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NEWSLETTER

2/2016

CONSUMER PROTECTION ACT - NOVELIZATION

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I. Introduction

In this Newsletter No. 2/2016 we bring insight to the new consumer protection law, which follows from the novelization of the Consumer Protection Act, i.e. from the **Act No. 378/2015 Coll., by which the Act No. 634/1992 Coll., the Consumer Protection Act is amended.**

By its content the new act can be divided into two parts, each of these becoming effective on different date. The first part regulates the matter of unfair trade practices and became effective as of 28th December 2015. Second part of the act became effective only as of 1st February 2016 and introduces new possibility for alternative out of court resolution of consumer disputes. Because the new legislation will affect vast majority of people, consumers as well as traders, we would like to point out the most significant areas for your consideration.



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II. Consumer protection against unfair commercial practices – first part of the novelization of the Consumer Protection Act

This part of the novelization of the Consumer Protection Act became effective on **28th December 2015**.

Its aim is to provide for correct and full transposition of the Directive 2005/29/ES dated 11th May 2005 concerning unfair business-to-consumer commercial practices in the internal market ¹ (the **Unfair Commercial Practices Directive**) and ensure the same level of protection to all consumers irrespective of the place of purchase or sale in the EU. The new consumer protection legislation should bring *support to the honest businesses and also protection of their position within the in-*

¹ Directive 2005/29/ES dated 11th May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 (Unfair Commercial Practices Directive).



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ternal business market against dishonest businesses, whose position (and the use of misleading and aggressive business practices), on the other hand, should be weakened.

The new legislation brings more detailed and exact **definition** of illegal actions defined as unfair commercial practices, brings definitions of the statutory terms %bad-er+, %products+, %commercial practice+ and defines other statutory terms (see below).

Commercial practice

Section **2 (1) (o)** of the Consumer Protection Act defines what is understood to be **commercial practice**%. The term commercial practice means 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.



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Unfair commercial practice

The term unfair commercial practice is defined in **Section 4** of the Consumer Protection Act. Unfair commercial practices are those which do not comply with the requirements of professional diligence and are likely to materially distort the economic behaviour of the average consumer.

The above actions are always measured in relation to **average consumer**. As average consumer is considered a consumer, who is sufficiently informed and has reasonable level of care and attention, with respect to social, cultural and language factors.

It is desirable that the impact of the commercial practice whether it is capable of materially exploiting the economic behaviour of an identifiable group of consumers whose characteristics make them particularly vulnerable to unfair commercial practices (because of their mental or physical infirmity, age or credulity), is assessed from the perspective of the average member of that group.



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The Consumer Protection Act distinguishes the following unfair commercial practices: **misleading as set out in § 5 or misleadingly omitted as set out in § 5a and aggressive as set out in § 5b. Annex I and II** of the Consumer Protection Act contains the list of those commercial practices which shall in all circumstances be regarded as unfair.

Unfair commercial practices **are prohibited**, prior to the actual decision of the consumer about the purchase as well as during the decision making process and after its completion (e.g. during warranty claim).

Section **§ 2 (1) q) - u)** of the Consumer Protection Act defines also other terms in consistent with the Directive such as **invitation to purchase**, **transactional decision**, **to materially distort the economic behaviour of consumers**, **undue influence**, **cross border dispute** and **consumer competition**.



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To materially distort the economic behaviour of consumers pursuant to **§ 2 (1) (s)** of the Consumer Protection Act means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.

Proving the correctness of the factual allegations

The Consumer Protection Act newly lays the burden of proof of the factual allegations onto the seller. According to the new provision of **§ 5c**, the supervisory authority is entitled to require the seller to prove within the administrative proceedings the accuracy of any factual allegations in relation to the questioned commercial practice. If the seller does not carry this burden of proof, i.e. does not submit the required evidence, or if the supervisory authority finds it inadequate, will be factual claims deemed incorrect.



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Prohibition of violation of IP rights

The Consumer Protection Act already contained a ban on violations of certain intellectual property rights, but he did so under the provision, which regulated misleading commercial practice. Given the fact that such prohibition does not fall within the scope of implemented Directive on Unfair Commercial Practices, the provision was taken out and embedded into a separate **§ 8** of the Consumer Protection Act as prohibition of the offering, sale and storage of goods infringing certain intellectual property rights.



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III. Alternative resolution of consumer disputes – second part of the novelization of the Consumer Protection Act

The second part of the novelization of the Consumer Protection Act became effective as of **1st February 2016**, which governs the out of court settlement of consumer disputes.

It is the implementation of the EU Directive 2013/11/EU of 21st May 2013 on alternative dispute resolution for consumer disputes² (the **%Directive on consumer ADR+**), and the adaptation of the Regulation (EU) No 524/2013 of 21st May 2013 on online dispute resolution for consumer disputes³ (the **%Directive on consumer ODR+**).

² EU Directive 2013/11/EU of 21st May 2013 on alternative dispute resolution for consumer disputes², and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

³ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21st May 2013 on online dispute resolution for consumer disputes, and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ODR).



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This legislation does not apply to any disputes between the traders (seller or service provider) and the entities accepting such sale/services . legal entity or physical entity when also acting within the scope of business activities.

The new legislation introduces a new option for resolution of consumer disputes, which should be faster and less financially demanding for both parties.

Effects of the new legislation on traders:

Section 14 of the Consumer Protection Act seems to be quite important as it imposes **the information duty of the traders (sellers) about the possibility of alternative dispute resolution process.**

The sellers are newly obliged to inform the consumers about **the possibility of alternative dispute resolution process** and about the competent authority. The information must contain a link to the website of the competent authority.



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If the seller also uses its own website, it must also have such link on that website.

If the consumer contract also includes reference to general terms and conditions of sales or service contracts between the trader and a consumer, such information must be also included in the general terms and conditions. There is a three months transition period till 28.03.2016 for the trades to update their documentation and comply with the information duty.

In case of a consumer. trader dispute, which could not be settled further to a complaint submitted directly by the consumer to the trader, the trader provides the consumer with the relevant information specifying whether he will make use of the relevant ADR entities to settle the dispute. That information shall be provided on paper or on another durable medium. In other words, the traders must inform the consumers not only by the general information which must be provided upfront, but also directly if the consumer. trader dispute cannot be settled further to a complaint submitted directly by the consumer to the trader.



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If the trader is engaging in online sales or service contracts, and has online market places established, it must also provide on its websites an electronic link to the ADR platform. That link shall be easily accessible for consumers. The traders engaging in online sales or service contracts shall also provide an electronic link to the ADR platform on their websites and, if the offer is made by e-mail, in that e-mail. The information shall also be provided, where applicable, in the general terms and conditions applicable to online sales and service contracts.

Breach of the information duty constitutes an administrative tort pursuant to Section 24 (7) (m) of the Consumer Protection Act for which a financial fine up to the amount of CZK 1,000,000 may be imposed.

As the result of the novelization, the traders must amend their websites as well as their current contractual documentation and must inform the consumers about the possibility of alternative dispute resolution and the competent authority to handle the dispute.

Competent Authorities:

The generally competent authority for ADR is the **Czech Trade Inspection** (*česká obchodní inspekce*).

There are also other specialized authorities in certain fields:

- Financial services . Financial Arbiter;
- E-communication and postal services . Czech Telecommunication Office;
- Energy, Gas and Heat Supplies - Energetic Regulatory Office.

In addition to the above, the Ministry of Trade and Industry may also authorized other entities to handle ADR between the consumers and the trades (such as professional associations and bars).



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Alternative resolution of the consumer disputes:

The new legislation gives the consumer the right to alternative resolution of consumer disputes from purchase contracts or contracts for services.

The subject of such disputes will be typically issues relating to warranty claims of the consumers, non-delivery of goods/services or failure to return money after withdrawal, etc. We cannot also exclude possible disputes arising from the sale of real estate property and lease relations, as well as disputes arising from consumer contracts for work, travel and transportation contracts. The prerequisite for using this method of resolution of the consumer dispute is, the fact that the consumer first tried to resolve the dispute directly with the seller (i.e. filed a complaint, which was rejected, exercised its right of withdrawal, etc.).

When it comes to the actual proceedings - it is initiated only **on the basis of the consumer's application**, which must contain the elements specified in Section 20n of the Consumer Protection Act. The consumer is obliged to attach a proof of



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the fact that he failed to settle the dispute with the other party directly. The consumer is entitled to file a petition with the competent authority within 1 year from the date when he exercised his right with the seller first.

The seller will be obliged to provide his statement to the Czech Trade Inspection or other competent authority, within 15 working days from receipt of the notification. The seller must cooperate closely and provide the Czech Trade Inspection or other competent body with all cooperation needed for the efficient conduct of ADR. Failure to comply with this obligation is an administrative tort pursuant to Section 24 (7) (z) of the Consumer Protection Act for which a financial fine up to the amount of CZK 1,000,000 may be imposed.

Outcome of the ADR

The ADR must be closed within 90 days from its initiation (in specific cases this period may be extended by maximum of additional 90 days).

The outcomes of the ADR may be following:

- Execution of **written** contract between the trader and the consumer,
- Unilateral notification made by the consumer to the competent authority (ADR may be voluntarily terminated only by the consumer),
- Expiration of the period specified in Section 20t of the Consumer Protection Act,
- Rejection of the consumer application to initiate the ADR pursuant to Section 20r of the Consumer Protection Act,
- By death of the parties or dissolution of the legal entity without any legal successor.

Aim of the ADR is to reach **conciliation** between the parties. The task of the competent authority is to lead the parties in dispute to find amicable solution, being independent entity. The competent authority does not have a decisive power. The outcome should be a civil law agreement between the consumer and the trader. In the event that the trader is not willing to accept the proposed agreement, the



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Czech Trade Inspection or other authorized body may issue a non-binding statement opinion that the consumer may use for his possible further steps to ensure his claim (for example in subsequent legal proceedings) .

The ADR is free of charge. Costs associated with the ADR process bear the parties themselves.



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Conclusion

The new legislation in the area of consumer protection brings changes which effect almost all entities acting within the consumer market. It is therefore important to get to know the legislation and obey the newly imposed duties, such as information duty towards the consumers, as well as be ready for enforcement of the ADR process. What will be the actual effects of the above, we will be able to see with time.



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We hope the above summary will ease your orientation in the new legislation. We are available for any of your additional requests or information.

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