (under-) optimism and generally irrational behaviour.[43] Seen in this context increasing the amount of information is hardly promising. It can rather contribute to an information fatigue, whereby consumers see even less sense in trying to penetrate the complexity of the information environment.

c. Commercial communication and free speech

Occasionally, the question of the compatibility of excessive information obligations with the fundamental freedom of expression and freedom of speech is raised. This has been the case in Belgium at the time of the adoption of the CPA (Belgian report), as well as in Sweden, at the time of the adoption of the positive information disclosure duty in the first Swedish MFL. Certainly all countries that have submitted national reports recognize these fundamental freedoms and are bound by Article 10 European Convention of Human Rights. As is well known, the European Court of Human Rights (ECtHR) has ruled that Article 10 ECHR in principle applies to advertising messages and to commercial speech. This has been confirmed by national constitutional tribunals (see French report, Hungarian report). At the same time, it is accepted that commercial speech can be subject to greater restrictions and control, because business advertising is undertaken in the self-interest of the advertiser and its main goal is not self-expression (Hungarian report). In the Belgian debate information duties were defended as

[41] Tunney, 'The Neglected Tension Between Disclosure of Information in Consumer and Competition Law Contexts' (25)(2002*) Journal of Consumer Policy*, 329–343.
[42] Haupt, An Economic Analysis of Consumer Protection Law, *German Law Journal*, (4) (11)(2003), 1137-1164; Long, Navigating the Maze: Reviewing the Information Disclosure Requirements in the Financial Services *Acquis* (2008) *European Business Law Review*, 485-524.
[43] Howells, 'The Potential and Limits of Consumer Empowerment by Information' (32) (2005) *Journal of Law and Society*, 349-70.

constituting limitations on the freedom of speech in the public interest and thus falling within the scope of Article 10(2) ECHR. There is so far no case law from the ECtHR or from national constitutional tribunals concerning the compatibility of information obligations with constitutional law. Yet, according to some national reports, if information duties are driven to an extreme, it is not excluded that such cases may emerge in the future (French report).

d. Regulative thickets

Finally, the general impact of a growing number and variety of information duties on the regulative environment has to be considered. Attention is drawn in some national reports to the redundancy and overlap of industry- and product-specific information disclosure rules following the transposition of the UCPD and to the ensuing problems with clarifying the rights and obligations of market actors as well administrative and enforcement competences. The transposition of the Directive is seen positively, as an occasion to review these rules and their compatibility with each other and a chance to improve the regulative environment (Hungarian report).

e. Certainty v. flexibility?

Turning more specifically to the implementation of the UCPD, the important question has been raised as to the balance between clarity and flexibility of the legal rules and the choice of appropriate regulative technique when defining the legislative standards and information obligations. As pointed out in the French report it is important to leave sufficient flexibility in the assessment of the individual case. The appreciation of when an omission of information in commercial communications is misleading should be allowed to take account of the character of the product (its reputation, notoriety and complexity, possible effects for human health and safety or for the environment), the character and limitations of the medium, as well as the context and the targeted consumers. At the same time, while allowing for flexibility and providing a margin of appreciation in the particular case, the rules should remain sufficiently precise in order not to put at risk the protection of consumers or the interest in legal certainty for the advertisers.

Defining carefully the benchmark consumer is likewise important in order to have a better idea about the scope and effect of the information obligations. Also here a balancing exercise between a firm and universal standard for all commercial communication and a flexible standard adapted to the circumstances of the case is needed. The French rapporteur suggests that there is a need for a more precise definition of the consumer who is the addressee of an advert and who is taken as a benchmark in order to ascertain the degree of information that has to be provided and the misleading character of the omission. As an alternative the rapporteur proposes that it could be asserted that there is no one notion of consumer, but that the notion has to be adapted to the type of advertising measure and the media used, or the product that is advertised. These can be issues for further discussion by the Congress.

Conclusion

On the basis of the national reports and the analysis above the following proposal is submitted for discussion by the LIDC congress.

1) The League should in principle support measures enhancing market transparency and truthful commercial communication, while stressing the need to balance such measures against the principle of free market communication. The choice of form, content and medium of commercial communication should essentially rest with advertisers.

2) Positive information obligations on advertisers should be imposed in carefully selected instances of well-evidenced information asymmetries, where additional information can be effectively apprehended and used by consumers.
3) Concerning the implementation of the UCPD in the national laws of the EU Member States, the League should argue for loyal implementation of the Directive's provision on misleading omissions, transposing the flexibilities envisaged by the Directive in determining when a commercial practice constitutes misleading omission, in particular the importance of context, communication medium and the circumstances of the individual case.
4) When ascertaining which information should be considered 'material' in the sense of the Directive findings from economic theory as to the importance of the type, value, frequency of purchase of a product, its reputation, the competition on the relevant market could be taken into account. The question is, however, whether it is advisable to opt for a limitative enumeration of the main information that has to be provided in each case or to leave more flexibility to adapt the information requirement to the circumstances of the individual case. It appears unnecessary and impractical that the degree of information duties should be equal for all products and all circumstances.
5) The League could consider taking a stand on the interpretation of the concept 'invitation to purchase'. Shall this concept apply to any commercial communication which contains price and product characteristic or should the communication also enable the consumer to make a purchase in other way?
6) The League could take a stand on the issue of whether information obligations should be confined to B2C relations or whether they should be extended to traders as well. The French group proposes that the LIDC should take a position on whether it is advisable to extend the protection against misleading omissions to traders. The protection is in the views of the group intended for less informed and vigilant parties in market relations, such as consumers and should not be extended to professionals, who are expected to be more competent and informed.
7) The League should insist on a better regulative environment where redundancy and overlap of information duties and confusion over applicable rules and regulatory competence are avoided. The implementation of the UCPD in national law should be used as an occasion for streamlining and consolidating information duties to match market transparency with regulatory transparency.