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New Sanctions Put Unfair Competition and Misleading and Comparative Advertising on the Top of Corporate Compliance List

How much does a marketing campaign cost? That may have been an easy question until recently, but with the new Protection of Competition Act, the answer may be that it will cost 10% of the company's annual turnover

In an unprecedented move the new Bulgarian Protection of Competition Act (the "Act" or "PCA"), which came into effect in December 2008, extended the sanctions which are normally applied in Europe to anti-trust violations such as cartels and dominance abuse, to unfair competition practices, and misleading and illegal comparative advertising.

1. What is at stake ?

The classic unfair competition infringements, that existed under the old Act survived almost intact in the new PCA. They can now lead to a sanction as high as 10% of the company's annual turnover. In addition to the general ban against acting contrary to business ethics, specific counts include:

- **Defamation** - damaging the good name and trust in competitors, as well as in the goods or services offered by them, by way of the assertion or dissemination of untrue information, as well as by way of distorted presentation of facts;
- **Misrepresentation** - misrepresentation in respect of material properties of goods or services, or in respect of the manner of use of the goods or the provision of the services by making untrue assertions or distortion of facts;

- **Imitation** - offering of goods or services whose appearance, packaging, marking, name or other features deceive or are likely to deceive in respect of their origin, manufacturer, seller, method and place of manufacture, the source and manner of acquisition or purpose, the quantity, quality, nature, consumer properties and other material characteristics of the goods or services;
- **Unfair solicitation of clients** - carrying out unfair competition, aimed at soliciting clients, as a result of which existing agreements are terminated or breached, or entry into such agreements with competitors is prevented;
- **Bundling** - offering or granting as a supplement to goods sold or services provided, either free of charge or in consideration of an ostensible price, of other goods or services except for: advertising items of minor value and bearing a clear indication of the advertising undertaking; items or services which according to commercial usage are an attribute to the goods sold or services provided; goods or services as a rebate for sales in higher quantities;
- **Prize games** - conducting a sale, where an offer or promise is attached, which is conditional upon: solving problems, puzzles, raffles, riddles; collecting a series of coupons and other

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*New sanctions for unfair competition or unfair advertising can reach **10%** of the annual turnover of the company.*

The principal unfair competition infringements include prize games, offering awards of excessive value, imitation, defaming competitors, unethical solicitation of clients and other violations of business ethics.

The CPC is expected to adopt rules on prize games which state which prizes are excessive. The current limit is 100 times the price of the products sold, but not more than 10 minimum salaries.

If you have any further questions concerning this note, please contact the head of our anti-trust practice group:

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similar items; organizing games to win money or prizes, the value of which significantly exceeds the price of the goods or services sold. In respect of prize games the Commission is expected to adopt special rules, which should replace the existing informal guidance adopted by it, that sets the limit above which prizes are considered excessive, at 100 times the price of the product sold, but not more than 10 minimum wages;

- **Dumping** - the sale to the domestic market of significant quantities of goods over an extended period of time at prices lower than the costs of their production and marketing, with the purpose to unfairly solicit clients;

- **Discovery and disclosure of trade secrets** - discovering, using or disclosing manufacturing or trade secrets that is contrary to good faith commercial practices, or where they have been discovered or disclosed under the condition that they shall not be used or disclosed further.

2. What is new ?

2.1. Misleading and Illegal Comparative Advertising

Before the new Act unfair advertising had somewhat duplicating regulation in both the Consumer Protection and Protection of Competition Act. The new PCA consolidates unfair advertising rules, and puts them also under the general 10% of annual turnover sanction.

Misleading, in the words of the Act, is any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of this, is likely to affect their economic behaviour or which, for these reasons, injures or is likely to injure a competitor

Comparative advertising is permitted only where:

1. it is not misleading and is not an unfair commercial practice;

2. it compares goods or services satisfying the same needs or intended for the same purpose;

3. it objectively compares one or more features of the goods and services which are material, verifiable and representative for these goods and services, which may include their price;

4. it does not lead to confusion between the advertiser and his competitors or between trademarks, trade names, other distinguishing marks, goods or services of the advertiser and those of his competitors;

5. it does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities or circumstances of the competitors;

6. it compares goods with the same designation of origin;

7. it does not take unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of the competitors or of the designation of origin of competing goods;

8. it does not present the goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name.

All forms of comparative advertising which do not answer all of the above criteria are illegal.

These two definitions follow closely the definitions under Directive 2006/114/EC concerning misleading and comparative advertising.

Both the advertiser and the advertising agency will be held liable for misleading and illegal comparative advertising.

The burden of proof has expressly been placed upon the defendants to prove that the advertising is not misleading, and that where comparative advertising has been used this has been done in line with the provisions of the Act.

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New regulation consolidates misleading and illegal comparative advertising under the 10% of annual turnover sanctions limit.

Misleading is any advertising which in any way, including its presentation, deceives or is likely to deceive customers and thereby affect their market behaviour or injure a competitor.

Comparative advertising is legal only if the criteria set out in the law are met.

Both the advertiser and the advertising agency will be held liable for misleading or illegal comparative advertising.

The burden of proof is upon the advertiser to demonstrate that its advertising is not misleading.

2.2. Domain names and Web-site Imitation

The new PCA provides that the use of a domain name or web-site design identical or similar to those of other persons in a manner that may mislead and/or injure the interests of competitors is prohibited.

This infringement is also guarded by the 10% of annual turnover sanctions limit and may provide a valuable tool in the fight against malicious internet domain name registrations – an area that completely lacked regulation prior to the Act.

2.3. Sanctions

Where a company has engaged in unfair competition, or in misleading or illegal comparative advertising, the Commission for the Protection of Competition (“CPC” or the “Commission”) may impose a sanction on the infringing undertaking amounting to up to 10 per cent of the total turnover for the preceding financial year. A sanction in the same amount can be imposed on an undertaking for failing to comply with a decision of the Commission.

The Commission may also impose periodic penalties in an amount of up to 5 per cent of the average daily turnover for the preceding financial year, calculated on a daily basis for each day of non compliance with:

1. a decision of the Commission ordering the termination of an infringement, including by imposing the appropriate behavioural or structural remedies;

The new PCA provides a facilitated regime of submitting class-actions for civil damages on account of unfair competition and misleading advertising violations against the infringing company. Please email us if you would like to receive a separate memorandum on this topic.

2. a ruling of the Commission, imposing interim measures.

2.4. Interim Measures

The Commission, of its own motion or on the request of the parties, has been entitled to impose interim measures, whenever there is a risk of serious damage to the interests of consumers or competitors in respect of unfair advertising, but not in respect of unfair competition. The available measures in respect of misleading and illegal comparative advertising are limited to the following two types:

- Prohibiting the distribution of the advertising before it has become public, where its distribution is imminent;
- Stopping the distribution of the advertising.

The imposition of interim measures can be appealed, but the appeal would not suspend their implementation.

3. Conclusion

In conclusion, the new very high sanctions amounts put unfair competition and misleading and illegal comparative advertising at the top of company compliance checklists. Any marketing and advertising initiatives and campaigns are to be assessed carefully before their launch, as the potential amount of sanctions could severely outweigh any positive effect they may have on sales. New anti-imitation provisions may provide a powerful tool for companies which have suffered from domain name “piracy”, which has become common over recent years in Bulgaria.

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Imitation of domain names or web-designs is now a violation, punishable with the same sanctions as other unfair competition infringements.

Sanctions for unfair competition or misleading or illegal comparative advertising can reach 10% of annual turnover.

Failure to comply with an order of the Commission to stop an infringement can lead to daily sanctions of 5% of the average daily turnover.

The CPC can order the stopping of misleading or illegal comparative advertising.

Unfair competition and unfair advertising should be on the top of company compliance checklist in the case marketing and advertising.

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