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Unfair commercial practices: the advertiser, even when acting in good faith, is solely liable in case of misleading commercial practice

There are some situations where - good faith being ineffective - it is absolutely vital to contractually impose on one's business partners the obligation to fulfill in every respect the promises made to consumers.

Such contractual precautions will at most (but it is always better than nothing!) enable to bring an action against the defaulting partner; yet, they will not allow the advertiser to avoid being convicted/fined for misleading commercial practice even if it has acted in good faith and worked to ensure that its advertising promises were duly fulfilled.

This is the harsh reality recently experienced by the Austrian travel agency Team4 Travel in a judgment rendered by the Court of Justice of the European Union ("CJEU") on **September 19, 2013**^[1].

In this case, Team4 Travel, a travel agency specialized in the sale of skiing lessons and snow holidays for groups of schoolchildren from the United Kingdom, had indicated in its English-language sales brochure that booking with certain hotels on certain specified dates was only available through its booking platform, said hotels having contractually agreed to grant this booking exclusivity to Team4 Travel.

An upset competitor, i.e. the Austrian travel agency CHS Tour Services, to which the same hotels had granted accommodation on the same dates, initiated legal proceedings and asked Austrian courts to prohibit Team4 Travel from stating that it had a booking exclusivity as it considered such statement as a violation of the prohibition of unfair commercial practices.

In two decisions, the Austrian courts dismissed CHS Tour Services' claim. They held that Team4 Travel had not engaged into any unfair commercial practice since it had fully complied with the requirements of professional diligence (within the meaning of Article 5.2 of Directive 2005/29/EC on unfair commercial practices ("UCP")^[2]) insofar as it had secured the exclusive booking opportunity with the concerned hotels and



was, at the time the brochures were sent out, unaware that the hotels had breached their contractual exclusivity commitment.

CHS Tour Services lodged an appeal before the Austrian Supreme Court that referred a question on the articulation of Articles 5.2 and 6.1 of the UCP Directive to the CJEU for a preliminary ruling. Specifically, it asked the CJEU whether a commercial practice, to be qualified as misleading (within the meaning of Article 6.1), must also be contrary to the requirements of professional diligence (Article 5.2).

In other words, the question was whether a misleading commercial practice within the meaning of Article 6.1 can escape sanction if the perpetrator of the practice has fully satisfied the requirements of professional diligence provided for under Article 5.2.

It is necessary at this stage to recall the applicable provisions:

Pursuant to Article 5 “*Prohibition of unfair commercial practices*” of the UCP Directive:

“

1. *A commercial practice shall be unfair if:*

a. it is contrary to the requirements of professional diligence, and

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

[....]

4. In particular, commercial practices shall be unfair which:

(a) are misleading as set out in Articles 6 and 7, or

(b) are aggressive as set out in Articles 8 and 9”.

Article 6.1 of the UCP Directive defines “misleading actions” as follows:

“a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

(a) the existence or nature of the product;



(b) the main characteristics of the product, such as its availability, benefits [...]

Firstly, the CJEU considered that the advertising brochure concerned indeed the “availability” of a product (namely stays / accommodation within certain hotels), as defined by Article 6.1 sub b)), and that the information relating to the guaranteed exclusivity on which Team4 Travel relied was misleading (insofar as it was established that same stays could be booked in the same hotels and for the same dates through CHS Tour Services).

Concerning the question as to whether, within the general thrust of the UCP Directive, only the criteria set forth in Article 6.1 are sufficient to hold that a commercial practice is misleading and to sanction such practice accordingly, without having to determine if the commercial practice in question is contrary to the “requirements of professional diligence”, as provided for in Article 5(2), the CJEU provides the following response:

- firstly, it is explicitly stated in Article 5.1 that commercial practices must be characterized as misleading “as set out in” Articles 6; *“that expression suggesting that the determination of whether the practice concerned is misleading (...) depends only on the assessment of the practice in the light of the criteria set out”* in Article 6;
- secondly, Article 5.2 establishes the “basic rule” that unfair commercial practices are to be prohibited and this basic rule is then “given effect and concrete expression by more specific provisions with a view to due account’s being taken of the risk posed to consumers by the two cases that arise most frequently, namely, misleading commercial practices and aggressive commercial practices”; this is, in some way, an illustration of the Latin phrase “*specialia generalibus derogant*” (i.e. special departs from general);
- lastly, to characterize a commercial practice as misleading, Article 6.1 adopts the “viewpoint of the consumer”: it is indeed the average consumer’s opinion / feelings that must be taken into account to assess the misleading nature of the relevant practice.

The fact that the advertiser has fully complied with the requirements of professional diligence – thereby acting within the “sphere of the trader” that is unknown to consumers – does not in any way change the misleading nature of the advertising for consumers.

Consequently, the CJEU concluded that:

“having regard both to the wording and to the structure of Articles 5 and 6(1) of that directive, and to its general scheme, a commercial practice must be regarded as ‘misleading’ within the meaning of the second of those provisions if the criteria set out there are satisfied, and it is not necessary to determine whether the condition of that practice being contrary to the requirements of professional diligence, laid down in Article 5(2)(a) of that directive, is also met”.

This interpretation is, after all, quite logical: if, before being able to characterize a commercial practice as misleading, it was necessary to determine whether such practice is contrary to the requirements of professional diligence, this would amount to:



- adding a condition to Article 6.1 that is supposed to define alone what is a misleading practice, on the one hand, and
- rendering ineffective Articles 6 and 7 that define specific categories of unfair commercial practices, namely, “misleading practices” and “aggressive practices”,

which would, on the whole, run counter the objective of high level of consumer protection pursued by the UCP Directive.

The same interpretation prevails under French law: good faith is ineffective and the advertiser, “*as the person on behalf of whom the misleading commercial practice is implemented*”^[3], remains “*primarily*” liable for the dissemination of false or misleading allegations directed at France, whatever the (domestic or foreign) origin of the relevant practices.

In this respect, the UCP Directive leaves the Member States free to determine the appropriate toolbox of sanctions^[4] and any advertiser responsible for a misleading advertising having effects in France is guilty of an offense and faces severe criminal sanctions: up to 2 years of imprisonment and/or a 37,500 Euros fine that can be increased up to 50% of the cost of the advertising or the practice constituting the offense^[5]. In addition, the sentencing judgment is published.

Because a conviction for misleading commercial practice undoubtedly has a devastating impact on its image, the good faith advertiser has only one option left: trying to bring an action against his defaulting contractual partner to have the latter bear the cost of its own conviction and, as the case may be, seeking additional indemnification for the economic loss suffered.

Yet, to do so, the contract must be appropriately drafted and provide for such recourse.

[1] CJEU, Case C-435/11, CHS Tour Services GmbH / Team4 Travel GmbH.

[2] Directive 2005/29/EC of May 11, 2005 concerning unfair business-to-consumer commercial practices in the internal market.

[3] Article L.121-5 of the French Consumer Code.

[4] Article 13 of the UCP Directive: “*Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive*”.

[5] Article L. 213-1 of the French Consumer Code.



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