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REPORT 2

RECOMMENDATIONS ON DRAFT LAW ON CONSUMER PROTECTION

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UPGRADING VIETNAMESE CONSUMER PROTECTION LEGISLATION

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ANNEX

DRAFT NO. 2 ON CONSUMER PROTECTION LAW

PART I

SYNTHETIC RECOMMENDATIONS

I. Introduction and summary

Under the Terms of Reference for this activity, we are responsible to deliver a study summarizing the best practices in industrialized countries regarding the legislation for the protection of consumers, including aspects relating to e-commerce and cross-border transactions.

In order to carry out our activity, PTF experts provided us with the draft Consumer Protection Act (CPA) as well as with a review of the existing legislative framework applicable to consumer interests.

In agreement with PTF experts, we have therefore decided to focus our recommendations on the content of the draft CPA which can be subject to further improvement if compared with the relevant international legal practice, particularly from the EU context.

Our recommendations will be covering the following aspects of consumer protection legislation:

- Scope, definitions and subjects of the law
- Consumer associations
- Information, packaging and labeling requirements
- Health and safety
- Price indications
- Unfair commercial practices perpetrated by professionals vis-à-vis consumers
- Misleading and comparative advertising affecting other traders' interests
- Contracts concluded away from business premises
- Distance contracts (cross-border sales)
- E-commerce
- Consumer credit
- Public services or services of general economic interest
- Access to justice
- Out-of-court settlement

- Class action
- Enforcement

In order to keep our document within the page limit set by the terms of reference, we have decided to list our recommendations synthetically for each covered subject and provide the rationale for each set of recommendations in a separate paper, attached to the present document as Appendix I, which includes a copy of the relevant legislation used as a background to the recommendations.

Before presenting our recommendations, we have provided some preliminary remarks on how to improve the structure of the CPA in order to cover all the relevant aspects of consumer protection law. Our proposed new structure will also help us to set the framework for our intervention, since the topics covered by our recommendations would find their specific place within the chapters of the new proposed structure.

II. The structure of the CPA

The draft CPA is currently structured as follows:

- Chapter I – General Provisions
- Chapter II – Protecting consumers before conducting transactions with traders
- Chapter III- Protection of consumers during transactions
- Chapter IV – Protecting consumers during the use of goods and services
- Chapter V – Resolution of disputes between consumers and traders
- Chapter VI – State Management of CP
- Chapter VII – CP Associations
- Chapter VIII – Handling of violations of CP Law
- Chapter IX – Implementing provisions

We believe a reorganization of this structure is necessary in order for the CPA to cover all the aspects traditionally identified as falling within consumer protection legislation. Besides those already indicated in the CPA, these are:

- Identification of the main institutions entrusted with the protection of consumers' interests, the Ministry responsible for Consumer Affairs, a Consumer Affairs Council, Consumers Associations and possibly a National Programme for Consumer Protection.
- Education of consumers, minimum information requirements, unfair commercial practices and advertising.

- Safety and Quality of goods and services.
- Consumer contracts such as distance contracts (cross-border sales), e-commerce, consumer credit and services of general economic interests etc.
- Specific remedies including, the class action.

In the light of the above remarks, the proposed new structure should include the following chapters:

- Chapter I – **General Provisions**: This chapter should regulate the scope of the law; the general definitions used throughout the act [unless otherwise specified]; and the relation of the CPA with other acts affecting the interests of consumers.
- Chapter II – **Subjects of the law**: This chapter should make reference to the institutional bodies entrusted with the protection of consumers’ interests in Vietnam, including the responsible Ministry, a Consumers Affair Council, consumer associations. This chapter should also describe the role of these bodies and provide for a National Consumer Protection Programme to be prepared for the coming years.
- Chapter III - **Education and information**: This chapter should include provisions on the education of consumers and regulate the minimum information requirements applicable to products and services; packaging and labeling requirements; price indication requirement; unfair commercial practices by traders vis-à-vis consumers; misleading advertising and comparative advertising against other traders’ interests.
- Chapter IV – **Safety and Quality**: This chapter should regulate the obligations of the producers and distributors related to the safety of the products; the responsibility for damages caused by defective products; the commercial warranty and the warranty for the conformity of the product to its intended use.
- Chapter V- **Consumer contracts**: This chapter should regulate consumer contracts in general and provide rules concerning abusive clauses; contracts negotiated away from business premises; distance selling contracts (cross border sales); e-commerce; consumer credit; services of general economic interests; financial services; tourism; part-time ownership etc.
- Chapter VI – **Consumer redress**: This chapter should provide rules concerning the remedies available to the consumers, including the class action and other collective and out-of-court mechanisms to settle consumers’ disputes as well as in court procedures in the civil and criminal jurisdiction. It should also include reference Enforcement agency responsible for the application of the CP law and administrative procedures and sanctions

Bearing in mind our proposed new structure for the CPA, we now move on to list all the specific recommendations related to the aspects of the law covered by this document. The rationale for these recommendations is enclosed as the second part of this report.

III. Recommendations

1. Scope, definitions and subjects of the law

- Introduce a provision recognizing the following five basic rights for consumers: (i) protection of their life, health and property; (ii) protection of their economic interests; (iii) efficient legal protection; (iv) information and education; (v) the right to organize themselves in consumers associations aimed at protecting and promoting their interests, at their representation and participation in decision making procedures for matters of their interest.
- Introduce an “exception clause” for those cases in which a limitation in the application of consumer rights may be required in order to protect the national interest.
- Introduce a provision stating that consumers’ rights cannot be waived.
- Introduce definitions for the following terms: Consumer; Supplier; Trader; Consumer goods; Consumer associations; Consumer affair council; Minister; Consumer sales; Services.
- Introduce a provision stating that the implementation of the provisions of the CPA will not affect the rights granted to Consumers in separate legislation.
- Introduce a provision stating that the CPA is applicable, regardless of the fact that the underlying contract is regulated by a foreign applicable law, if it affects the interests of Vietnamese consumers.
- Introduce a provision stating that if the Trader has issued a guarantee for the product or service, he/ she shall abide by the legal obligations taken under the guarantee.
- Identify in the CPA the main institutions entrusted with the protection of consumers’ interests.

2. Consumer associations

- Introduce a legal regime for the set up and registration of consumer associations.
- Consider strengthening the role of consumer associations in comparative testing of products.
- Consider introducing the participation of consumer associations in decision making bodies (Council of Consumers Affairs)
- Consider strengthening the role of consumer associations in educating consumers and assisting them in their access to justice.

3. Information, packaging and labeling requirements

- Introduce a provision indicating that the consumer must be clearly informed on the product's nature, quantity, quality and price.
- Introduce a provision on the obligation of the trader to facilitate information on the essential features of the product or service at the pre-contractual stage. The relevant provision needs to mention that in claims for infringement of this provision the burden of the proof is on the trader.
- Introduce a definition of dangerous products mirroring that of the EC Directive 1999/45, including a list of exclusions as appropriate.
- Introduce specific provisions regarding packaging and labeling requirements for dangerous substances. All packages must be labeled with the name of the substance, the danger symbol and an indication of the danger involved in using the substance and a reference to the special risks involved. Their form and materials must be strong and solid.

4. Safety and quality

- Introduce a chapter on the protection of the health and safety. The first article under the referred chapter shall state clearly the obligation for producers to only place safe products in the market.
- Introduce a number of definitions at the beginning of the chapter concerning: safe product, dangerous product, serious risk, producer, distributor, withdrawal and recall of products. These definitions can be found in the relevant chapters of all equivalent laws in the EU as well as in the EU Directive 2001/95.
- Develop the requirements for a product to be deemed to be safe and other criteria to be followed when assessing the safety of the products.
- Consider whether establish a rapid alert system for exchange of information on dangerous products in Vietnam –the system functioning at EU level, RAPEX, can be taken as a model with respect to the procedures of notification and operation and can eventually be linked with equivalent systems operating in other ASEAN countries.
- Introduce a provision indicating the information requirements binding upon producers. Such information shall include any details enabling consumers to assess the risks involved in using a product or service.
- Introduce rules on market surveillance procedures, the principle of liability of producers for damages caused by defective or dangerous products placed on the market and sanctions.

5. Price indications

- Rephrase and complete the provision in art. 12 of the draft CPA to indicate that traders are obliged to specify both the selling price and the price per unit of the product in order to provide adequate information to consumers and to facilitate their comparison of prices.
- Introduce definitions of selling price, unit price, bulk product, pre-packed product and other relevant definitions.
- Introduce articles referring to exemptions and sanctions in line with the above indicated model laws.

6. Unfair commercial practices perpetrated by professionals vis-à-vis consumers

- Introduce a black list of misleading and aggressive commercial practices.
- Introduce a general ban on unfair commercial practices: the general ban should apply only when a practice is not already caught by the black list. In particular, a practice not caught by the black list should be nonetheless found contrary to the general ban if it is contrary to (i) the “professional diligence” that traders normally use in the sector of business concerns and (ii) it affects or is likely to affect the consumer freedom of choice and its ability to take informed commercial decisions.
- Introduce definitions of specific terms used in the provisions concerning unfair commercial practices: some of these definitions may derogate from the general definitions used throughout the consumer act – for example, the definition of “average consumer” may be different from that of “consumer” - and are needed to deal with specific concerns raised by unfair commercial practices.
- Define the scope of the provisions on unfair commercial practices and their inter-relation with other aspects of consumer protection law.
- Introduce the distinction between misleading actions and misleading omissions.
- Identify the elements over which the trader must provide information to the consumers in order to enable them to take informed decisions when purchasing its products.
- Introduce a more detailed definition of aggressive commercial practices.
- Introduce the possibility for Code of Conducts to regulate and settle disputes related to unfair commercial practices.
- Introduce settlement decisions (so called “moralsuasion”): traders accused of unfair commercial practices should be given the possibility to provide law enforcers with commitments aimed at eliminating all the negative effects of the accused practice on consumers. Law enforcers should be allowed to seek these commitments *ex-officio*. This possibility should be conferred only when the accused practice in question has not already

exhausted its negative effects on consumers. [This issue can be dealt also through an implementing regulation]

- Consider whether to introduce a class-action. [We will provide detailed recommendations on how to introduce the class-action in Vietnam in a separate section of this document] [This issue can be dealt also through an implementing regulation]
- Introduce details concerning the instances where either remedies provided in the draft law can be invoked against unfair consumer practices. [This issue can be dealt also through an implementing regulation]
- Consider identifying VCAD and VCC as the administrative authorities in charge of enforcing the provisions on unfair commercial practices.

7. Misleading and comparative advertising affecting the interests of other traders

- Introduce provisions on misleading and comparative advertising to protect the interest of traders.
- Introduce definitions of “misleading advertising” and “comparative advertising” mirroring those of the EC Directive.
- Consider adopting uniform rules on the evaluation of when advertisements can be considered as “misleading” under these provisions and the provisions on unfair commercial practices.
- Provide access to justice to both traders and consumers (including representative associations).
- Provide appropriate remedies against these practices.
- Consider conferring the role of administrative law enforcer to VCAD and VCC.

8. Contracts concluded away from business premises

- Introduce a definition of contracts concluded away from business premises.
- Introduce a right of cancellation mirroring that established under the provisions of the EC Directive 85/577.
- Introduce the obligation for the supplier to provide consumers with a written notice about the existence of their right of cancellation and the conditions under which it can be exercised.
- Consider introducing a list of contracts which will not be subject to these rules. In order to carry out this exercise, you may find inspiration from the list established under the EC Directive and the way this has been applied by EU member states.

9. Distance contracts (cross-border sales)

- Introduce a minimum information requirement to be provided by the supplier before the distance contract is concluded.

- Introduce a right of withdrawal for the consumer mirroring that provided under the EC Directive.
- Introduce an obligation for the supplier to execute the order within a maximum of 30 days from the day following that on which the consumer forwarded his order to the supplier.
- Provide the possibility for the consumer to be reimbursed if the goods or services are not available. If authorized by the consumer, the supplier may execute its obligation by providing alternative goods or services of equivalent quality and price. The costs of returning the good or services following the exercise of the right of withdrawal must be bear by the supplier.
- Authorize consumer to receive reimbursement of sum fraudulently charged in distance contracts.
- Prohibit the supplier to demand payment of unrequested goods or services.
- Prohibit unsolicited breaches of consumer's privacy such as unsolicited phone calls or email providing commercial information.
- Consider shifting the burden of proof concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent on the supplier.
- Consider exemptions from the application of the distance contracts provisions.
- Consider stricter rules on products which may affect the human health or the interests of minors.

10. E-commerce

- Introduce a provision in the draft law stating that it disciplines also e-commerce transactions and communications.
- Introduce general minimum requirements concerning the information to be provided by the service provider when approaching consumers through the use of e-commerce.
- Introduce specific requirements for information to be used in commercial communication.
- Introduce specific requirements for information to be used in unsolicited commercial communication.
- Introduce an obligation for the service provider to create an opt-out register to enable recipients not wishing to receive unsolicited commercial communication to register.
- Introduce a minimum information requirement that the service provider must give when concluding a contract through electronic means prior to the order being placed by the recipient.
- Introduce an obligation for the service provider that contract terms and general conditions must be made available to the recipient in a way that allows him to store and reproduce them.
- Introduce an obligation for the service provider to acknowledge receipt of the recipient's order without undue delay and by way of electronic means (under EU law this provision does not apply to contracts concluded through an exchange of emails).

11. Consumer credit

- Consider introducing a provision on Consumer Credit in the CPA indicating that credit agreements shall contain all necessary information in a clear and concise manner and that consumers shall be protected against unfair or misleading practices by creditors and intermediaries, particularly with respect to the disclosure of information by creditors.
- Provide an indication of the scope of the obligation of transparency in credit agreements to reflect the requirements in the EC Directive 2008/48/EC including an obligation to provide the consumer with information concerning the borrowing rate both at the pre-contractual stage and during the period of validity of the agreement and an obligation upon the creditor to inform the consumer on any changes to that rate and the terms of payment.
- Introduce the more stringent information requirements established under the EC 2008/48/EC.
- Introduce an obligation for the professional to provide a minimum information requirement at pre-contractual stage concerning: Type of credit; Identities and addresses of the contracting parties; Borrowing rate fixed or variable together with the particulars of any charges included in the total cost of the credit to the consumer; Total amount of credit; Annual percentage rate of charge; Duration of the credit agreement; For the case of a credit in the form of deferred payment for a specific good or service, the cash price and the amount of any advance payment; and, total amount payable by the consumer and the amount of the installments.
- Introduce a right of withdrawal from the credit agreement available to the consumer during the 14 days following signature of the credit agreement.
- Introduce an obligation for the creditor to assess the creditworthiness of the applicant on the basis of sufficient information and subject to the information requirements laid out for the cases of change in the amount of credit.
- Consider whether you wish to provide detailed regulation of consumer credit in the CPA or whether you prefer to insert a general provision in the CPA and provide detailed regulation in a separate law.

12. Public services or services of general economic interest

- Introduce rules concerning public services and services of general economic interests.
- Consider whether adopting a model which includes general principles governing the provision of these services and makes reference to the specific legislation applicable to the service concerned [such as the Italian model] OR a model providing specific rules for contracts related to this kind of services [such as the French model].

13. Access to justice

- The relevant provisions under Section 4 (Dispute settlement in court) arts. 43 to 53 of the CPA need to be completed and reorganized, including with the indication of the complementary provisions in the Civil and criminal procedural laws, Decree nr. 55/2008/ND-CP of 24/4/2008, the 1999 Ordinance on Protection of Consumers' interests, Law on Complaints and denunciations of Dec. 2, 1998 and other applicable laws as relevant.
- The criteria for categorization and classification of the claims and for bringing those claims to either the civil or the criminal jurisdiction need to be determined and included in the law.
- Make provision for adequate enforcement procedures to ensure the effective application of court decisions on compensation for damages to consumers.
- Regulate the representation of Consumers in court procedures by Consumers Associations and establish the instances where Consumer Associations are entitled to initiate those proceedings. The regime applicable to Consumers Associations in the relevant chapter of the CPA ("Subjects of the Law") shall mention and describe the types of actions that Consumers Associations are entitled to initiate.
- Review the burden of the proof regime established in art. 44 of the CPA in line with the more detailed regime resulting from the application of the EU Consumer Protection Directives.

14. Out-of-court settlements

- Introduce a minimum period for stay in office applicable to members of dispute settlement bodies.
- Introduce a rule stating that those members cannot be removed without just cause.
- Introduce a rule aimed at preventing conflicts of interests for members of dispute settlement bodies.
- If the decision is taken by a collegiate body, introduce a rule giving equal representation to consumers and professionals.
- Introduce clear rules on: jurisdiction, procedure, costs of procedure, rules which will form the basis of the decision, timing and the governance of the decision making body. [These issues can be addressed by the government when it establishes the rules of organization, operation and termination of mediation centers in accordance with article 24(5) of the draft CPA]
- Introduce a rule providing for consumer access to the procedure without being obliged to use a legal representative.
- Introduce the adversarial principle.
- Introduce a rule stating that the result of the decision may not deprive the consumer of a right granted by the consumer act.
- Introduce a rules obliging the decision making body to communicate the decision to the parties and state the grounds on which it is based.
- Enable the parties to be represented by a third party if they wish so.

15. Class action

- Consider whether introducing a class action for damages caused to a multiple number of consumers by the same breach. This action should be provided against a breach of general standard contracts, unfair commercial practices, anti-competitive practices and instances of extra-contractual liability.
- Grant the judge authority to identify the “class”.
- Authorize access to justice to individuals showing a legitimate interest or representative associations as long as they act together with at least one interested individual.
- Grant the judge authority to determine *locus standi*.
- Allow individuals to *opt-in* the class action in three different stages: at the beginning; after a settlement; or, after the judgment. Those who *opt-in* may no longer seek redress through a separate action (*ne bis in idem*).
- Introduce procedural rules.
- Consider whether to leave the parties free to negotiate lawyers’ fees, such as in the US legal system, or to impose a cap-fee, such as in EU member states.
- Introduce punitive damages if it emerges that the revenues generated by the Illegal behavior of the professional are higher than the compensatory damages provoked to the consumers.
- Identify the business seat where is located the professional as the competent jurisdictional forum where the class action should be filed.

16. Enforcement

- Introduce a provision indicating the inspection authority that is entrusted with the enforcement of the CPA, including the authority to impose sanctions in cases of infringement.
- Develop the precise types of action that can be conducted during investigations to prosecute infringements to the CPA.
- Introduce a provision laying out the criteria to distinguish between administrative, civil and criminal offences.
- Introduce a classification of the offences in minor, serious and very serious according to criteria to be decided on the basis of the above indicated models.
- Include provisions describing the procedures for inspection.
- Indicate the value of the fines for minor, serious and very serious infringements and list the exceptions, as appropriate, including a clause enabling the competent authority to regularly review and update the value of the fines.
- Indicate the remedies that can be taken against very serious offences and by whom (for example, the Spanish Law indicates that the Council of Ministers may decide to close

down temporarily the business premises or to suspend the supply of the service for a maximum period of 5 years).

- Include a provision in the CPA stating that the sanction should include any accessory duty by the trader to restore the situation before the infringement and the duty of compensation to consumers.
- Introduce a provision indicating that an appeal against an administrative decision by the Inspection authority shall not delay its execution.

PART II

RATIONALE FOR THE SYNTHETIC RECOMMENDATIONS

I. Introduction, scope, definitions and subjects of the law

The VCAD is currently developing a draft for a new Law on Consumer Protection in conjunction with a drafting team including representatives from the relevant Ministries and Agencies. The adoption of this Law is a high priority in the Government Agenda. The reasons for this are manifold:

- To provide a framework for subsequent work to improve compliance with multilateral requirements in the relevant areas –safety and quality standards of goods and services including SPS and TBT issues, packaging, labeling and information requirements on goods and services on the Vietnamese market-,
- To improve certainty and reliability in retail sales transactions for the benefit of Vietnamese consumers,
- To improve the mechanisms of settlement of disputes and access to justice for consumers' claims
- To upgrade the existing procedures for factory and market inspection and the mechanisms of enforcement for the provisions of the Law and related legislation.

The Vietnamese authorities also understand the conditions that need to be in place in order to guarantee adequate levels of protection. These are:

- 1) The Consumer Protection Law that is adopted must cover all relevant topics according to international practice. These subject matters need to be adequately regulated.
- 2) The Institutions that are responsible for the application of the Law also need to be in place
- 3) Citizen need to be well informed on their rights as consumers and to know on the contents of the law ,
- 4) Consumers are to play an active role in the promotion of their rights and interests both as individuals and collectively.

In this context, this report aims at providing background information and recommendations on the structure and the contents of the draft Law on the basis of relevant international legal practice, particularly from the EU context. From this perspective, a reminder of the conditions that a good Consumer Protection Law needs to meet:

- It strikes a good balance between the parties –traders/producers and consumers-
- It covers all aspects pertaining to Consumer Protection (which is a vast and growing area. A good reference on the scope is provided by the various EU Directives as well as the subjects regulated in relevant legislation in EU member states)
- It provides for adequate implementing tools for the contents of the Law

- It declares that the rights guaranteed in the Law cannot be waived¹.

BACKGROUND TO THE RECOMMENDATIONS

Following a first reading of the draft received from the VCAD a few general comments are in order:

The draft Law is currently structured in the following chapters:

- Chapter 1 – General Provisions
- Chapter II – Protecting consumers before conducting transactions with traders
- Chapter III- Protection of consumers during transactions
- Chapter IV – Protecting consumers during the use of goods and services
- Chapter V – Resolution of disputes between consumers and traders
- Chapter VI – State Management of CP
- Chapter VII – CP Associations
- Chapter VIII – Handling of violations of CP Law
- Ch. IX – Implementing provisions

In turn, Chapter 1 on general provisions currently includes:

- Art 1 – Objective scope of application of the Law
- Art 2 – Law subjects
- Art 3 – Definitions
- Art 4 - Principles of Consumer Protection
- Art 5 – Policies of Consumer Protection

A reorganization of the provisions is necessary. In comparative legal practice, the options for structuring of the contents are manifold. The structure of the current draft appears to mirror the way in which some equivalent pieces of legislation in EU countries organize the relevant provisions, particularly to some extent, the Spanish CP Law. However, when restructuring the contents of the Law the drafters should be mindful to cover all required aspects. In essence, the minimum content is indicated hereunder:

- **Scope of application and definitions** (Producer/ Trader, Consumer - to state clearly who are protected and who are bound by the Law - and other necessary definitions that will be listed in a specific recommendation).
- **Consumers' rights:** The rights that are recognized by the Law to consumers need to be stated clearly in a provision. The Law must be declared of Public Order.
- **Protection of the life and health of consumers:** Extensive reference needs to be made in the Law to products actually or potentially posing a threat to the health and/ or to the safety of

¹ This principle is currently embodied in art. 12(1) (a) and (b) of the draft CPA.

consumers with a detailed regulation of procedures to be followed by consumers to obtain redress in the various cases and the compensation to be obtained from producers or traders.

- **Sales of goods and services:** What rights are recognized to consumers in their sales transactions of goods or services. What actions are available in cases of sales of defective products or failure to deliver the product by the trader.
- **Protection of consumers in services transactions, including public services:** The Law needs to contain provisions indicating what consumers can expect to be delivered by service providers (utilities suppliers, transport providers, etc.)
- **Liability principles:** Who is to bear responsibility in cases of defective products damaging consumers' health, safety or economic interests.
- **Rules regarding advertising:** To include a prohibition of misleading, abusive or false advertising.
- **Contractual rules:** To prohibit abusive and unclear clauses to complement the regulation in the Civil Code.
- **Consumers' Associations:** Rules on the establishment and functions of independent Consumers Organizations. Mechanisms and resources to support Consumers Associations.
- **Consumer redress mechanisms and in court procedures available for consumers claims.** A peculiar feature in these procedures is **the burden of the proof in consumer claims is on the trader** (i.e.: a denial to replace a defective product by a trader).
- **Administrative department or Public Agency responsible:** The Law needs to lay out its mandate, role and functions including responsibility for protecting, informing and educating consumers.

RECOMMENDATIONS

1. Scope of the Law

With respect to chapter I (Scope of application of the Law), we would like to make the following remarks:

- Arts. 1 and 4 can be merged². The resulting article should simply but clearly indicate that the Law applies to the purchase of goods and services from suppliers by consumers and that the latter are granted the five internationally recognized basic rights, namely:

² The Croatian CP Act providing for a simple statement of the Rights recognized to consumers in their purchasing transactions would be suggested as a model. (cfr. Art. 1 of the CP Act of Croatia)

- The right to the protection of their life, health and property,
- The right to the protection of their economic interests,
- The right to efficient legal protection,
- The right of information and education,
- The right to organize themselves in consumers associations aimed at protecting and promoting their interests, at their representation and participation in decision making procedures for matters of their interest.

The resulting article should also include:

- an “exception clause” for those cases in which a limitation in the application of those rights may be deemed to be required in order to protect the national interest.
- a statement indicating that Consumers rights cannot be waived by their subjects.

If rephrased according to the suggested Croatian model this article would also define the personal scope of application of the Law and consequently art. 2 would become unnecessary. For this first indent we would suggest the following wording:

“This Law regulates the protection of the basic rights of Consumers in purchasing goods and services from traders, and in participating in other forms of acquisition of products and services on the market for final use. These rights are...” (see above)

2. Definitions in art. 3

The draft Law currently includes definitions for the following terms: Consumers, product liability, defective goods, disturbing consumers, consumers’ complaint, general commercial conditions, negotiation, mediation, mediation center and template contract.

A comparative analysis of equivalent laws in EU member states and in associated countries shows that there is neither a unified approach nor a closed list of such definitions. While some Laws only include definitions for the terms “Consumer” and “Trader” most of them include a variable number of relevant terms.

Taking account of the contents of the present draft –which we anticipate may differ substantially from the final draft, submitted to the Assembly- we would suggest the following terms should be included:

- **Consumer**, “any natural person who buys a good for purposes that do not fall within the sphere of his commercial or professional activity³

³ See Directive 2005/29/EC on unfair commercial practices, which only applies to transactions between businesses and consumers (see **Annex**).

- **Supplier**, “Any natural or legal person who in contracts for the use of goods or services is acting in his commercial or professional capacity”⁴.
- **Trader**, “Any natural or legal person who sells or offers for sale products which fall within his professional or commercial activity”⁵
- **Consumer goods**, which according to the EU Directive on Sales of Consumers goods can be defined as “any tangible movable item, with the exception of goods sold by way of execution or otherwise by authority of Law, water and gas where they are not put up for sale in a limited volume or set quantity, and electricity”⁶. Also in the EU definitions of the term goods vary with respect to the exclusion of intangible goods.
- **Consumers Associations**, to be defined as “voluntary organizations established by consumers to protect and promote their rights. They are to be subject to the relevant general rules applicable to non- profit associations, particularly to the obligation not to receive funding from businesses.
- **Consumer Affairs Council** or an interdepartmental body also including members of Consumers Associations intervening in the consultation procedure leading to decisions for all matters affecting consumers. The draft Law, however, does not provide for such Council in the relevant chapter⁷, as it is the case in comparative practice in the EU and internationally.
- **Minister**, the authority responsible for Consumers Affairs according to the Law (yet to be specified in the text) at Ministerial level.
- **Consumer Sale**, “the supply of goods or services by traders to consumers as end users in exchange for a price, including contracts for the supply of consumers’ goods to be manufactured or produced⁸.” The definition implies that only B to C transactions are under the scope of the Law.
- **Services**. These are defined by the relevant Directive on Services (2006/123/EC; see **Annex**) as “a wide variety of ever-changing activities”. Art. 2 (2) of the Directive, however, lists the services that are not covered by the Law to define its scope of application and it is to be noted that financial services, healthcare, transports and audiovisual amongst others are not covered. The resulting scope of application of this Directive is therefore limited although both services to

⁴ *Ibidem*.

⁵ See Directive 99/44 on consumer sales (see **Annex**).

⁶ In the EU those states that apply this definition of goods are: Belgium Cyprus, France, Hungary, Ireland, Luxemburg, Poland and Sweden. However, there are other member states that have not made use of specific exclusions in the definition of goods.

⁷ Chapter VI on State Management of Consumer Protection.

⁸ This definition is according to the modification introduced by EC Directive 99/44 on Consumer Sales that led to the amendment of such definition in most but not in all member states (see **Annex**).

business and to consumers are included. Similarly, the relevancy of the definition in the Vietnamese draft Law arises from the need to determine if there are any sectors that are excluded.

3. Other provisions recommended to be included under Chapter 1

In addition to the above remarks we would suggest to also include:

- A provision indicating that the implementation of the Law will not affect the rights granted to Consumers in other Laws.
- The indication that the provisions of the Law will apply regardless of the fact that the underlying contract is regulated by a foreign applicable Law.
- A provision indicating that if the Trader has issued a guarantee for the product or service, he/she shall abide by the legal obligations taken under the guarantee.

4. Modifying and completing the regulation on “the Subjects of the Law” under Chapter VI

This could be achieved by renaming this chapter as “Subjects of the Law” and through:

- The determination of the responsible authority mandated to make decisions and to develop and apply the Consumer Protection Law. In comparative CP Law in EU member states this authority is a **relevant Ministry**. Its authority is implemented either through a designated Department within the structure of the Ministry –such as in the case of Vietnam the designated VCAD- or through an ad hoc autonomous Agency.

Thus, in the case of France this responsibility is allocated to the Ministry of Economic Affairs, Finance and Employment, in Germany the Federal Ministry of Food, Agriculture and Consumer Protection, in Italy the Ministry of Economic Development and in Spain, the Ministry of Health and Consumption⁹

- The regulation of a **Consumer Affairs Council** to participate in the decision making procedure for all matters concerning the health safety or economic interests of consumers, including its membership and functions. In comparative legal practice consultation with the Council is mandatory.

- Including the role and functions of **Consumers Associations** as Subjects of the Law. This would allow the merger of Chapters VI and VII in the draft into a single new chapter.

II. Consumer associations

The list of Consumers rights in Art. 4 of the Vietnamese draft law on Consumer Protection does not include the right of association and representation of consumers (principles of consumer

⁹ See Country profiles for France, Germany, Italy and Spain attached as **Annex** to the present document.

protection), whereas they are internationally recognized and usually mentioned as such in international comparative legal practice. Consumers Associations are mentioned in art 5 (7) on consumer protection policies as an implementing tool of such policies.

The role of these Associations is then developed under Chapter VII of the draft law. This chapter includes a definition that in our opinion needs to be completed in the light of legal definitions of equivalent laws in the EU context and the role that they are recognized in EU strategy documents and best practice. We understand in Vietnam this requires political will and a cautious approach given the need to prepare the members of existing and new organizations to develop the wide range of novel activities and functions that they normally develop in the EU.

While existing organizations in Vietnam may be currently ill adapted to play a role as main implementing agents of national Consumer protection policies similar to the role they are accorded by European legislation, a different approach in the legislation and practice may be required at this stage in Vietnam.

Art. 61 correctly makes a remission to the law governing non profit associations when laying out the requirements for the establishment of new Consumers Associations. The prohibition for these Associations to receive funding from businesses is also laid out in the same article in order to guarantee their independence.

In our opinion, art. 62 needs to be renamed since it does not refer to the rights of such organizations but rather to their functions. This article follows a positive list approach that stresses their role of representing consumers in their claims while failing to mention their role in the education of consumers or in conducting comparative testing of products or services in order to inform consumers and enhance their capacity to make more rational choices.

The restrictions set out by the draft law in their functions in lawsuits in the form of legal requirements to conduct those functions for the benefit of consumers are not unknown in the EU. Thus, the French Consumers Code indicates that their participation in those functions is subject to similar requirements. Given the fact these organizations are new in Vietnam and given the overwhelming need to raise awareness in society of the existence and recognition by the State of basic rights available to citizen as consumers and the availability of mechanisms to defend those rights in and out of court these restrictive conditions can be justified.

The concern of the drafter arising from the potential consequence of the adoption of this new function of consumer representation in the Vietnamese law can be the reason for the failure to include other functions that these Associations need to develop as indicated above, functions that we believe should be included.

Finally, the draft contains a norm indicating that Consumers Associations will participate in the implementation of activities of public interest by specific acts of delegation of functions belonging to the Public Administration in which cases they will be fully or partly funded to

conduct them. To that effect –and in general for activities intended to promote consumers’ interest- a budget allocation partially funded by public resources is provided for in the draft law (art. 57 to 60) and will be managed by the responsible authorities.

BACKGROUND TO THE RECOMMENDATIONS

In the EU the consumer movement has a long tradition. However, it varies substantially across countries in terms of strength, structure and capacity. The Commission pays special attention to the monitoring of national policy towards the consumer movement, in particular in new member states where it is weakest.

Consumers’ organizations have become essential implementing tools for EU and national strategies. In the current Consumer Protection strategy document (2007-2013) EU level consumer organizations are recognized the capacity to make an input into consumer initiatives with a European dimension. In order to promote them, the European Commission co-finances the operational functioning of European level consumer organizations. At the EU level, a European Consumer Consultative Group (ECCG) is the main forum for the Commission to consult with European and national Consumer organizations while also developing specialist user groups and forums¹⁰.

Equivalent laws in EU member states regulate consumer organizations and their functions as legal subjects established by consumers in order to act independently to protect and promote consumers rights. The Spanish Law develops their regime in two articles under the chapter dedicated to the right of representation, consultation and participation. The Italian Codice del Consumo regulates them in connection with the various redress options available to consumers in Italy¹¹. The French Code de la Consommation emphasizes their associative nature, the requirements for their establishment, registration and their recognition as associations of national interest, their participation in the National Council for Consumer Affairs and their ability to represent consumers in their access to justice and out of court dispute settlement mechanisms.

In the review of the relevant articles in the draft Law we would suggest the Croatian Consumer Protection Act¹² as a model. Art. 101 refers to the regime of non profit associations to lay out their establishment requirements and to the role of a federation, the Union of CP Associations in implementing public policy in this area, giving advisory opinion on legal proposals that may affect consumers, participating in Parliamentary discussions and serving as mediator between the State and Consumers as well as between businesses and consumers.

The position of the President of the National Council on Consumer Affairs is in Croatia inherent to the position of the President of the federation according to the CP Act.

¹⁰ See FIN-USE panel of users, a financial and competition sub-groups and others operating in the framework of ECCG.

¹¹ See Part V Codice del Consumo: Le Associazioni dei Consumatori e accesso alla giustizia (arts. 136 – 140 Codice del Consumo).

¹² See Consumer Protection Act of the Republic of Croatia. Official Gazette nr. 96/2003, 10 June 2003.

Art. 102 lays out the role of Consumer Associations. This article includes an open list of the wide range of activities conducted by these organizations and we would refer the Vietnamese drafters to this model. Essentially the functions recognized include information, education of consumers, particularly using the media, communication to/ between consumers, public administration and businesses, comparative testing of products, legal assistance in the handling of claims by consumers (including a specific mention of types of actions that Consumers Associations are entitled to initiate), keeping records, running counseling offices and participating in market surveillance activities in coordination and under the responsibility of the relevant authorities.

Under the Croatian Law, counseling offices authorized by the Ministry of Economy, are to be established by consumers associations to provide organized assistance to consumers on the basis of the needs identified in the National Programme for Consumer Protection.¹³

RECOMENDATIONS

Consistent with our recommendation on the scope and general provisions in the draft law that the content of current art. 5 (“Consumer Protection policies”) should be relocated and renamed as “Consumer Protection Subjects” we would reiterate our recommendation that this new chapter should cover the regime applicable to Consumers Associations as one of such legal subjects –the others being: The Ministry responsible, the Consumer Affairs Council and a National Programme for CP laying out the policies and priorities for a certain period-, in line with the suggested Croatian model.

Against the above background, it is also recommended to further elaborate on the contents of art. 61 which needs to be completed to cover in more detail the legal regime of establishment and registration applicable to Consumers Associations – i.e.: Is there a provision for a specific registry for such organizations, authority and procedures for their authorization, membership requirements for their consideration as associations of public interest, if applicable, etc -¹⁴. Eventually, the same article shall contain the functions of a Federation of Consumers Associations.¹⁵

Art. 62 appears to refer to the functions of Consumers Associations so we recommend to rename it as “Activities of Consumers Associations” following the Croatian model and to merge it with art. 63. While their role in handling consumers claims is covered and the same goes for their right to represent consumers interests in court the list of their activities needs to be completed and we recommend again the Croatian model in art. 102 of the Croatian Consumer Protection Act.¹⁶

¹³ The National Programme defines the policies and priorities for a certain period. It is approved by the Parliament (Sabor) at the proposal of the Government.

¹⁴ For the legal regime applicable to establishment of Consumers Associations we can recommend the French Code (Livre IV, Titre 1er: Agrément des associations; see **Annex**).

¹⁵ Art. 101 of the Croatian Consumer Protection Act can also be recommended as a reference in the rephrasing of art. 61 of the Vietnamese draft law.

¹⁶ See **Annex**.

Their role in providing information to consumers on their rights and events on the market can be mentioned specifically although it is implied in the remission of last point of art. 63. One of the activities usually performed by Consumers Associations, that is, comparative testing of products and services on the market in licensed labs in country in cooperation with the Inspection authorities as well as out of the country if necessary is not comprised in the list.

The participation of members of Consumers Associations in decision making bodies (i.e.: the Council of Consumer Affairs) should also be mentioned in the list of activities with the indication of the conditions the exercise of such participation will be subject to.

Their ability to keep records and track of consumers claims should be also specifically mentioned among their activities as well as their participation in activities concerning the education of consumers (i.e.: developing curricula for primary and secondary education, running programs on consumer education and counseling in the media).

The Vietnamese should also consider including in the draft law the practice of allowing Counseling offices run by consumers associations in the National Programme on Consumer Protection that should be prepared, discussed and adopted, as it is usual practice in the EU as well associated countries and countries that are candidates for accession. The Counseling offices are normally authorized by the responsible Minister and are established for the purpose of providing organized assistance to consumers in a wide range of fields.

With respect to their role in assisting consumers in their access to justice and on the basis of a comparative approach vis-à-vis of European legislation we would recommend to indicate the specific types of actions in which the Consumers Associations that meet the conditions in art. 64 can intervene. The Spanish Law mentions specifically the following:

- Assistance to consumers in claims before the competent courts to request the discontinuation of business activities of traders and operators of means of communication in cases comprised in the articles laying out the legal regime applicable to distance contracts.
- Initiation of court proceedings for requesting from the Court the prohibition of the use of unfair contractual provisions in standard contracts by a trader or group of traders or certain interest groups.
- Initiation of proceedings to request from the Court the termination of activities involving misleading or unauthorized comparative advertising or to request the prohibition of publication of unpermitted misleading and comparative advertising.

Similarly, the Vietnamese drafters should consider further elaborating on the specific function of Consumer representation before courts by Consumers Associations in the relevant provision.¹⁷

¹⁷ Alternatively, this can be developed in the provisions regarding consumer redress.

III. Information, packaging and labeling requirements

The Vietnamese draft CP Law covers information requirements in two articles (Arts. 6 and 7) under Chapter II dedicated to “protecting consumers before conducting transactions with traders”. Thus, Art. 6 referring to "Communication to Consumers" indicates that traders are bound by the obligation to:

- (1) Properly label their goods as provided for by law
- (2) Properly display prices
- (3) To provide consumers with the information about the address where claims about traders are to be received;
- (4) To provide consumers with manuals in Vietnamese if so provided for by laws or if the goods contain such manuals;
- (5) To provide sufficient information about the possibility of goods and services to have adverse impact on the health, lives and assets of consumers and preventative measures;
- (6) To provide information about the possibility to supply spare parts or accessories for replacement;
- (7) To provide relevant information and materials to consumers about the conditions, term, venue and procedures for warranty in the Vietnamese language if the goods and services are subject to warranty;
- (8) To provide consumers with accurate and sufficient information about general commercial conditions before the transaction takes place.

The regulation in this article is complemented by the prohibition of inaccurate and misleading information stipulated in art. 7. It is to be noted that this article provides for the joint responsibility of the trader and a third party involved in any given cases of infringement except if the third party can prove “that it has taken all measures provided for by laws to examine the accuracy and adequacy of the information.”

BACKGROUND TO THE RECOMMENDATIONS

As a general principle, on the basis of the general principle concerning the obligation of information embodied in Directive 2000/13/CE on foodstuff labeling, presentation and advertising (see **Annex**). Consumers’ right to information extends to the essential features of the product – i.e. its nature, quality, quantity and price - so as to provide them with all the elements necessary to make rational choices in the market. Since harmonized labeling requirements were necessary for the achievement of the Internal market foodstuff labeling was regulated in an early Directive (79/112/CE) which was later replaced by the above.

However, for the cases of dangerous substances the information requirements set out in the relevant Directive 67/548/EEC (see **Annex**) on law approximation relating to the classification, packaging and labeling of dangerous substances are far more stringent. For such substances the Directive requires that all packages must be labeled with the name of the substance, the danger symbol and an indication of the danger involved in using the substance, a reference to the special

risks involved in addition to other requirements.¹⁸ The regime laid out in this Directive was partially replaced by Directive 1999/45/EC which enlarged the definition of dangerous substances (see **Annex**). In the sense of the Directive, a dangerous substance is considered to be the one that:

- Contains at least one dangerous substance within the meaning of Art. 2, and
- It is considered to be dangerous after evaluation because of its physical-chemical properties, or the dangers that it poses to health or to the environment. The methods of evaluation of the criteria are set in the annexes of the EC Directive.
- It is not considered to be dangerous within the strict meaning of the Directive but may nevertheless present a specific danger.

There is a list of exclusions of the scope of application of the Directive –medicinal products, cosmetics, certain forms of waste, foodstuffs, animal feeding stuffs, and other cases.

The Directive also establishes the main requirements concerning packaging of dangerous substances. They are as follows:

- The form and materials of the packaging must be strong and solid.
- Containers of dangerous preparations offered to the public must not have either a shape and/or graphic decoration likely to attract children nor mislead consumers nor a presentation similar to that used for foodstuffs or animal feeding stuffs or medicinal products or cosmetics.
- Preparations sold to the general public must be supplied in a container fitted with child resistant fastenings and/ or carrying a tactile warning of danger.

All EU member states have adopted these provisions. In the French Consumers Code a whole title is dedicated to laying out the information requirements (Title I) whose Chapter I develops the general provisions, including¹⁹:

- a) Obligation for the trader to facilitate information on the essential features of the product or service to the consumer at the pre-contractual stage. Most importantly, in consumer claims on the basis of infringement of this general obligation the burden of the proof is on the trader.

In addition to this general obligation of information the French Code contains the following chapters:

- Labeling requirements
- Prices
- Information on terms of delivery

¹⁸ See Article 6 of Directive 67/548/EEC (see **Annex**).

¹⁹ See articles L111-1 to L115-1 of the French Code de la Consommation (see **Annex**). For the redress mechanisms available to consumers see arts. L115-2 to L115-18.

- Value of products and services
- Indications of origin

With respect to labeling requirements the French Code stipulates for the case of products with indication of origin the obligation to mention on the label the name and the address of the producer, as well as the registered logo and instructions for use. The latter applies to any products.

The Spanish Law regulates the right to information in arts 13 to 17. According to this Law traders are bound to indicate true, effective and sufficient information on the essential features of the products, at least on:

- a) The origin, nature, composition and use²⁰
- b) The quality, quantity, category and usual denomination.
- c) The general legal and economic conditions of the sale as well as complete information on the price including VAT and other taxes
- d) Date of production and expiry date
- e) Instructions of use
- f) Procedure available to consumers to terminate the contract

These general provisions are developed through a more detailed regulation on labeling requirements in specific Regulations on labeling, packaging and advertisement of products and services. According to the Spanish Law pre-contractual information shall be supplied at no cost to the consumer. Unlike in the Vietnamese draft Law the Spanish Law on CP includes a provision on the rules by which businesses' offices or services of information to consumers must abide. This article stipulates that such services need to guarantee that the consumers have a proof of their claims and that those claims are addressed directly regardless of the possibility of using those services in addition to other available procedures.

Information requirements can be considered as a cross cutting obligation in all the relevant directives. The Directive on Sales refers to pre-contractual information, the package travel directive or the unfair terms in consumers' contracts include an obligation of transparency, etc.

The principle of transparency can be considered an essential part of the European information model and is closely related to other consumer-protecting requirements prescribed by Community Law²¹.

²⁰ See article 13(1)(a) of the Spanish Consumer Protection Law (Ley de defensa y proteccion de consumidores y usuarios).

²¹ Prof. Dr. Hans Schulte-Nölke, Dr. Christian Twigg-Flesner and Dr. Martin Ebers: EC Consumer Law Compendium. A comparative Analysis. Pag 395

RECOMMENDATIONS

We would recommend that the information requirements in the Vietnamese draft law to be reformulated to reflect the scope of the obligation according to the following guidelines:

1) To include a provision indicating clearly that the right of Consumers to information on products and services extends to their essential features: nature, quantity, quality and price. This information should be indicated in a clear and concise manner in order to provide sufficient information to consumers to enable their rational choices in the market. Alternatively, we would recommend a provision mirroring the Spanish model which requires from traders to provide the following information on products labels or on the sales contract at a pre-contractual stage as appropriate:

- a) The origin, nature, composition and use²²
- b) The quality, quantity, category and usual denomination.
- c) The general legal and economic conditions of the sale as well as complete information on the price including VAT and other taxes
- d) Date of production and expiry date
- e) Instructions of use
- f) Procedure available to consumers to terminate the contract

2) To include a provision on the obligation of the trader to facilitate information on the essential features of the product or service at the pre-contractual stage. The relevant provision needs to mention that in claims for infringement of this provision the burden of the proof is on the trader.

3) For the cases of products with geographical indications the information on the product label needs to include the name and the address of the producer, as well as the registered logo and instructions for use.

4) To include specific provisions regarding packaging and labeling requirements for dangerous substances as well as a definition of such substances mirroring the legal regime in Directive 1999/45/EC. Minimum requirements set out in this Directive are:

- All packages must be labeled with the name of the substance, the danger symbol and an indication of the danger involved in using the substance and a reference to the special risks involved.

5) As for the definition of dangerous products, we recommend the adoption of the enlarged definition introduced by Directive 1999/45/EC. In line with this Directive, a substance is considered to be dangerous if:

²² Art. 13(1)(a) of the Spanish Consumer Protection Law (Ley de defensa y proteccion de consumidores y usuarios)

- Contains at least one dangerous substance within the meaning of art. 2 of this directive,
- It is considered to be dangerous after evaluation because of its physical-chemical properties or the dangers it poses to the health or to the environment. The methods of evaluation of the risks are set in the annexes.
- It is not considered to be dangerous within the strict meaning of the Directive but may nevertheless pose a specific danger.

6) Similarly, the regulation of information requirements on dangerous substances in the new CP Law needs to include a list of exclusions, as appropriate.

7) With respect to packaging of dangerous products the requirement that their form and materials must be strong and solid is to be included in the Vietnamese Law.

IV. Health and safety

Although the Vietnamese draft law on CP includes scattered provisions concerning the protection of consumers' health and safety it does not cover all the relevant provisions under a single chapter unlike in equivalent laws in EU context which incorporate the whole contents of the EC Directive on General Product Safety 2001/95 (see **Annex**)²³.

In the Vietnamese draft law the main principle is laid out in art 5(3) which only points out at the role of the State in encouraging traders to improve the safety and quality of their goods and services to protect the health, safety and economic interest of consumers. In parallel, the same article dedicated to public policies in its first indent indicates the duty of the citizen not to consume goods and services that are detrimental to the environment, contrary to the morals or harmful to their health or to public health. Other provisions (art. 6.1) set out the obligation for traders to properly label their goods according to the law.

By contrast the EU approach to protecting the health and safety of consumers is laid out in a more comprehensive and compelling manner and the relevant obligations emanating from the Directive and the provisions included in national laws are binding upon traders. The protection of the health and safety of consumers is, in fact, a main focus of the EU Consumer Protection Acquis (system) and the relevant provisions in the Directive and in national laws are developed in full detail, accordingly.

BACKGROUND TO THE RECOMMENDATIONS

According to the Directive on General Product Safety, the introduction by member states of a general product safety requirement, provisions on the general obligations of producers and distributors, on enforcement of Community product safety requirements and on rapid exchange of information and action at Community level are required. In order to ensure a high level of consumer protection.

²³ EC Directive of the European Parliament and of the Council 2001/95/EC on General Product Safety (see **Annex**).

Consistent with this the GPSD introduces a general obligation for traders to place only safe products in the market (art.3.1). According to the Directive, a product is deemed to be safe when it conforms to voluntary national standards transposing European standards, the references of which have been published in the Official Journal of the EECC. The member states have the obligation to publish the references of such national standards.

Other than to the European and national standards of safety the Directive also mentions as a reference product safety codes of good practice in force in some sectors as well as recommendations by the Commission setting guidelines on product safety assessment, to the state of the art and technology and to consumer expectations concerning safety. In addition, the Directive indicates that conformity of a product with the criteria designed to ensure the general safety requirement shall not prevent relevant authorities in member states from taking appropriate measures to impose restrictions on the products placed on the market or to recall products where there is evidence, despite such conformity, that the product is unsafe. The Directive also includes directions to draw up European standards.

The Directive sets out the obligation of producers to provide the relevant information to consumers to enable them to assess the risks inherent in a product throughout the reasonably foreseeable period of its use. It also states that producers shall adopt measures commensurate with the characteristics of the product which they supply so as to enable consumers to: (a) be informed of the risks that they pose, (b) choose to take appropriate action.

Producers must take measures to indicate in the product or in the package the identity and details of the producer and the product reference or, when appropriate, the batch of products to which it belongs if this is justified. They are to carry out sample testing of the product if appropriate, keep a register of complaints and distributors informed of such monitoring.

Most importantly, the Directive created a rapid alert and exchange of information system, RAPEX, that has proved to be very effective in the detection of products (non foodstuffs) posing a health or safety related risk. All restricting measures taken by member states –withdrawal or recall of products from the market- must be notified to the Commission including the reasons for their adoption and the changes –i.e.: lifting- of such measures, even if the risk involved is believed not to be likely to impact in other member states, they are nevertheless of interest to member states from a product safety standpoint.

The European Commission is, according to the Directive, responsible for setting the guidelines for the procedures of notification and the criteria to determine when notification is relevant. The EC must forward notifications of member states to other member states. RAPEX is thus the system whereby the information on notifications is exchanged throughout the EU. It is provided for under art. 12.1 of the GPS Directive and its procedures described in detail in following articles and in Annex II.

The system is open to applicant and third countries as well as to international organizations within the framework of agreements between the EC and those countries.

Essentially, the rapid alert system works at different stages. According to art. 11.2 upon reception of a notification, the EC checks whether they comply with the basic requirements applicable to the functioning of RAPEX. If so, the notification is forwarded to the focal points in all EU member states which in turn shall inform the EC of any measures adopted.

The provisions concerning the protection of consumers' health and safety in the Directive have been horizontally adopted throughout the EU. We will refer to how the Italian Consumers Code regulates the safety and quality requirements of products and safety in the market in the twelve articles under the relevant chapter.

The first article (art. 102) indicates that the purpose of the provisions concerning health and safety is to guarantee that the products on the market are safe. It determines the scope of application: (a) The provisions under the chapter are applicable unless it exists a specific provision with the same purpose; (b) Foodstuffs are excluded.

Art. 103 covers a number of relevant definitions, including "safe product", reflecting the above definition in the Directive, "dangerous product", "serious risk", "producer", "distributor", "withdrawal" and "recall" of products from the market.

The Italian Code lays out the obligation of the producer to place on the market only products that are safe. In addition, producers need to provide all information that is relevant for consumers to assess and to prevent risks arising from normal and reasonable use of the product if they are not immediately visible consumers. The measures adopted by producers must be commensurate with the features of the relevant products. They include: (a) the indication in the product and in the package of the producers' relevant details, type of product and eventually batch of products to which it belongs. The particulars of the regulation in the Italian Consumers Code concerning requirements to be met by producers and distributors to ensure high levels of protection of consumers' health and safety reflect fully the regime in the GPS Directive that we have examined.

Other articles in the Italian Code concern: Presumption and safety assessment (art. 105), mechanisms of coordination and consultation (art. 106), market control (art. 107), procedural provisions (art. 108), market surveillance (art. 109), Notification and exchange of information (referred to RAPEX procedures, art. 110), liability of producers for damages arising from use of defective or dangerous products (art. 111) and sanctions (art. 112).

RECOMMENDATIONS

- A chapter on the protection of the health and safety of consumers needs to be included in the law to conform to international standards of regulation in consumer protection. We understand these principles can be covered in other pieces of legislation but developing them under a single chapter is necessary if a Law on Consumer Protection is adopted.
- The first article under the referred chapter shall state clearly the obligation for producers to only place safe products in the market

- A number of definitions need to be included at the beginning of the chapter. We suggest the following: safe product, dangerous product, serious risk, producer, distributor, withdrawal and recall of products. These definitions can be found in the relevant chapters of all equivalent laws in the EU as well as in the EU Directive.
- The chapter containing rules on health and safety of consumers shall also develop the requirements for a product to be deemed to be safe and other criteria to be followed to assess the safety of the products. The regulation covering safety and quality standards in the EU Acquis (product safety codes are available for some sectors, the EC guidelines for product safety, etc) can provide models to regulate the relevant issues in Vietnam.
- Consideration should be given to establishing and regulating a rapid alert system for exchange of information on dangerous products in Vietnam –the system functioning at EU level, RAPEX, can be taken as a model with respect to the procedures of notification and operation- that can eventually be linked with equivalent systems operating in other ASEAN countries.
- A provision indicating the information requirements binding upon producers shall be included. Such information shall include any details enabling consumers to assess the risks involved in using a product or service. In general, the relevant provisions need to include information, packaging and labeling requirements to ensure adequate safety levels indicated in a different set of recommendations and we refer to those recommendations.
- Other articles to be included revolve essentially around market surveillance procedures, the principle of liability of producers for damages caused by defective or dangerous products placed on the market and on sanctions.

V. Price indications

Art 4 (2) of the Vietnamese draft stipulates the following obligation for traders:

“To publicly display prices of all goods and services at their business places in accordance with the law”

It would be strongly recommended to rephrase and elaborate on this provision to specify that the obligation is for traders to indicate both the selling and the unit price of the products in order to improve the information to consumers and to facilitate comparison of prices. In various indents the drafters could elaborate on the definitions of the relevant terms (i.e.: selling price, price per unit of measurement, bulk product, pre-packed product) and provide for exemptions for those cases in which such indications might be deemed not to be useful or to create confusion,²⁴ as appropriate.

For the case of failure to indicate prices according to the Law sanctions shall be determined and stipulated in the enforcement provisions currently included in chapter VIII.

²⁴ This option has been retained both in art. 5 of the Directive on Price Indication (98/6/EC) and in the relevant CP Laws of some member states [Italian Consumers’ Code arts. 13 – 17; see Spanish CP Law art. 13 (d)].

In the EU the requirements on price indication are set in a Directive (98/6/EC; see **Annex**) that has been adopted by all member states. Some of them have even enlarged the scope of application of this directive to extend it to legal persons – by way of providing a wider definition of Consumer in their laws- and by extending the scope of application of this provision to services whereas the Directive only concerns goods. The Directive also includes a general obligation incumbent on member states to provide for sanctions for cases of infringement and to ensure that these sanctions are enforced. These sanctions need to be effective, proportionate and dissuasive.

In practice, the exclusion of services from the scope of application of this Directive (together with the possible exemption for member states allowed by art. 5) has proved to be a constraint to cross border trade.

Both the Directive and the relevant laws in member states adopting its provisions have included the pertinent definitions. Thus, selling price is defined as the “final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes”, a definition that has been adopted by most member states using the copy and paste technique.

Some member states have applied even stricter provisions:

- In Finland and Sweden both the selling price and the unit price have to be indicated in a clear and individualized way to avoid any confusion.
- In Cyprus, the selling and unit price must also be “distinct”.
- In Spain, “the price must be located in the same visual ambit and visible for the consumer without need to apply for that information”.

Most member states have implemented the Directive on Price Indication as Public Law and therefore, in these countries, the responsible public authorities control the application of the rules on price indication. As a consequence of this, a majority of the member states have stated public law sanctions ranging from fines to imprisonment.

As an example of how the above obligation has been adopted by member states we would refer to the Italian case. The Italian “Codice del Consumo” regulates the obligation of price indication in a Chapter dedicated to “specific information requirements.” For the price indication obligations in particular the Italian Law includes a section on “Price indication per unit of measurement” including separate articles for definitions, scope of application, modalities of price indication, exemptions and sanctions.

To refer to legal practice in an accession country we have examined the pertinent articles in the Croatian Law. Art. 8 reads as follows:

Article 8

(1) The trader shall clearly, visibly and legibly state the retail price of products, services he/she provides and spare parts he/she sells with the service, and mark the price is in HRK.

(2) The retail price of a product or service, a retail price of a product unit, manufacturing unit or a certain quantity of product shall be the final price for the consumer.

(3) A unit price is a price per one kilogram, one litre, one meter, one square meter or one cubic meter of a product, or some other quantity measure that is generally of usually used in the sale of products.

(4) Besides the retail price, in the case of pre-packed products in the consumer packaging, the unit measure for such a product shall be clearly, visibly and legibly stated if the package unit and unit of measure of the product are different.

(5) For bulk products, only the unit price of the product shall be stated at the selling point.

(6) The price for unit of measure does not need to be stated for pre-packed products if it equal to the retail price of the product, as well as for those products in the case of which it would be pointless of could cause confusion taking into consideration the characteristics of the product.

(7) If other regulations stipulate stating of the information on net weight, it shall be sufficient for pre-packed products to state the price for the net unit of measurement.

(8) The retail price shall be stated on the product or packaging, as well as at the product selling point and on the product displayed in the shop window. No other price besides those referred to in paragraph 2 of this Article shall be stated on the product, except in the case of a sale at a reduced price. The price for unit of measure of the pre-packed product shall be stated at the product selling point.

(9) Provision of the paragraph 8 of this Article shall not be applied to public auctions and sales of works of art and antiquities, as well as to the prices of services stipulated by other regulations.

The Croatian Law provides for one exemption from these obligations that applies to small trading companies or individual traders.

The general obligation to indicate the selling and unit price on products also applies to advertisement on such products according to art. 9

Therefore, we would recommend further elaboration of art. 4(2) in line with these models.

Article 9

The provision in Article 9 paragraph 4 on stating the price for the product's unit of measure shall not be applied to small trading companies, craftsmen and individual traders with up to five employees.

Article 10

Each advertisement mentioning the retail price of the product shall also contain the price as defined by Article 8 paragraph 1 of this Act. (that is the unit price)

RECOMMENDATIONS

- Rephrasing and completing the provision in art. 12 to indicate that traders are obliged to specify both the selling price and the price per unit of the product in order to provide adequate information to consumers and to facilitate their comparison of prices
- To include definitions of selling price, unit price, bulk product, pre-packed product and other relevant definitions.
- To include articles referring to exemptions and sanctions in line with the above indicated model laws.

VI. Unfair commercial practices perpetrated by professionals vis-à-vis consumers

These provisions correspond to article 7, 8 and 9 of the draft law and correctly identify in misleading and aggressive commercial practices the two general categories of practices which are generally considered illegal under EU and member states legislation on unfair commercial practices. Breaches of these rules are subject to the general remedies provided in articles 67 and 68 of the draft law and may be the object of an out of court settlement (negotiation – articles 21 and 22; mediation – article 23 to 34; and, arbitration – article 35).

Our recommendations are based on the provisions of the Directive 2005/29/EC concerning unfair business-to-consumers commercial practices in the internal market, the text of which is attached to this document in the **Annex**. Furthermore, with respect to remedies and law enforcers, we will formulate recommendations based on the “best practices” adopted by EU member states.

BACKGROUND TO THE RECOMMENDATIONS

As regards the overall draft law, we observe that its provisions follow a methodology which is inconsistent with that adopted by the EC Directive. On this point, we have two remarks:

- Firstly, the draft law lacks significant detail in defining misleading (articles 6 and 7 of the EC Directive) and aggressive (articles 8 and 9 of the EC Directive) commercial practices. In particular, unlike the methodology used in the EC Directive, the draft law does not include a black list of clauses which are considered unfair in all circumstances (See Annex I of the EC Directive). The black list approach adopted by the EC Directive increases legal certainty by clarifying for all the main players – traders, consumers (including consumer associations) and law enforcers - which practices are considered always illegal.
- Secondly, the draft law does not include a general ban on unfair commercial practices (see article 5 of the EC Directive). This general ban enables law enforcers in EU member states to include within the notion of unfair commercial practices also practices which were unknown at the time the Directive was adopted, thus allowing them to adjust this notion in the light of the evolution that unfair commercial practices may have in the future.

As regards the specific substantive provisions, we observe that, unlike the EC Directive, the draft law does not contain any detailed provision dealing with the following aspects:

- The definitions used in the text (see article 2 of the EC Directive), such as, for example, the definition of “business-to-consumers commercial practices”, which is important to distinguish these practices from “business-to-business commercial practices” (such as misleading advertising); or the definition of “average consumer“ which is important when a practice is likely to affect a consumer group as opposed to an individual (see article 3(2) of the EC Directive) ;
- The scope of the provisions and their inter-relation with other rules on consumer protection, particularly those concerning the protection of consumers’ health and safety (see article 3 of the EC Directive);
- The distinction between misleading actions (see article 6 of the EC Directive) and misleading omissions (see article 7 of the EC Directive);
- The elements over which the trader must provide information to the consumers in order to enable them to take informed decisions when purchasing its products (Article 6(1) of the EC Directive), specifically when the trader expressly invites consumers to purchase its products (see article 7(4) of the EC Directive), such as, for example, the obligation to provide clear information over the characteristics of the product or its price (including taxes and all other charges);
- The definition of aggressive commercial practices, including the circumstances to be taken into account in order to evaluate the use by a trader of “harassment, coercion and undue influence” over the commercial decision of a consumer when purchasing its products (article 9 of the EC Directive).

As regards the issue of remedies and law enforcers, we have the following three remarks:

- Firstly, unlike the EC Directive, the draft law does not provide for the possibility to settle disputes regarding unfair commercial practices in accordance with a Code of Conduct (see article 10 of the EC Directive). Recourse to such Code of Conducts provides an alternative way to resolve a dispute – instead of going, for example, before a judicial or administrative authority – and may be found more convenient by the parties.
- Secondly, unlike the best practices in EU member states, the draft law does not provide any remedy specifically applicable to unfair commercial practices. On this point, EU member states legislation provides for several specific remedies against unfair commercial practices which include: (i) settlement decisions; (ii) interim measures; (iii) heavy monetary sanctions; (iv) publication of the whole decision or a part of it in newspapers or other media; (v) publication of a corrective statement; (vi) compulsory or temporary suspension of business activities; (vii) class-actions. It is true that, with the important exceptions of settlements and class-actions, all these remedies are already

provided in articles 67 and 68 of the draft law. However, these articles completely lack of any detail concerning the instances where either of these remedies can be invoked and therefore do not provide traders, consumers and law enforcers with the clarity needed to deal with this crucial aspect of the law. [This issue can be dealt also through an implementing regulation]

- Thirdly, following the model adopted in Italy and to some extent also in France and UK, we believe it would make sense to confer the role of administrative law enforcer on unfair commercial practices to VCAD and VCC, since these authorities are also competent to apply the competition rules in Vietnam. Indeed, competition and consumer protection law are largely complementary subjects. Competition authorities are very well placed to look into unfair commercial practices since among their regular tasks they are responsible to monitor traders' commercial behavior in the market place (for example, through investigations of anti-competitive practices, RIA and general studies concerning specific economic sectors). Thus, if a trader is accused of unfair commercial behavior, VCAD and VCC are two public administrations which are well placed to look into the substance of the matter, compare the suspected practice with market practice and provide a fast response.

RECOMMENDATIONS

- Introduce a black list of misleading and aggressive commercial practices.
- Introduce a general ban on unfair commercial practices: the general ban should apply only when a practice is not already caught by the black list. In particular, a practice not caught by the black list should be nonetheless found contrary to the general ban if it is contrary to (i) the “professional diligence” that traders normally use in the sector of business concerns and (ii) it affects or is likely to affect the consumer freedom of choice and its ability to take informed commercial decisions.
- Introduce definitions of specific terms used in the provisions concerning unfair commercial practices: some of these definitions may derogate from the general definitions used throughout the consumer act – for example, the definition of “average consumer” may be different from that of “consumer” - and are needed to deal with specific concerns raised by unfair commercial practices.
- Define the scope of the provisions on unfair commercial practices and their inter-relation with other aspects of consumer protection law.
- Introduce the distinction between misleading actions and misleading omissions.
- Identify the elements over which the trader must provide information to the consumers in order to enable them to take informed decisions when purchasing its products.
- Introduce a more detailed definition of aggressive commercial practices.

- Introduce the possibility for Code of Conducts to regulate and settle disputes related to unfair commercial practices.
- Introduce settlement decisions (so called “moralsuasion”): traders accused of unfair commercial practices should be given the possibility to provide law enforcers with commitments aimed at eliminating all the negative effects of the accused practice on consumers. Law enforcers should be allowed to seek these commitments *ex-officio*. This possibility should be conferred only when the accused practice in question has not already exhausted its negative effects on consumers. [This issue can be dealt also through an implementing regulation]
- Consider whether to introduce the class-action: unfair commercial practices have been traditionally subject to class-action remedies where the same illegal practice implemented by a trader provokes damages to several different consumers at the same time (think, for example, about the decision of a mobile telephone company to raise the tariffs for its services unilaterally, without asking the authorization of its subscribers). In these instances, in the absence of a class-action remedy, consumers would be discouraged to ask compensation from the trader individually, if the damage they suffered corresponds to an amount which would not justify the costs of their access to justice. [We will provide detailed recommendations on how to introduce the class-action in Vietnam in a separate section of this document.] [This issue can be dealt also through an implementing regulation]
- Introduce details concerning the instances where either remedies provided in the draft law can be invoked against unfair consumer practices. [This issue can be dealt also through an implementing regulation]
- Consider identifying VCAD and VCC as the administrative authorities in charge of enforcing the provisions on unfair commercial practices.

VII. Misleading and comparative advertising affecting other traders’ interests

The draft law disciplines the consequences of misleading advertising on consumer interests in Article 7. As regards this provision, we have already provided our recommendations in the section of this document concerning unfair commercial practices to which we refer the reader. However, unlike EU law, the draft law does not include any provision concerning the impact of misleading advertising on the interest of other traders. Furthermore, the draft law is silent over the possibility for traders to use comparative advertising to market their products. Under EU law, these issues are subject to the provisions of the EC Directive 2006/114 concerning misleading and comparative advertising, which provides the background to our recommendations and is attached in the **Annex** of the present document.

We will also make reference to EU member states “best practices” to justify our recommendations concerning the issues related to the access to justice, appropriate remedies and the relevant enforcement authority.

BACKGROUND TO THE RECOMMENDATIONS

The rationale of the EC Directive 2006/114 is that advertising is a very important means of creating genuine outlets for all goods and services throughout the EU. The Directive therefore lays down common rules for the definition of misleading advertising and sets uniform conditions where comparative advertising can be allowed.

The Directive adopts the following definition for both “misleading advertising” and “comparative advertising”:

- “Misleading advertising” means 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 its deceptive nature, is likely to affect their economic behavior or which, for those reasons, injures or is likely to injure a competitor.
- “Comparative advertising” means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor (see article 2).

Similarly to the provisions of EC Directive 2005/29 on unfair commercial practices (see article 6), EC Directive 2006/114 provides that in order to establish whether advertising is misleading, account must be given to the information concerning (see article 3): (a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services; (b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided; (c) the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.

Under the directive, comparative advertising is allowed if the following four conditions are cumulatively met (article 5):

- It is not misleading (here the assessment required is identical to that carried out under the provisions on unfair commercial practices).
- It compares goods or services meeting the same needs or intended for the same purpose.
- It objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price.
- It does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor.
- For products with designation of origin (such as for example “Greek feta cheese” or “French Bordeaux wine”), it relates in each case to products with the same designation.
- It does not take unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products.

- It does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.
- It does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trademarks, trade names, other distinguishing marks, goods or services and those of a competitor.

As regards the issues of access to justice, appropriate remedies and the relevant enforcement authority, EU member states adopt solutions similar to those related to unfair commercial practices. Thus, access to justice against misleading advertising is granted to both affected traders and consumers, even through representative associations (obviously, the consumers and their representative associations will attack a misleading advertising under the provisions related to unfair commercial practices). As regards possible remedies, these include: (i) settlements (moralsuasion), (ii) interim measures, (iii) financial penalties; (iv) cease and desist orders; and, (v) publication of the decision or of a corrective statement. Finally, for the same reasons we have highlighted in the section related to unfair commercial practices, EU member states such as France, Italy and the UK confer the role of administrative law enforcer to their competition authorities.

RECOMMENDATIONS

- Introduce provisions on misleading and comparative advertising to protect the interest of traders.
- Introduce definitions of “misleading advertising” and “comparative advertising” mirroring those of the EC Directive.
- Consider adopting uniform rules on the evaluation of when advertisings can be considered as “misleading” under these provisions and the provisions on unfair commercial practices.
- Provide access to justice to both traders and consumers (including representative associations).
- Provide appropriate remedies against these practices.
- Consider conferring the role of administrative law enforcer to VCAD and VCC.

VIII. Contracts concluded away from business premises

The draft law does not include any provision concerning contracts concluded away from business premises. Under EU law, this kind of contracts is subject to the provisions of EC Directive 85/577 to protect the consumers in respect of contracts concluded away from business premises, which constitute the background to our recommendations and is attached to the present document in the **Annex**. Furthermore, we will be referring to the “best practices” of EU member states in respect of the financial thresholds established for the application of these rules.

Other recommendations applicable to this kind of contracts may be found in the sections of this document concerning unfair commercial practices, e-commerce and distance selling.

BACKGROUND TO THE RECOMMENDATIONS

The special feature of contracts concluded away from the business premises of the trader is that as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared. In these instances, the consumer is often unable to compare the quality and price of the offer with other offers and needs to be given some time to reflect about the purchase he has made (this is also referred as the “cooling off” period).

The EC Directive includes a definition of contracts concluded away from business premises. These are (see article 1):

- (i) Contracts concluded during an excursion organized by the trader away from his business premises, or-during a visit by a trader (a) to the consumer's home or to that of another consumer; (b) to the consumer's place of work; where the visit does not take place at the express request of the consumer.
- (ii) Contracts for the supply of goods or services other than those concerning which the consumer requested the visit of the trader, provided that when he requested the visit the consumer did not know, or could not reasonably have known, that the supply of those other goods or services formed part of the trader's commercial or professional activities.
- (iii) Contracts in respect of which an offer was made by the consumer under conditions similar to those described under points (i) and (ii) above, before its acceptance by the trader.

These transactions require a special legal regime conferring to the consumer a right of cancellation over a minimum period, which the EC directive identifies in at least seven days (see article 5). In EU member states this right is normally identified with the right of withdrawal which, as we have seen, is already applicable to contracts concluded at distance or through electronic means (e-commerce). Thus, in Italy, for example, this cooling off period is identical to the period granted to the consumer for the exercise of the right of withdrawal and corresponds to at least 10 days.

The EC Directive also establishes the principle that the consumer must be informed in writing of his right of cancellation. The written notice must include (see article 4): (i) the name and the address of a person against whom the right can be exercised; (ii) the date of the notice; (iii) the contract identification (to enable the consumer to quickly identify his contract). The written notice referred in article 4 of the EC Directive, must be given at the time the contract is concluded for contracts falling within points (i) and (ii) above or at the time when the offer was made for contracts falling within point (iii) above.

The Directive does not apply to (see article 3):

- Contracts below a certain financial threshold: In Italy, for example, this threshold is established at Euro 26 (net of any fiscal charges). In these instances, the value of the contract is deemed to be too low to justify the application of the special protection regime established under this directive.

- Contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property (contracts for the supply of goods and for their incorporation in immovable property or contracts for repairing immovable property fall within the scope of the Directive). [This exemption is similar to that provided under the EC rules on distance contracts]
- Contracts for the supply of foodstuffs or beverages or other goods intended for current consumption in the household and supplied by regular roundsmen. [This exemption is identical to that provided under the EC rules on distance contracts]
- Contracts for the supply of goods or services, provided that all three of the following conditions are met: (i) the contract is concluded on the basis of a trader's catalogue which the consumer has a proper opportunity of reading in the absence of the trader's representative, (ii) there is intended to be continuity of contact between the trader's representative and the consumer in relation to that or any subsequent transaction, (iii) both the catalogue and the contract clearly inform the consumer of his right to return goods to the supplier within a period of not less than seven days of receipt or otherwise to cancel the contract within that period without obligation of any kind other than to take reasonable care of the goods. [This exemption is not applicable under Italian consumer protection law]
- Insurance contracts.
- Contracts for securities. [This exemption is identical to that provided under the EC rules on distance contracts]

RECOMMENDATIONS

- Introduce a definition of contracts concluded away from business premises.
- Introduce a right of cancellation mirroring the provisions of the EC Directive.
- Introduce the obligation for the supplier to provide consumers with a written notice about the existence of their right of cancellation and the conditions under which it can be exercised.
- Consider introducing a list of contracts which will not be subject to these rules. In order to carry out this exercise, you may find inspiration from the list established under the EC Directive and the way this has been applied by EU member states.

IX. Distance contracts (cross-border sales)

The draft law does not include any provision concerning the conclusion of distance contracts between a supplier and a consumer. In the EU, this kind of transactions is subject to the provisions of the EC Directive 97/7 on the protection of consumers in respect of distance contracts, which provides the background to our recommendations and is attached to the present document in the **Annex**. We will also refer to certain EU member states “best practices”, notably

concerning the issues of consumer's privacy, burden of proof, protection of human health and the interest of minors.

Other recommendations which can be applicable to distance contracts can be found in the sections of this document related to unfair commercial practices and e-commerce.

BACKGROUND TO THE RECOMMENDATIONS

In essence, the provisions of the EC Directive discipline all those contracts which are concluded in accordance to a scheme which does not involve the simultaneous presence of the supplier and the consumer. The directive defines "distance contract" as "any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded." (see article 2) It also defines "means of distance communication" as any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties (*ibidem*).

These contracts require a special legal regime which must enable the consumer to make an informed choice before concluding the contract. Also, given that the consumer is not able actually to see the product or ascertain the nature of the service provided before concluding the contract, he should be granted a special right of withdrawal which he can exercise in determined circumstances.

As regards the information requirements, the EC directive disciplines the following aspects:

- Before concluding the contract, the consumer shall be provided with the following minimum information [see Article 4(1)]: (a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address; (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 [except when this right does not apply – see below]; (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) the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently. As you can see this information overlaps with that requested under the recommendations concerning e-commerce rules and should therefore be checked in order to avoid repetition in the consumer act.
- The consumer must receive written confirmation or confirmation in another durable medium available and accessible to him of the information referred to in letters (a) to (f) above, in good time during the performance of the contract, and at the latest at the time of delivery of the goods [see article 5(1)];
- In any event the consumer must be given the following information [see article 5(1)]: (i) written information on the conditions and procedures to exercise the right of withdrawal;

- (ii) the geographical address of the place of business of the supplier to which the consumer may address any complaints; (iii) information on after-sales services and guarantees which exist; and, (iv) the conclusion for cancelling the contract, where it is of unspecified duration or a duration exceeding one year (this provision does not apply to services which are performed through the use of a means of distance communication, where they are supplied on only one occasion and are invoiced by the operator of the means of distance communication - think, for example, to the service of internet access through a Wi-Fi operator at the airport; in these instances, the consumer must be given an address of the supplier where he may address complaints).
- In the case of telephone communications, the identity of the supplier and the commercial purpose of the call shall be made explicitly clear at the beginning of any conversation with the consumer [see article 4(3)].

As regards the right of withdrawal, the EC Directive provides the following:

- For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods [see article 6(1)] [in Italy this minimum period is at least 10 working days]; If the supplier has failed to respect the minimum information requirements set out above, the period for the exercise of the right of withdrawal is extended to three months (*ibidem*). This period shall begin: (i) in the case of goods, from the date of receipt by the consumer; (ii) in the case of services, from the day of conclusion of the contract (*ibidem*).
- If the consumer exercises legitimately his right of withdrawal, the supplier shall be obliged to reimburse the sums paid by the consumer free of charge. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods. Such reimbursement must be carried out as soon as possible and in any case within 30 days [see article 6(2)]. In these instances, if the price of goods or services is fully or partly covered by credit granted by the supplier or by a third party on the basis of an agreement between the third party and the supplier, the credit agreement shall be cancelled, without any penalty [see article 6(4)].
- The consumer may not exercise the right of withdrawal, unless otherwise agreed by the parties, in respect of contracts: (i) for the provision of services if performance has begun, with the consumer's agreement, before the end of the seven working day period; (ii) for the supply of goods or services the price of which is dependent on fluctuations in the financial market which cannot be controlled by the supplier; (iii) for the supply of goods made to the consumer's specifications or clearly personalized or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly; (iv) for the supply of audio or video recordings or computer software which were unsealed by the consumer; (v) for the supply of newspapers, periodicals and magazines; (vi) for gaming and lottery services [see article 6(3)].

The EC Directive includes other provisions concerning distance contracts which are of significant importance for the interests of consumers. These are:

- Unless otherwise agreed by the parties, the supplier is under an obligation to execute the order within a maximum of 30 days from the day following that on which the consumer forwarded his order to the supplier. If the supplier defaults because the goods or services are not available, the consumer must be reimbursed the sums he paid within maximum 30 days. The supplier may provide alternative goods or services if authorized prior to the conclusion of the contract or by the contract. These goods or services must be of equivalent quality and price. In these instances, the costs of returning the goods following the right of withdrawal must be bear by the supplier (see article 7).
- The right of consumers to cancel a payment where the supplier made fraudulent use of their payment card in distance contracts. These sums must be either re-credited or returned to the consumer (see article 8).
- The prohibition for the supplier to demand payment for the supply unrequested goods or services [this practice is black listed under EC Directive 2005/29 on unfair commercial practices; see Annex I of the Directive] and the exemption for the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent (see article 9).

It is very important to stress that the burden of proof concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent is placed by the EU member states on the supplier [see also article 11(3) of the EC Directive].

The EC Directive and member states “best practices” protect the consumer's right to privacy, particularly as regards freedom from certain particularly intrusive means of communication. Thus, use by a supplier of automated calling system without human intervention (automatic calling machine) and facsimile machine (fax) is permitted only if authorized by the consumer. The EC Directive 2005/29 on unfair commercial practices black list a number of practices violating the consumer’s right to privacy such as making several unsolicited phone calls or sending faxes or emails to provide commercial information (see Annex I to the EC Directive 2005/29).

The EC Directive on distance contracts does not apply to:

- contracts relating to financial services;
- contracts concluded by means of automatic vending machines or automated commercial premises;
- contracts concluded with telecommunications operators through the use of public payphones;
- contracts concluded for the construction and sale of immovable property or relating to other immovable property rights, except for rental;
- contracts concluded at an auction;
- contracts for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home of the consumer, to his residence or to his workplace by regular roundsmen;

- contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period; exceptionally, in the case of outdoor leisure events, the supplier can reserve the right not to refund the sum to consumers in specific circumstances.

EU member states ban the application of the directive to medicinal products and other substances which may affect the human health and normally include in their consumer protection acts special provisions to protect the interests of minors.

RECOMMENDATIONS

- Introduce a minimum information requirement to be provided by the supplier before the distance contract is concluded.
- Introduce a right of withdrawal for the consumer mirroring that provided under the EC Directive.
- Introduce an obligation for the supplier to execute the order within a maximum of 30 days from the day following that on which the consumer forwarded his order to the supplier.
- Provide the possibility for the consumer to be reimbursed if the goods or services are not available. If authorized by the consumer, the supplier may execute its obligation by providing alternative goods or services of equivalent quality and price. The costs of returning the good or services following the exercise of the right of withdrawal must be bear by the supplier.
- Authorize consumer to receive reimbursement of sum fraudulently charged in distance contracts.
- Prohibit the supplier to demand payment of unrequested goods or services.
- Prohibit unsolicited breaches of consumer's privacy such as unsolicited phone calls or email providing commercial information.
- Consider shifting the burden of proof concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent on the supplier.
- Consider exemptions from the application of the distance contracts provisions.
- Consider stricter rules on products which may affect the human health or the interests of minors.

X. E-commerce

The draft law on consumer protection does not include provisions concerning the protection of consumer's interests in e-commerce transactions and communications. These provisions are included in a separate text, the law 51/2005/QH11 on e-transactions. This law establishes that agencies, organizations and individuals must not take any action that prevents or adversely affects the protection of security and safety in e-transactions (see Article 44). It also establishes that "online service-providing organizations" shall co-coordinate with concerned agencies in elaborating management regulations and adopting technical measures to prevent and stop the use of their network services for dissemination of data messages which are "against the cultural

traditions, national ethics, or prejudicial to the national security, public order and safety or violate other provisions of law.” Online service organizations may be held responsible for the delayed removal of such illegal data, following the removal order from the competent state agencies (see Article 45). The law authorizes the use of e-contracts (see articles 33 to 38) and gives the party the possibility to reach an agreement on “technical requirements, certification, conditions to ensure integrity and confidentiality related to such e-contracts” [article 35(3)].

We have reviewed the provisions of this law against the background of the EC Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (attached in the **Annex** to the present document) and the “best practices” adopted by EU member states.

Other recommendations that touch upon e-commerce may be found in the sections of this document concerning unfair commercial practices, misleading advertising and distance selling.

BACKGROUND TO THE RECOMMENDATIONS

Consumer’s interests in activities carried out through electronic means in Vietnam can be efficiently protected if the draft law will include a provision stating that it disciplines also these activities. It is easy to do this in our case, given that the Vietnamese e-commerce legislation already exists and the consumer act has not been adopted yet.²⁵ Once this is done, all the following remarks and recommendations could be implemented directly in the draft law.

Our preliminary remarks on this law concern the definitions it uses (see article 4). Unlike the EC Directive, these definitions fail to identify in the “service provider”, the natural or legal person that is providing a service subject to the rules on e-commerce (see article 2 of the EC Directive). A similar ambiguity concerns the actual services which are covered by the e-commerce law. In the EC Directive, these are described as follows at paragraph 18 of the preamble:

“Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or

²⁵ The other way to deal with this issue would be to change the existing Vietnamese law on e-transactions and introduce a waiver stating that “the provisions of this law are without prejudice to the rules on the protection of consumers.” However, this alternative way is complicated since it would force the Vietnamese authorities to amend the existing law.

the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.”

At this stage, we are not suggesting to change the Vietnamese law on e-transactions to introduce new definitions or improve the existing ones. However, we draw your attention to these definitions since they may help you to better frame and understand our remarks over the substance of the law.

As regards the substantive provisions of the Vietnamese law, our remarks cover two areas: (i) the information to be provided when using electronic means by the service provider; and, (ii) the liability of intermediary service providers such as, for example, telecommunication companies.

Concerning the information to be provided by the service provider when using electronic means, we have the following remarks:

- Unlike the EC Directive on e-commerce, the Vietnamese law on e-transactions does not contain any provisions on the general information that the service provider needs to supply to consumers when it uses e-commerce (see article 5 of the EC Directive). This information covers at least the following aspects: (a) the name of the service provider; (b) the geographic address at which the service provider is established; (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner; (d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register; (e) where the activity is subject to an authorization scheme, the particulars of the relevant supervisory authority; (g) the VAT identification where applicable. Also prices, where listed, should be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.
- Unlike the EC Directive, the Vietnamese law on e-transactions does not contain any provision for the minimum information that the service provider must include in its commercial communication to consumers. In particular, this information must comply at least with the following conditions (see article 6 of the EC Directive): (a) the commercial communication shall be clearly identifiable as such; (b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable; (c) promotional offers, such as discounts, premiums and gifts, where permitted, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously; (d) promotional competitions or games, where permitted, shall be clearly identifiable as such, and the

conditions for participation shall be easily accessible and be presented clearly and unambiguously. The EC Directive applies similar requirements also to unsolicited commercial communication by electronic mail (see article 7). In addition, Article 7(2) of the directive imposes on service providers using unsolicited commercial communication the obligation to constitute an opt-out register in which natural persons not wishing to receive such commercial communications can register themselves.

- Unlike the EC Directive, the Vietnamese law on e-transactions does not contain any provisions on the minimum information that the service provider must give when concluding a contract through electronic means prior to the order being placed by the recipient of the service. This information must be “clear and unambiguous” on the following aspects (see article 10 of the EC Directive): (a) the different technical steps to follow to conclude the contract; (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible; (c) the technical means for identifying and correcting input errors prior to the placing of the order; (d) the languages offered for the conclusion of the contract. In addition, contract terms and general conditions must be made available to the recipient in a way that allows him to store it and reproduce it. Finally, where the recipient places an order, the service provider has to acknowledge receipt of the recipient’s order without undue delay and by way of electronic means (this provision does not apply to contracts concluded through an exchange of emails) (see article 11 of the EC Directive).

As regards the liability of intermediary service providers, we notice that the EC Directive expressly provide an exclusion from liability to the service provider when it merely transmits, cache or host illegal information on its network (article 12 to 14 of the EC Directive). Also, the Directive expressly excludes an obligation for the service provider to monitor the information that it transit or store on its network or to seek facts or circumstances indicating illegal activity (article 15 of the EC Directive). This issue was hotly debated in Brussels at the time of the adoption of this directive, since it clearly raises many concerns for large service providers such as telecommunication operators and TV broadcasters. However, similarly to the Vietnamese legislation, when the provider has actual knowledge of illegal information being transmitted, cached or stored via its network, it should act expeditiously to remove or prevent access to that information (see articles 12 to 15). The same conclusion obviously applies if the provider is ordered to do so by a court or another state authority.

We do not recommend at this stage to amend the existing Vietnamese law on e-transactions to include an express exclusion from liability for service providers in these instances. However, we thought it was important for us to mention these provisions of the EC Directive since they cover a very important aspect of this law.

Finally, for the sake of completeness, we also notice that, unlike the Vietnamese law, the EC Directive provides specific rules for regulated professions such as lawyers, doctors, architects etc (see articles 5 and 8 of the EC Directive). These rules cover the minimum information requirements that service providers belonging to this professions should observe when operating via e-commerce, which we believe might not be of great relevance for Vietnam. The Directive

acknowledges that these aspects may be subject to specific regulations in accordance with the Code of Conducts adopted by the various regulated professions concerned.

RECOMMENDATIONS

- Introduce a provision in the draft law stating that it disciplines also e-commerce transactions and communications.
- Introduce general minimum requirements concerning the information to be provided by the service provider when reaching consumers through the use of e-commerce.
- Introduce specific requirements for information concerning commercial communication.
- Introduce specific requirements for information concerning unsolicited commercial communication.
- Introduce an obligation for service provider to create an opt-out register to enable recipients not wishing to receive unsolicited commercial communication to register.
- Introduce minimum information requirement that the service provider must give when concluding a contract through electronic means prior to the order being placed by the recipient.
- Introduce an obligation for the service provider that contract terms and general conditions must be made available to the recipient in a way that allows him to store and reproduce them.
- Introduce an obligation for the service provider to acknowledge receipt of the recipient's order without undue delay and by way of electronic means (in the EU this provision does not apply to contracts concluded through an exchange of emails).

XI. Consumer credit

Unlike in the EU context the Vietnamese draft Law on Consumer Protection (Law nr. 2010/QH12) does not include specific provisions aimed at protecting consumers in their credit transactions. Both the relevant EU Directive and the legislation of member states provide appropriate legal instruments to increase the certainty and reliability of credit arrangements for both consumers and creditors. In addition to the adoption of the requirements set in Directive 2008/48/EC (see **Annex**) on credit arrangements for consumers²⁶ most member states have developed their own specific laws both to adopt the basic obligations set in the directive and to cover the areas that are excluded from its scope of application.

BACKGROUND TO THE RECOMMENDATIONS

What is peculiar both in the EU Directive and in the relevant national Laws is that they establish more stringent information requirements. The rationale for this is in order to enable consumers to know their rights and obligations, credit contracts shall contain all necessary information in a

²⁶ This Directive repeals Council Directive 87/102/EEC (see **Annex**).

clear and concise manner. More specifically consumers shall be protected against unfair or misleading practices, particularly with respect to the disclosure of information by the creditor.²⁷

The purpose of the Directive is not to regulate contract law issues related to the validity of credit arrangements –this is only regulated by national contract law in conformity with Community Law.

With respect to the obligation of transparency the Directive establishes that the consumer should be provided with information concerning the borrowing rate, both at a pre-contractual stage and upon conclusion of the credit agreement. During the period of validity of the contract the consumer must be informed of changes in the borrowing rate and of changes to the payments caused thereby.

According to the Directive both parties have the right to terminate open end credit agreements whereas the creditor has the right to suspend the right of the consumer to draw down on an open end credit contract for justified reasons.²⁸

However, the scope of application of the directive is limited by a long list of exclusions, among them credits secured by a mortgage on immovable property, credit agreements to acquire or retain property rights on land, credits of low or high value (less than EUR 200 or more of EUR 75000), credit agreements in the form of an overdraft facility and where the credit needs to be repaid within one month, and many others that are to be covered by national specific laws.

The Directive prescribes the standard information requirements of credit agreements. This includes:

- Borrowing rate fixed or variable together with the particulars of any charges included in the total cost of the credit to the consumer.
- Total amount of credit
- Annual percentage rate of charge
- Duration of the credit agreement
- For the case of a credit in the form of deferred payment for a specific good or service, the cash price and the amount of any advance payment, and,
- The total amount payable by the consumer and the amount of the installments.

Regarding pre-contractual information, the creditor and, if applicable, the intermediary is bound by the directive to provide the consumer with the information needed to compare different offers

²⁷ This provision must be interpreted in the light of Directive 2005/29/EC on unfair business to consumer commercial practices in the internal market.

²⁸ These reasons may include a suspicion of unauthorized use of the creditor or a significantly increased risk of the consumer being unable to fulfil his obligation to repay the credit.

in order to take an informed decision on whether to conclude a credit agreement. Such information shall be provided by means of the Standard European Consumer Credit Information. In turn, such information shall specify the type of credit, the identity and address of the creditor and the intermediary, the total amount of credit and the conditions governing the drawdown, duration of the credit agreement, the goods or services involved in cases of credit in the form of deferred payment, borrowing rate and conditions of the credit, annual percentage rate of charge and total amount payable by the consumer illustrated by appropriate examples, amount, number and frequency of payments to be made by the consumer, charges for maintaining one or several accounts recording both payment transactions and drawdowns, notaries costs payable by the consumer if any, obligation to enter into ancillary services (insurance policy compulsory to obtain the credit), interest rate applicable in case of late payment, a warning regarding the consequences of missing payments, absence or existence of a right of withdrawal, right of early repayment, consumer's right to be informed immediately and free of charge on any database consultation for the purpose of assessing his creditworthiness, consumer's right to be supplied with a copy of the draft credit agreement and the period of time during which the creditor is bound by the pre-contractual information. Other provisions in the directive refer to information requirements for specific types of credit.

With respect to the old directive on consumer credit the new directive introduces the obligation binding upon the creditor to assess the creditworthiness of the consumer on the basis of sufficient information both from the consumer and from databases. If the total amount of credit is changed during the period of validity of the agreement the creditor must update the information on the creditworthiness of the consumer.

In the cases of rejection of credit applications on the basis of consultation of a database creditors must inform consumers immediately and free of charge of the results of a consultation and the particulars of the database.

Most importantly the directive sets the mandatory information requirements for credit agreements. These requirements are:

- Credit agreements are to be drawn up on paper or another durable medium. All parties involved are to receive a copy of the agreement.
- The credit agreement shall specify in a clear and concise manner :
 - Type of credit
 - Identities and addresses of the contracting parties
 - Duration of the credit agreement
 - Total amount of credit and conditions of the drawdown.
 - In case of a credit in the form of a deferred payment for a specific good or service, the good or service and its cash price,

- Borrowing rate, conditions governing the application of that rate and the index or reference rate applicable to the initial borrowing rate
- Annual percentage rate of charge and total amount payable by the consumer by the time the agreement is concluded
- Amount and number and frequency of payments to be made by the consumer
- In cases involving capital amortization of a credit agreement with fixed duration, the right of the consumer to receive a statement of account upon request and free of charge.

The directive includes particular provisions on obligations in connection with credit agreements in the form of overdraft facilities and open end agreements and establishes a general right of withdrawal from the credit agreement available to the consumer within the 14 day period without giving any reasons subject to notification to the creditor and to payment of the capital and interest accrued thereon from the date the credit was drawdown. The directive also indicates the way in which the interest shall be calculated.

An important addendum of this directive vis-à-vis of the regime applicable under the old one is represented by the provisions on regulation of creditors, in order to ensure that they are adequately supervised by a relevant authority independent from financial institutions in all member states.

With respect to intermediaries the Directive introduces the obligation to publicize the extent of their powers and particularly whether he works for one or more creditors or as an independent broker.

In the light of the above regime laid out by the Directive most member states have introduced only a general provision in their Consumer Protection laws and developed the detailed regime in separate laws covering specifically credit activities.

Thus, Malta has introduced a provision in the Consumer Protection Act reading as follows:

“The Minister may, after consulting the Council, issue regulations...

To regulate consumer credit offers and the conclusion of agreements for the provision of credit terms and facilities by traders or other persons to consumers in the course of a trade, business, craft or profession in relation, directly or indirectly, to the sale or offer of goods, immovable property or services, to lay down the form and procedure for making consumer credit agreements, to stipulate and regulate the terms and conditions that may or may not be adopted in such agreements, to lay down thresholds and exemptions, the method of calculating the cost of credit, advertising and other measures considered necessary or appropriate to establish minimum rights for debtors and to make credit offers more transparent and informative and to regulate any other aspects of consumer credit arrangements”

In turn, the Italian “Codice del Consumo” covers consumers’ credit in four articles (Art. 40 to 44). They include a commitment to adopt the regime laid out in the old Directive, a task that is entrusted to an Interministerial Committee on Credit and Saving, in particular to introduce in the national legislation the obligation to illustrate the Annual effective rate of credit with an example. The following provisions indicate what are the norms that need to be modified.

RECOMMENDATIONS

It would be desirable for the Vietnamese drafters to consider filling the vacuum with respect to Consumers credit in the current draft with the introduction of a new provision indicating the minimum information requirements and the conditions to which credit agreements are to be subject to ensure adequate levels of protection for consumers. The provision should indicate the authorities mandated to develop legislation in this area and to refer to the particular laws that would need to be amended.

The proposed provision should simply indicate that credit agreements shall contain all necessary information in a clear and concise manner and that consumers shall be protected against unfair or misleading practices by creditors and intermediaries, particularly with respect to the disclosure of information by creditors.

In line with the provisions laid out in the Directive of Consumers credit the Vietnamese law should also give an indication of the scope of the obligation of transparency in credit agreements including an obligation to provide the consumer with information concerning the borrowing rate both at the pre-contractual stage and during the period of validity of the agreement and an obligation upon the creditor to inform the consumer on any changes in that rate and in the payments.

The credit agreement shall specify in a clear and concise manner:

- Type of credit
- Identities and addresses of the contracting parties
- Borrowing rate fixed or variable together with the particulars of any charges included in the total cost of the credit to the consumer.
- Total amount of credit
- Annual percentage rate of charge
- Duration of the credit agreement
- For the case of a credit in the form of deferred payment for a specific good or service, the cash price and the amount of any advance payment, and,
- The total amount payable by the consumer and the amount of the installments

In addition to a requirement to draw up credit agreements on paper support and to send copies of the agreement to all parties involved.

The relevant provisions should also indicate if there are any type of credit agreements that would be excluded from the information requirements.

The proposed provision should also include the obligation of the creditor to assess the creditworthiness of the applicant on the basis of sufficient information and the information requirements in cases of changes in the amount of credit.

Adequate information requirements to the consumer at the pre-contractual stage should also be prescribed in the Vietnamese Law on Consumer Protection. In comparative legal practice, typical information requirements at this stage include on the type of credit, the identity and address of the creditor and the intermediary, the total amount of credit and the conditions governing the drawdown, duration of the credit agreement, the goods or services involved in cases of credit in the form of deferred payment, borrowing rate and conditions of the credit, annual percentage rate of charge and total amount payable by the consumer illustrated by appropriate examples, amount, number and frequency of payments to be made by the consumer, charges for maintaining one or several accounts recording both payment transactions and drawdowns, notaries costs payable by the consumer if any, obligation to enter into ancillary services (insurance policy compulsory to obtain the credit), interest rate applicable in case of late payment, a warning regarding the consequences of missing payments, absence or existence of a right of withdrawal, right of early repayment, consumer's right to be informed immediately and free of charge on any database consultation for the purpose of assessing his creditworthiness, consumer's right to be supplied with a copy of the draft credit agreement and the period of time during which the creditor is bound by the pre-contractual information.

A right of withdrawal within the period of 14 days following the conclusion of the agreement shall be made available to the consumer in the CP Law.

However, the Vietnamese drafters may want to choose to include to develop the details of this regulation in a specific law for the sake of simplicity of the framework law on consumer protection.

XII. Public services or services of general economic interest

The draft law does not include any provision concerning services of general economic interests. These services generally include electronic communication, postal services, electricity, gas and transport. At EU level, these services are subject to specific sector regulations which say nothing about the protection of consumers' rights.²⁹

²⁹ See for electricity, EC Directive 2003/54; for gas, EC Directive 2003/55; for communication, EC Directive 2002/21; for maritime transport EC Regulation 4055/86; for air transport, EC Regulation 3976/87; for railway transport, EC Directive 2004/51; for postal services, EC Directive 97/67.

At member states level, the majority of EU member states provides for the protection of consumer rights in regulations which are outside the consumer protection act and are included in the specific regulatory framework related to the sector concerned. In these countries, the protection of consumers' rights in contracts concerning the provision of public services or services of general economic interest is ensured by reference general principles such as, for example, the principle to provide services of "high quality standard" as well as by reference to specific legislation applicable to the service concerned. This is the case, for example, of Italy. On the other hand, France, for example, provides specific rules applicable to contracts concluded for the supply of electronic communication services as well as for the supply of electricity and gas. These two different models will form the background to our recommendations [the French model is attached in the **Annex** to the present document].

Other recommendations which may be applicable to these services can be found in the section of this document related to unfair commercial practices.

BACKGROUND TO THE RECOMMENDATIONS

In Italy, the Code of Consumption states that (see article 101):

- The State and the regions guarantee the respect of the rights of the users of public services through the correct application of the specific rules applicable to these services.
- The supply contract must respect predetermined and publicly available high quality standards.
- Consumers are guaranteed, through associations or other form of representative representation, their participation in the definition of the above quality standards.
- The law may impose to public service providers to adopt a Chart of Service [This is the case in Italy for our public railway transport operator Trenitalia].

In France, contracts concerning the provision of electronic communications services are subject to Articles 83 to 85 of the Code of Consumption. In essence, these articles provide:

- Minimum information requirement, notably concerning (i) the identity of the supplier; (ii) the characteristics of the services offered, such as quality level etc.; (iii) the applicable tariffs; (iv) compensation mechanisms if the service does not respect quality standards; (v) duration of the contract and conditions for renewal or termination; (vi) indication of an amicable settlement procedure (see article 83).
- The obligation for the supplier to communicate all changes to the contract by giving the consumer one month written notice and enable him to terminate the contract (see article 84).
- The obligation for the supplier, following termination of the contract, to return to consumers any advance payment within the maximum delay from the payment of the last invoice (net of any remaining charges). The amount of the returning sum must be doubled if the supplier does not observe this delay [see article 84(1)].

- The obligation for the supplier to terminate the contract after maximum 10 days from the receipt of the consumer's termination notice. The consumer has a right to extend this period unilaterally [see article 84(2)].
- When contracts provide a minimum delay before the consumer can walk away from it, the obligation for the supplier to indicate in its invoices if this minimum delay has expired or the time remaining for its expiration [see article 84(3)].
- Payment of accessory services which were initially provided for free is always subject to the express consent of the consumer [see article 84(4)].
- Minimum duration of the contract may not exceed 24 months. Suppliers offering concerning contracts for a minimum duration exceeding 12 months must provide consumers with alternative offers having a minimum delay of less than 12 months which are commercially viable. In any event, for contracts providing for a minimum duration exceeding 12 months, consumers may walk away after 12 months by paying ¼ of the balance due until termination [see article 84(6)].
- Termination fees must reflect only the costs incurred by the supplier (without prejudice for sum due to early termination of a contract subject to minimum duration) [see article 84(7)].
- Tariffs of mobile calls to directory enquiry services must reflect national tariffs for these services [see article 84(9)].
- When connecting consumers to third party numbers, directory enquiry services must state the cost of this service before connecting the consumer, to enable the latter to interrupt the service if he does not approve the tariff [see article 84(10)].
- These provisions apply to both consumers and "non-professionals" (i.e., professionals who are purchasing these services outside the strict scope of their profession – think, for example, to a company selling motorbikes which wants to conclude a contract for the supply of telecommunication services to its retail shop) (see article 85).

Always in France, contracts concerning the supply of electricity and gas are subject to the following rules (see article 87 to 94):

- The offer must include minimum information requirement, notably on (i) the identity of the supplier; (ii) its address, telephone number and email; (iii) the characteristics of the services; (iv) the prices, and, if applicable, their evolution; (v) mention of whether the proposed price is regulated or subject to the fluctuation of the market and of the right of the consumer to request always the application of the regulated price; (vi) the duration of the contract and the conditions for renewal; (vii) the timing for the beginning of the supply; (viii) the invoice conditions; (ix) the means, especially electronic means, to receive information concerning the access and use of the public distribution network, the list of technical services, their price, the conditions for liability and reimbursement if the quality standard is not satisfied or if the supply is interrupted; (x) the contractual liability of the supplier; (xi) the clauses of termination; (xii) the conditions for the exercise of the right of termination. All this information must be given to the consumer, before the

conclusion of the contract, in writing or through a media which allows for long-time storage of the information (article 87).

- The contract concerning the supply of electricity or natural gas is always in writing or included in a media which allows for long-time storage of the information and always provide for the date of its entry into force and its duration (unless it is of indefinite duration), the conditions for the right of choosing a regulated tariff, the contact details of the manager of the network, the power subscribed (in terms of KW or GW for electricity and cubic meters for gas), the main rights and obligations arising from the contract (article 88).
- The offer of the supplier concerns a contract of, at least, one year duration. If the consumer wants to change supplier, the contract is terminated only at the date when it starts the new contract (this is to avoid interruption of supply). In other instances, the contract is terminated within maximum 30 days from the receipt of the termination notice by the supplier. Termination fees must reflect only the cost supported by the supplier (article 89).
- Supplier's proposed changes to the terms of the contract must be communicated to the consumer at least one month before their envisaged application. The consumer may terminate the contract within 3 months from this notice (article 90).
- Any offer of supply of electricity and gas enables the consumer to pay at least once a year based on the actual consumption he has incurred (article 91).

RECOMMENDATIONS

- Introduce rules concerning public services and services of general economic interests.
- Consider whether adopting a model which includes general principles governing the provision of these services and makes reference to the specific legislation applicable to the service concerned [such as the Italian model] OR a model providing specific rules for contract related to this kind of services [such as the French model].

XIII. Access to justice

As a rule, offences affecting consumers arising from infringement of consumers' rights and interests by traders are dealt with as administrative offences and imposed sanctions in the form of warnings or fines by the Consumer Protection Authority according to art.67³⁰ which also makes provision for a number of other forms of sanction.. Consumers are entitled to take their cases to the competent civil courts at anytime, particularly if conciliation or mediation efforts are insufficient to settle their claims. Consumers' disputes before courts in Vietnam are subject to

³⁰ And according to art. 12 of the 2002 Ordinance on handling of administrative violations (last text of 2008)

civil litigation or criminal litigation procedural rules, depending on the seriousness of the offence³¹.

The regime applicable to Consumers' Claims in civil courts is set out in a new Decree nr. 55/2008/ND-CP of 24/4/2008 on implementing provisions for the 1999 Ordinance on Protection of Consumers' interests which includes a detailed description of the procedures followed upon submission of the claim by the consumer. However, neither the Decree nor the Ordinance include necessary rules on how to make effective a decision on compensation to affected consumers and how to constrain the traders into compliance of decisions involving the duty to compensate consumers.

The Law on Complaints and denunciations of Dec. 2, 1998 also applies insofar as it gives citizen the right to denounce to the relevant authorities illegal acts "by...individuals causing damage to...the legitimate rights or interests of citizen..."³² and allocates the duty to settle the issue within 60 days.

Cases of serious wrongdoing are taken up by the criminal jurisdiction and applied the sanctions provided for in the Criminal Code. Procedures to be followed in criminal cases affecting consumers are according to the 2003 Criminal procedural code. Ancillary request for restitution of the status previous to the offence and/ or demand for compensation are dealt with separately according to the provisions of the civil procedural law.

Claims by consumers are preferably handled as civil litigation cases much like in the EU context. In this jurisdiction the rules applied to consumers' claims are those of the 2004 Civil procedural code. The Consumer Protection Unit in the Bureau of Competition Management is entitled to initiate proceedings for damage on consumers' rights or interests by expressed written delegation of the affected consumers.

The Civil procedural law provides to the parties a chance -which can be waived by them- for conciliation in order to reach a settlement. If proceedings are initiated, art. 44 of the draft CP Law allocates the burden of the proof on both parties –consistent with the regime laid out in the Civil procedural rules- unlike the regime of reversed burden of proof applicable in the EU as a rule within the scope of the Directive on Consumer sales, that is applicable to sales contracts.

Competent courts for consumers claims or claims for compensation for extra-contractual damages are normally the District level people's courts of the place of residence or headquarters of the defendant. In cases in which the proceedings are initiated in the courts of first instance a petition is required³³ including evidence on the grounds for litigation by the parties. The law regulates the procedures for submission of the petitions, the deadlines that apply and the procedural fees to be paid in advance by consumers including amongst others the fees for expertise, as required.

³¹ However, the law does not include criteria for the determination of the claim as a matter of civil or criminal litigation unlike in equivalent CP laws in EU context.

³² Art. 1 of the Law on complaints and denunciations.

³³ Art. 164 of the Civil procedural code.

The fast track procedures that the new CP Law will make available to consumers claims of low value³⁴ will be made dependant on a number of conditions listed in art. 45 of the draft CPL all of which are in line with the types of procedures available in EU member countries for low value claims in the civil jurisdiction by consumers and the conditions required to activate them.

The Vietnamese draft CP Law makes provision in art. 48 for in court claims initiated by Consumers Associations in representation of consumers subject to the conditions laid out in art. 64 of the draft CPL –to have been operating for 5 years and that the lawsuit concerns a minimum number of 100 consumers- and to duties of notification set out in art. 49 of the draft CPL, including publicity in the media.

BACKGROUND TO THE RECOMMENDATIONS

All Consumer Protection Laws in EU member countries as well as in accession and associated countries that have developed specific laws to reflect the contents of the European Consumer Protection Directives do provide for fast track procedures in the civil jurisdiction for consumer claims, especially for claims of low value.

Depending on criteria such as the value of the claim, possible damage to the public in addition to the private interest or social impact of the offence consumers complaints are also dealt with in the criminal jurisdiction. We refer to our remarks on the enforcement provisions.

With respect to the representation of consumers in their claims by Consumers Associations the equivalent CP Laws in the EU are very precise regarding the scope of their representation.

Thus, the Spanish CP Law indicates that Consumers Associations are entitled “to bring actions against acts of unfair competition which directly affect consumers interests” in the scope of the Spanish Act concerning unfair competition. In this framework, actions brought by Consumers Associations may have as their object: (a) the establishment of the act of unfair competition (formal declaration), (b) suspension (admonition) or prohibition of such action (preventive action), (c) annulment of the effects (repudiation), (d) rectification of the misleading, incorrect or false information.

In France, “approved” Consumers Associations may request the civil courts or criminal courts acting in a civil matter "to order the defendant or the accused, where applicable with sanctions, to undertake any measure designed to terminate illegal acts or to remove an illegal term from the individual or standard contract proposed to the consumer" (the request is filed with the civil courts when its purpose is compensation for damages incurred by one or several consumers by virtue of circumstances which do not constitute a penal infringement). Hence, this is a representative action, which is brought by an organization on behalf of interests which "transcend" particular interests.

An action in joint representation has been created in France and it can be used when several consumers have suffered individual damages which were caused by one and the same professional, and which have a common origin, any duly recognized representative association

³⁴ The threshold is 100 million dong.

may, if it has been designated by at least two of the consumers concerned, sue for damages before any court on behalf of these consumers.

In Ireland, Consumers Associations can initiate proceedings to defend collective interests of consumers in matters concerning false or misleading advertising and misleading price indications or abusive commercial practices. In these matters they can secure an injunction to “cease and desist” against any practices contravening the “Consumers Information Act”.

In Luxemburg, Consumer Associations may bring an action to protect collective interests against unfair terms and unfair commercial practices. These actions are reserved for Consumers Associations represented at the “Price Committee” of the Grand Duchy of Luxembourg.

RECOMMENDATIONS

- The relevant provisions under Section 4 (Dispute settlement in court) arts. 43 to 53 need to be completed and reorganized, including with the indication of the complementary provisions in the Civil and criminal procedural laws, Decree nr. 55/2008/ND-CP of 24/4/2008, the 1999 Ordinance on Protection of Consumers’ interests, Law on Complaints and denunciations of Dec. 2, 1998 and other applicable laws as relevant.
- The criteria for classification of the claims and for bringing those claims to either the civil or the criminal jurisdiction need to be determined and included in the law.
- Make provision for adequate enforcement procedures to ensure the effective application of court decisions on compensation for damages to consumers,
- Regulate the regime applicable to Consumers Associations in the CPL and if necessary in a separate law or regulation, including their representation of consumers in court procedures for certain types of claims that need to be indicated.
- Review the burden of the proof regime established in art. 44 in line with the more detailed regime resulting from the application of the EU Directives.

XIV. Out-of-court settlement

Section 2 of the draft law (articles 23 to 35) provides for out-of-court settlement of consumers’ disputes. The draft law briefly touches upon the various critical issues involved in out-of-court settlement of consumers’ disputes: principles of mediation (article 24), characteristics of the out-of-court body (article 25), qualification of the mediator (article 26), mediation procedures (article 28) and implementation of a successful mediation (articles 30 to 34). These provisions represent a very good starting point. However, we believe they can be further improved in the light of the EC Recommendations 98/257 and 2001/310 on the principles for out-of-court bodies involved in the solution of consumers’ disputes, which form the background to our recommendations and are attached to the present document in the **Annex**.

BACKGROUND TO THE RECOMMENDATIONS

The EC Recommendations identify four principles which must be observed by out-of-court bodies involved in the settlement of consumers' disputes: the principles of impartiality; the principle of transparency; the principle effectiveness and the principle of fairness.

As regards the principle of impartiality, the EC Recommendations provide that:

- The person appointed to act as decision maker [the equivalent of the mediator in the Vietnamese draft law] must be granted a minimum period in office and cannot be relieved of his duty without just cause.
- He must have no actual or perceived conflict of interest with any of the parties.
- If the decision is taken by a collegiate body the independence of the body responsible for taking the decision must be ensured by giving equal representation to consumers and professionals.

As regards the principle of transparency, the EC Recommendations provide that the out-of-court body must clearly state:

- The rules in accordance to which a dispute can be referred. [jurisdictional rules]
- The procedural rules.
- The rules governing the cost of the procedure, including the rules on the award of costs at the end of the procedure.
- The type of rules used as the basis for the decisions (law, equity, code of conduct).
- The timing of the decision.
- The decision-making arrangement within the body.

Article 24(5) of the draft law states that the government shall determine the provisions concerning the establishment, operation and termination of mediation centers. Accordingly, these issues can be addressed by the government when it decides to act in accordance with this provision.

As regards the principle of effectiveness, the EC Recommendations provide that:

- The consumer has access to the procedure without being obliged to use a legal representative.
- The procedure is free of charge or of moderate costs [consumers are normally discouraged to complain against traders' abuses because of the costs of the dispute procedure].
- The competent body must be given active role and should be able to consider any factor leading to a settlement of the dispute.
- The conduct of the parties to the dispute must be checked in order to ensure that they are seeking a proper, fair and timely resolution of their dispute.
- The decision must be timely.

Finally, as regards the principle of fairness, the EC Recommendations provide:

- The parties shall be informed to their right to refuse to participate or to withdraw from the procedure at anytime and access the legal system [the draft law already provides this right under article 28(4)].
- The procedure to be followed must allow all the parties concerned to present their view point before the competent body and to hear the arguments and facts put forward by the other party [adversarial principle].
- The result of the decision must not deprive the consumer of the rights he is granted under the law.
- All decisions must be communicated to the parties and state grounds on which they are based.
- The parties should be free to be represented and assisted by a third party at all stages.

RECOMMENDATIONS

- Introduce a minimum period for stay in office applicable to members of dispute settlement bodies.
- Introduce a rule stating that those members cannot be removed without just cause.
- Introduce a rule aimed at preventing conflicts of interests for members of dispute settlement bodies.
- If the decision is taken by a collegiate body, introduce a rule giving equal representation to consumers and professionals.
- Introduce clear rules on: jurisdiction, procedure, costs of procedure, rules which will form the basis of the decision, timing and the governance of the decision making body. [These issues can be addressed by the government when it establishes the rules of organization, operation and termination of mediation centers in accordance with article 24(5) of the draft CPA]
- Introduce a rule providing for consumer access to the procedure without being obliged to use a legal representative.
- Introduce the adversarial principle.
- Introduce a rule stating that the result of the decision may not deprive the consumer of a right granted by the consumer act.
- Introduce a rules obliging the decision making body to communicate the decision to the parties and state the grounds on which it is based.
- Enable the parties to be represented by a third party if they wish so.

XV. Class action

The draft law does not include any provision concerning the possibility for several consumers who have been damaged by the same practice to seek a collective redress before the judicial authority. This kind of redress is normally referred as class action and represents the most important redress that consumers have against unfair commercial practices and damages cause by defective products, particularly when the amount of the damage suffered by a consumer is of a very small value. Indeed, in these instances, consumers are unlikely to seek redress before a

judicial authority individually, given that the costs of access to justice are generally higher than the amount of the damage suffered by the consumer.

The class action is not subject to any specific EU legislation. However, it exists in the US legal system since many years and it was recently introduced in some EU countries such as France and Italy. The class action model adopted in these countries will provide the background to our recommendations.

BACKGROUND TO THE RECOMMENDATIONS

The main legal issues related to the introduction of a class action are the following: the scope of the class action, the identification of the “class”, *locus standi*, procedural rules, lawyers’ fees, punitive damages and competent jurisdictional forum.

Scope of class action: The class action is normally provided against damages originating from breach of general standard contracts (for example, the contracts provided by credit institutions, insurance companies and public utilities), unfair commercial practices, defective products and infringements of the competition rules (such as, for example, the damages caused by cartels). However, this list should not be considered as exhaustive and should include also any damage suffered by consumers originating outside a contract, provided that it is the result of the same infringement [so called extra-contractual liability].

Identification of the “class”: Class action is the action introduced by a single individual also on behalf of other individuals who are in the same legal situation as regards judicial redress (hence the word “class”). The responsibility to determine whether several individuals belong to the same “class” lies with the judge. In particular, the judge, on the basis of the documentation submitted to him, identifies the individuals belonging to the “class” and those who are excluded indicating the objective and subjective admission requirement and the documents which are able to confirm them. Thus, they belong to the class all the individuals satisfying the “class requirements” adopted by the judge.

Access to justice (*locus standi*): Access to justice shall be granted to anyone who has a legitimate interest (i.e. those individuals who have suffered damages as a result of the illegal practice of the trader), including representative associations of consumers’ interests as long as they act together with at least one interested individual. Ultimately, the determination of *locus standi* belongs to the judicial authority.

How to adhere to the class action: Adhesion to the class action by individuals having a legitimate interest may occur in three different stages of the proceedings: (i) at the beginning, through a written intervention within 90 days from registration of the action, (ii) within 180 days from the time of a settlement; or, (iii) within 180 days from the judgment. This is the so called *opt-in* system. Individuals who have not adhered to the “class” may still seek individual redress in a separate action. On the other hand, those who have joined the “class” are not allowed to do so (*no bis in idem*).

Procedural rules: The class action can be introduced by any individual showing a legitimate interest or any representative association together with at least one individual having a legitimate interest. Within 90 days from registration of such action, any interested individual may adhere to the action and may present the judge with facts identifying a conflict of interest in other individuals promoting the action. If the judge authorizes the action, it appoints a class leader among the individuals having a legitimate interests and a class manager in charge of collecting all the written interventions and distributing the awarded damages. The judge can authorize settlements if they represent at least the interests of 1/3 of those belonging to the class.

Lawyers' fees: Lawyers' fees in class action can be left to the negotiation of the parties, such as in the US legal system, or be subject to a fee-cap, such as in Italy, in order to avoid speculations from lawyers. In particular, in Italy lawyers' fees are kept between a minimum of 2.5% and a maximum of 10% of the value of the awarded damages.

Punitive damages: In addition to normal damages, the class leader is entitled to ask the judge to award punitive damages of if it emerges that the revenues generated by the Illegal behavior of the professional are higher than the compensatory damages provoked to the consumers (these damages are normally calculated as the sum of *lucrum cessans*³⁵ and *damnum emergens*³⁶).

Competent jurisdictional forum: The competent forum where the action should be filed is the forum where is located the business seat of the professional.

RECOMMENDATIONS

- Consider whether introducing a class action for damages caused to a multiple number of consumers by the same breach. This action should be provided against a breach of general standard contracts, unfair commercial practices, anti-competitive practices and instances of extra-contractual liability.
- Grant the judge authority to identify the “class”.
- Authorize access to justice to individuals showing a legitimate interest or representative associations as long as they act together with at least one interested individual.
- Grant the judge authority to determine *locus standi*.
- Allow individuals to *opt-in* the class action in three different stages: at the beginning; after a settlement; or, after the judgment. Those who *opt-in* may no longer seek redress through a separate action (*ne bis in idem*).
- Introduce procedural rules.
- Consider whether to leave the parties free to negotiate lawyers' fees, such as in the US legal system, or to impose a cap-fee, such as in EU member states.

³⁵ *Lucrum cessans* in this case is equal to the economic value that the consumer could have made had he not been subject to the illegal activity.

³⁶ *Damnum emergens* in this case is the actual economic damage suffered by the consumer linked to the illegal activity of the professional.

- Introduce punitive damages if it emerges that the revenues generated by the Illegal behavior of the professional are higher than the compensatory damages provoked to the consumers.
- Identify the business seat where is located the professional as the competent jurisdictional forum where the class action should be filed.

XVI. Enforcement

Chapter VIII in the Vietnamese draft CP Law develops the enforcement provisions and the procedures applicable in cases of infringement. The draft provides for the right of compensation to consumers having incurred loss or damage as a result of an unlawful activity by a trader (art. 66.2) which is consistent with the rule that considers breaches of the CP Law as administrative offences (art. 66.1). It includes a distinction between administrative offences that are the rule and the more serious cases of infringement which can be considered as criminal offences and prosecuted as such.

Unlike equivalent laws in the EU context there is a need to better define:

- The criteria for the consideration of a given case of breach as an administrative or a criminal offence, and
- The determination of an inspection authority mandated to enforce the obligations in the CP Law upon traders, to conduct factory and market inspection for the benefit of consumers and the procedures to enforce the provisions of the law.

Art. 67 gives a first indication of the two types of action –warnings and fines- to be taken against traders in cases of infringement of the law. This, however, does not provide a sufficient degree of certainty on the consequences of illegal acts and consequently should be further elaborated. In the background part we will attempt to summarize the enforcement provisions in some EU member countries.

The same article provides a list of possible additional actions to which enforcement agents can resort in the face of violations of the law, actions that it is said can be applied depending on the type of offence and its consequences. The list includes: Revocation of business license, compulsory/ temporary suspension of business activity, confiscation of the means used to commit the illegal activities, confiscation of profits from the illegal activity, inclusion of the traders name in a black list.

Other possible means of enforcement mentioned in the law are: the requirement of restitution of previous status binding upon the trader, expulsion from the territory of Vietnam, public statements to correct misleading advertisement, etc.

Art. 68 mentions both “The authority” in Consumer Protection and “State management Agencies” insofar they may impose additional penalties upon the trader arising from responsibility in different domains to indicate that both will be enforceable. A period of voluntary

compliance of 10 days by the trader is provided for under art. 69. In case of failure of voluntary compliance the intervention of the enforcement agents according to the law.

BACKGROUND TO THE RECOMMENDATIONS

1) Enforcement provisions in the Spanish Consumer Protection Law³⁷

As a rule, the Spanish Law considers infringements in the area of Consumer Law to be administrative offences without prejudice of the civil or criminal responsibilities and sanctions that might concur. The instruction of a criminal proceeding in court will automatically stop the administrative procedure and sanction started on the grounds of infringement of the same provision. However, any administrative measures applied in order to safeguard people's health and safety will be maintained until a decision is made on the administrative measures.

The administrative authorities responsible for each particular case of infringement will sanction any breach of the CP Law in Spanish territory regardless of the nationality, country of residence or country of establishment of the offender. The mandate of the enforcement authorities according to the Law will extend to the cases of infringement of provisions by traders or professionals in sectors that are self-regulated. The Law includes a provision to prohibit the application of two sanctions on the basis of the same facts and of a same case of breach of the same public interest. The Spanish Law attempts to classify in a single article most cases of infringement. Thus, the following categories of offences are mentioned:

- Failure to comply with the requirements, conditions, obligations and prohibitions for matters affecting people's health,
- Action or inaction causing risk or effectively damaging the health of consumers or users either deliberately or by neglect,
- Cases of fraud or adulteration in products made by adding various substances,
- Failure to comply with conditions pertaining to the nature or to the guarantee or obligation to repair durable goods,
- In general, any situation that might lead to fraud or confusion with respect to the true nature or essential features of the products or services.
- Failure to comply with the rules applicable to pricing, the application of unjustified conditions on unsolicited services or the obligation to supply minimum amounts or other types of interventions likely to result in higher prices.
- Failure to comply with the rules applicable to registration, normalization or classification, labeling, packaging and advertising of goods and services.
- The inclusion of abusive clauses in consumers' contracts.
- The failure to comply, in general, with the obligations, requirements or prohibitions laid out in the CPL and regulations for its application.

Unlike Consumer Protection Laws in the EU context, the Vietnamese draft does not include a precise allocation of mandate to the Inspection authorities to enforce the provisions of the CPL and to impose sanctions in cases of infringement. Art. 68 refers to a "consumer protection

³⁷ Arts. 32 to 38 "Ley de protección y defensa de consumidores y usuarios"

authority” to conduct these functions pending the specification of a precise administrative inspection body in the text of the law.

Unlike relevant legislation in EU member states, the Vietnamese draft does not typify the offences. Thus, the Spanish Law distinguishes between minor, serious and very serious offences on the basis of criteria such as the risk posed for consumers health, the market power of the offender, the purpose of the offender, the seriousness of the social impact caused by the offence and eventual repetitions of the same infringement.

The Spanish Law contains a provision allowing the sanction to include the duty of the trader to restore the situation altered by the infringement and well as the compensation for damages to consumers to be determined by the competent authority.

The authority mandated to decide on the sanction may also decide to seize the goods if they are flawed, deteriorated or faked particularly if it may pose hazards to the consumer or the user.

The Croatian CP Act has attempted in art. 106 to enumerate the various cases of offences that may be established by Inspectors. The article includes: (a) cases of traders selling flawed products without separating them from the rest, (b) Products offered for sale at reduced price that are not clearly and visibly priced with the indication of the price before and after the reduction, (c) products that are offered for sale at reduced prices because of its imminent expiry date does not have its shortest or final date of expiry visibly and legibly stated; as well as a number of other cases.

The CP Act of Malta³⁸ dedicates an article (see art. 103 under Part X – Enforcement) to lay out the procedures for inspection. These include the capacity to enter and search any premises of the trader to make inspections or to conduct tests and, “*on paying or making tender there for, take any good; and take any books, documents or records however kept or stored*”. Upon seizing any books or documents the Director may retain them for as long as necessary to conduct the inspection, to take copies as necessary or to use them as evidence in proceedings for an offence under the CPA or its regulations. In the course of an investigation the Director may require any person to provide information either by (a) *answering any questions orally or in writing: or (b) by producing any book, documents or records as the Director may consider necessary except if the answer may subject the offender to criminal proceedings.*³⁹

The provisions on enforcement procedures are subject to the duty of mutual assistance with other authorities laid out in the Consumer Protection Cooperation Regulation and to the Data Protection Act. The regulation of enforcement by the Director includes a provision to discharge him and his officers of any loss or damage suffered by any person by reason of anything done or omitted to be done in good faith in the course of administration of the CP Act.

³⁸ Annex nr.....

³⁹ Art. 103 of the Consumer Protection Act.

The Vietnamese drafters should set out the procedures for inspection of business premises in the course of an investigation.

RECOMMENDATIONS

- To introduce a provision indicating the inspection authority that is mandated to enforce the provisions of the CPL and to impose sanctions in cases of infringement. To develop in successive articles the precise types of action that can be conducted during investigations and to prosecute offences to the CPL.
- To introduce a provision laying out the criteria to distinguish between administrative, civil and criminal offences.
- To introduce a classification of the offences in minor, serious and very serious according to criteria to be decided on the basis of the above indicated models.
- To include provisions describing the procedures for inspection.
- To indicate the value of the fines for minor, serious and very serious infringements and to list the exceptions, as appropriate including a clause enabling the review and update of the value of the fines.
- To indicate the measures that can be taken in cases of very serious offences and by whom (i.e.: The Spanish Law indicates that the Council of Ministers may decide to close down temporarily the business premises or to suspend the supply of the service for a maximum period of 5 years).
- To include a provision in the CPL in the sense that the sanction should include any accessory duty by the trader to restore the situation before the infringement and the duty of compensation to consumers.
- The Vietnamese Law needs to include a provision indicating that an appeal against an administrative decision by the Inspection authority shall not delay its execution.