

# MARKETING COMMUNICATION AND UNFAIR COMPETITION

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## **ABSTRACT**

*Marketing communications are signals that are sent by competitors in competition, to exercise its marketing strategy, which aims to sell as many goods as possible at premium prices. Competitors behave sometimes fairly, sometimes unfairly. In order to avoid the unfair conduct of competitors, or at least it happened rarely, the state regulates the unfair conduct under private and public law.*

*The most important private legal standard in the Czech Republic, which regulates the protection against unfair competition from the 1st of January 2014 is Civil Code no. 89/2012 Coll., commonly called the New Civil Code, which governs this issue in the provisions of §§ 2976 - 2989. New Civil Code, except for some details, is an appropriate basis for protection of competition against undesirable business practices, based on unfair marketing communications.*

## **KEYWORDS**

*Marketing communications, legal protection, Czech law, unfair competition, competitor, consumer, customer, Czech new civil code, general clause, law against unfair competition.*

## **INTRODUCTION**

The topic of this paper is "Marketing Communication and Unfair Competition".

Each competitor is trying to sell as many goods and services as possible at premium prices. Therefore, he acts within the market in a certain way. He sends marketing communications to convince consumers to buy a product or a service. Marketing communications can be either fair (in accordance with the law) or unfair (contrary to law). Law against unfair competition defines the conditions under which competitive conducts on the market (and therefore marketing communications) are unfair.

## **OBJECTIVE OF THE PAPER**

The aim of this paper is neither to discuss the various types of marketing communications, nor present the comprehensive regulation of the unfair competition in the Czech Republic, but to seek connections between marketing communications and the unfair competition. So, we will focus on the assessment of the conduct of competitors, and note which marketing communications are, or may be, deemed to be unfair. I give great emphasis in this paper to the review of the current legislation on protection against unfair competition in the Czech Republic. In view of the fact that there was the recodification of the private law in the Czech Republic from the 1st of January 2014 and since the unfair competition was part of it, I consider it appropriate to draw attention to the new legal provisions of private law. Private law protection against unfair competition is newly regulated in the Civil Code no. 89/2012 Coll., which is commonly called the New Civil Code (abbreviated NCC). We can find marketing communications even here in the legal provisions on the unfair competition. The Act then provides us the conditions (qualifying criteria), under which marketing communications, referred to therein, could be described as fair or unfair.

## **1 MARKETING COMMUNICATIONS AND THE UNFAIR COMPETITION - DEFINITIONS**

### **1.1 MARKETING**

Marketing is essentially an activity that is based on the previously developed strategy, which aims to sell as many goods as possible at premium prices.<sup>1</sup>

### **1.2 MARKETING COMMUNICATIONS**

Marketing communications are signals, based on the marketing strategy that has been developed into specific tactical procedures (steps). These signals, which are sent in various forms by competitor towards consumers, other competitors and other market

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<sup>1</sup> Compare with Zyman, S.: *Konec marketingu, jak jsme jej dosud znali*. 1.vyd. (dotisk), Praha: MANAGEMENT PRESS, 2008, str. 21 (Zyman Sergio: The End of Marketing as We Know It)

participants, carry information to influence the behaviour of those entities to whom the signals arrive.

### **1.3 UNFAIR COMPETITION**

In the Czech legal order, the concept of unfair competition as defined in provision 2976 NCC (1), the so-called general clause against unfair competition, as follows: „Who gets in the economic contact in conflict with good morals of the competition behaving the way that is threatening to cause an injury to other competitors or customers, commits the unfair competition. ”

## **2 PRIVATE LAW LEGISLATION OF UNFAIR COMPETITION IN THE CZECH REPUBLIC UNDER NCC (New Civil Code)**

### **2.1 STRUCTURE OF LEGISLATION OF UNFAIR COMPETITION ACCORDING TO NCC**

In the Czech law, the unfair competition is not regulated by a special law, but it is included in the New Civil Code. It is governed by Part Four of NCC (relative property rights), Title III. Liabilities arising out of a tort/ delict, the Part Two entitled "Abuse and restricting of competition", the first section (general provisions for the two branches of competition law) and the second section (unfair competition).

Section One contains general provisions (§2972 - 2974). These are common provisions for both branches of competition law - unfair competition law (which provides for a prohibition in abuse of participation in the competition) and antitrust or cartel law (where the competition mustn't be restricted by prohibited agreements).

We can find provisions which define the notion of a competitor as a participant in the competition, division of competition law to those two branches, further provisions on territorial and personal scope of unfair competition and prohibited non-competition clause.

Section Two refers directly to the unfair competition.

## **2.2 THE LEGISLATION OF UNFAIR COMPETITION - STRUCTURE**

The unfair competition itself could be found in section two, in the provisions §§ 2976 - 2989 NCC.

It is based on a combination of general provision (also called general clause – § 2976 (1) NCC) and the illustrative list of special legal classifications (§ 2976 (2) NCC), of the most commonly encountered conducts of the unfair competition. This list is just illustrative, which means that the other competitive activities can occur in practice and these can be described as unfair competition. These special legal classifications are further elaborated and made more concrete in the provisions §§ 2977 - 2987 NCC. These are followed by the provisions of (§2988 and 2989 NCC), which govern the procedural means of protection against unfair competition, and active and passive legitimacy plea authorized persons affected by unfair competition. Provision § 2990 NCC relates to the means of protection against restriction of competition (it is thus cartel law).

## **2.3 BASIC TYPES OF CONDUCT PUNISHABLE BY UNFAIR COMPETITION LAW**

The progress in human society is the result of the natural human competition. Any behaviour, pursuing a specific goal, can be conducted in a manner fair or unfair. Therefore, it is possible to create in each way of competitive behaviour the extreme poles (expressing either fair or unfair conduct). There is a grey zone among this interrelated pair behaviour.

These opposites are:

1 LURING – DECEPTION

2 INITIATIVE - AGGRESSION

3 SYMBIOSIS - PARASITISM

The more detailed discussion of the aforementioned issues as fair and unfair ways of human behaviour counterparts and grey zones can be found in the works of Czech and Community Law against the Unfair Competition<sup>2</sup>

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<sup>2</sup> Compare with Hajn, P.: *Komunitární a české právo proti nekalé soutěži*. Brno: Masarykova univerzita, 2010, str.22-23

It is not always quite clear when assessing the conduct of competitor, to which group (to which opposite) we should range the conduct, therefore there are so called “Grey zones” where we rank such competitive activities that are borderline ones. This means it is not always quite clear, whether it is fair or unfair conduct. There may often be differences of opinions. We can also find some benefit to society in such behaviour, so it is not always necessarily negative under all circumstances.

Good morals of competition („Bonos mores“ of competition ) are the abstract measure of assessment of what is in the law of unfair competition considered to be fair (acceptable) and what is considered to be unfair (forbidden).

## **2.4 GENERAL CLAUSE OF THE RIGHTS AGAINST UNFAIR COMPETITION**

General clause in provision § 2976 (1) NCC in its current version contains the basic conditions – qualifying criteria to be done for the Unfair competition:

- a) Acting in the economic contact
- b) Being in contrary to good morals (bonos mores) of the competition
- c) Being capable of causing injury to other competitors or other customers.

Compared with the previous legislation, it was deleted the concept of the competition and it was left only the concept of economic contact.

It is extremely difficult to define the concept of good morals (bonos mores) of competition. General ethics should not be confused with good morals (bonos mores) of competition and vice versa. However, good manners are generally broader concept, while the good morals of competition are a narrower concept and both of the concepts often partly overlap each other. Nevertheless, they may be different to a certain extent, insofar as we are more tolerant to the good manners of competition as regards their dynamics and change of current customs.

Compared with the previous legislation, it was deleted the concept of "consumer" and it was left just the concept of “customer”. We conclude from the context of special provisions of unfair competition that the concept of consumer is included in the concept customer. The fundamental point, however, is that general clause defines the basic general conditions, that have to be met, to ensure, that the specific conduct was classified as the unfair competition.

The basic conditions of the general clause must be met cumulatively. These conditions are necessary and sufficient. The unfair competition is then any action that meets these three

conditions of general clause. It means that, even if the conduct of the competitor doesn't meet any of criteria mentioned in the special legal classifications of the unfair competition (defined in provisions § 2977 - misleading advertising et seq.), but it meets just the three conditions of general clause, it may be still classified as the unfair competition.

## 2.5 JUDGE MADE (JUDICIAL) LEGAL CLASSIFICATIONS OF UNFAIR COMPETITION

Judge made legal classifications are not expressly governed in NCC, but they can be inferred on the basis of three conditions of the general clause. As previously stated, even those acts which are not expressly mentioned in the special legal classifications (enumerated non-exhaustively in NCC) may be the act of unfair competition, if they meet the three conditions of general clause. It must be said that the law against unfair competition is judge made law, that can be found for the most part in case law. But even the special legal classifications, expressly governed by law, used to be originally judge made law. Some judicial legal classifications, which had been most often repeated in the practice, were later developed as special legal classifications. Special legal classifications (that will be discussed in the next subchapter) are thus governed in NCC and the purpose is to serve as a guide for courts.<sup>3</sup>

An example of judicial legal classification of the unfair competition is **“free-riding” (or Exploitation or misappropriation of another’s work)**

I can present, for demonstration, the case directly from business practice of manufacturers of wooden toys.<sup>4</sup> A competitor, (traditional Czech manufacturer of wooden toys) has been making for many years a toy - a take-apart truck. It was a wooden truck kit consisting also of wooden tools such as a hammer, a screwdriver, a spanner for the nut, wrench and wood screws intended for children. It was a didactic toy, so that the most important objective here was its

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<sup>3</sup> Compare with Hajn P. in: Horáček, R., Čada, K., Hajn, P. *Práva k průmyslovému vlastnictví*. 2. vydání. Praha: C.H. BECK, 2011, s. 456 - 459.

<sup>4</sup> For comparing the products of both producers use following address: <http://www.detoa.cz/vyrobky/auto-montazni> (original) (on line). (quot. 26 April 2016).

a <http://www.detoa.cz/vyrobky/auto-mix> (original) (on line). (quot. 26 April 2016).

a dále <http://www.woodyland.eu/z10334-montazni-auto> (slavish imitation) (on line). (quot. 26 April 2016).

a <http://www.woodyland.eu/z10335-montazni-automichacka-jedeme-v-tom-spolu> (slavish imitation) (on line). (quot. 26 April 2016).

functional principle. Furthermore, its shape and colour combinations were so attractive to draw the attention of consumers. Another toy, based on a similar principle, made by the same producer, was the cement mixer.

These toys turned out to be a great success among the customers. The production took place in a factory in a mountain landscape in the Czech border and allowed employment to local people. The original product had been already more than 30 years at the market, so that the design protection was not possible.

After several years, however, the slavish imitations of these products have been placed on the Czech market by a Czech competitor, who made his wooden toys (so it was a direct competitor), in China.

This competitor imitated full details, including shades of colours, so that the products were completely identical. The attractive appearance of the product (design), coupled with interesting functional principle of toy, which free rode on market-proven original product, was, in this case, an unfair marketing communication. It was not possible to qualify this conduct as the free riding on the reputation of another competitor or of his product. Also we could avoid the confusion for consumers, because the consumer could not have been mistaken in both (though identical) products. In fact, both of the manufacturers – the original and the parasitic one – sold their product in different packaging – in the cardboard box with the brand name and other graphic design. Consumer (when buying the product) wasn't interested in the name of the manufacturer, the decisive for his choice was the same appearance, attractive functional principle and especially price.

And, of course, the price of the Chinese imitations is considerably lower than of the Czech manufacturer, who had a much higher cost with the product. In this case, the imitator sold only proven, desired goods. Actually, it had been someone else, who developed and advertised this product before. It was the one who had invested finances and mental effort to this product in the past. The imitator didn't have to pay for the design, development and testing of the market. Thus he saved much costs. Since he only produced commercially proven, desired product, he didn't risk that the products supplied to the market would not be sold enough, after all these costly steps, or that the manufacturer would not satisfy the taste of majority customers. Even very expensive advertising was paid for by someone else, namely by the original manufacturer.

The original producer could only bring action on base of unfair competition law against slavish imitation.

## **2.6 SPECIAL LEGAL CLASSIFICATIONS OF UNFAIR COMPETITION**

Provision § 2976 (2) general clause non-exhaustively presents some special legal classifications. These are defined in provision § 2977 et seq NCC. The special legal classifications are the most prevalent competitive conducts, which are conceived more specifically in the provisions of the law against unfair competition. Nevertheless they are still sufficiently abstract to the court could decide whether the conduct is objectionable or not. The non-exhaustively special legal classifications enumerated in the law serve as a guide for courts.

Compared with the previous legislation, it was added to the list of special legal classifications the new legal classification - “Unacceptable nuisances“(Unsolicited communications).

## **3 SPECIAL LEGAL CLASSIFICATIONS WHERE WE CAN FIND DECEPTION**

### **3.1 MISLEADING ADVERTISING (§ 2977 NCC)**

Misleading advertising is such advertising, which is related to business or profession, it promotes the sale of moveable and immovable assets, including rights and obligations, 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 behaviour.

The important criteria of the misleading advertising are:

1. The advertising is related to business or profession
2. The advertising deceives persons or it is likely to deceive
3. The advertising is likely to affect economic behaviour of such persons



### **3.2 MISLEADING DESIGNATION OF GOODS OR SERVICE (§ 2978 NCC)**

Misleading designation is a designation liable to cause false impression in the competition about the origin of goods or services – i.e, that the goods or service originates from a certain region or place or from a particular manufacturer, or that has a particular characteristic or a particular quality.

The example of misleading designation of the service in the Czech Republic is the case "the Bailiff's Office".<sup>5</sup> Marketing communication, which deceived in this case, was the designation of Bailiff's. This designation promised special quality, in fact higher quality of service performed by the bailiff.

This business company offered its service under the name "Bailiff's Office Prague Co. Ltd." and under that name it was also registered in the Commercial Register. A lady who needed assistance for the recovery of claim, believed that it's really about the bureau of the bailiff's and she signed an agency contract with that business company. After finding out that the company only performs services associated with purchase of claims and debt recovery, but it's not about a real bailiff, the lady brought action in the courts for the unfair competition. She requested the court to declare the contract void. She also asked for getting back her payment. The Supreme Court of the Czech Republic was the only one, who admitted that the applicant, as a consumer, could be misled about the nature of the service. She could have an impression that the Party complained really operated as the bailiff's office. Any other person, except bailiff, is not entitled to use the designation of bailiff nor bailiff's authority, derived shapes of words, or designation capable of creating a likelihood of confusion with those signs

### **3.3 COMMON PROVISIONS ON MISLEADING ADVERTISING AND MISLEADING DESIGNATION OF GOODS OR SERVICE (§ 2979 NCC)**

The liability to mislead may have even correct information, if it is capable to mislead because of the circumstances and context in which it was made.

It's possible to present as an example of marketing communication that deceives with true designation - the label on the bottle of vermouth, which was manufactured in the Czech Republic,

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<sup>5</sup> compare with case law of the Supreme Court: Rozhodnutí Nejvyššího soudu 23 Cdo 2960/2012

but the label carries the words: “Printed in Italy”. Even if the label on the bottle was actually printed in Italy, some consumers may still believe (especially when if they do not understand English well), that the content of the bottle was manufactured in Italy too<sup>6</sup>.

### **3.4 COMPARATIVE ADVERTISING (§ 2980 NCC)**

Comparative advertising, explicitly or by implication, identifies a competitor or goods or services.

The law permits under certain conditions, comparative advertising, which is based on the European Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising - codified version. If the comparative advertising is unfair, it may be misleading, or it can denigrate a competitor or his goods or services or free-ride. It may comprise elements of deception, aggression and parasitism.

Unfair comparative advertising is often able to damage the good reputation of a competitor not only explicitly but also by implication, when the comparative advertising is associated with free-riding on good reputation. For example, when the competitor A claims that his product has the same characteristics as the branded product of the competitor B, but it is cheaper.

Mostly, competitors use this way for offering imitations or replicas of goods or services.<sup>7</sup>

### **3.5 LIKELIHOOD OF CONFUSION (§ 2981 NCC)**

This provision of the law against unfair competition, the same as the previous provision, directly concerns the intellectual property rights. It may be the violation of a trade name, trademark or registered design. It may be an appearance of the product or artistic performance. It may even cause infringement of the right for designation, which has become in use in trade characteristic – such as domain name.<sup>8</sup>

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<sup>6</sup> Compare with Hajn, P. in: Bejček, J., Hajn, P., Pokorná, J. a kolektiv.: *Obchodní právo. Obecná část. Soutěžní právo*. 1. vyd., Praha: C.H.BECK, 2014, str. 223

<sup>7</sup> Compare with Hajn, P. in: Bejček, J., Hajn, P., Pokorná, J. a kolektiv.: *Obchodní právo. Obecná část. Soutěžní právo*. 1. vyd., Praha: C.H.BECK, 2014, str.229

<sup>8</sup> Compare with Hajn, P. in: Bejček, J., Hajn, P., Pokorná, J. a kolektiv.: *Obchodní právo. Obecná část. Soutěžní právo*. 1. vyd., Praha: C.H.BECK, 2014, str. 223-225

In practice, it's mostly counterfeit or pirated goods. Provided that this conduct is likely to cause likelihood of confusion or a false idea of a connection (the merger) with a competitor's undertaking, name, special designation, performance, or result of activity.

#### **4 SPECIAL LEGAL CLASSIFICATION OF UNFAIR COMPETITION WHERE IS PARASITISM**

##### **4.1 FREE-RIDING ON REPUTATION OF THE UNDERTAKING, PRODUCT OR SERVICE (§ 2982 NCC)**

Free-riding is abuse of reputation of the undertaking, product or service of another competitor, allowing (mere possibility) to obtain the benefit for own or foreign business results and it must be the result which wouldn't be reached otherwise by competitor.

Free-riding on the reputation differs from invoking the likelihood of confusion. There is not made the impression about different entity. The competitor is presented under the real name, and he mostly compares himself with the same good quality of another publicly known or renowned product of a good reputation and he often emphasises lower price of his own product.

To classify the conduct as the act of the unfair competition, it is irrelevant if the competitor is the direct one or not. According to the case-law: „*The fact that an undertaking, riding on the backs "of another company, whilst benefiting from his efforts, his reputation and the reputation of its products, can be assessed as harmful parasitic act ...*"<sup>9</sup>

Not always, the parasitic conduct is detrimental to competitor, whose reputation is riding on.

It could be some sort of symbiosis.

An example could be the case “Champomy” of a French competitor which could be found in the case law of the Fourth Chamber Section A - The Court of Appeal of Paris dated November 7<sup>th</sup>, 2007 (closer AZEMA J. trimestrielle Revue de droit commercial. Paris: Dalloz, 2008, s.540) .

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<sup>9</sup> Tourneau, P. *Le parasitisme (Agissement parasitaires et concurrence parasitaire)*. Paris: Litec, 1998, s.98.in (306) 16 janv.1997, Habitat France: D.Affaires 1997, p.565. (Translated from French by Iveta Chadimová)

In this case, "the French company produced "Children's champagne"<sup>10</sup> ... *under the name Champomy (derived from the French word "pommes" – an apple). The business company was sued by an entity which is dedicated to the legal protection of a designation of origin 'Champagne' for champagne. The Court concluded that the conduct of the defending party could also be to the benefit of producers of champagne. He argued as follows: Children, who have accustomed to drink Champomy during the celebration of their birthday parties and other festive events, would be more likely to consume champagne during the celebrations in their adulthood.*"<sup>11</sup>

## **4.2 COMMERCIAL BRIBERY (§ 2982 NCC)**

Commercial bribery is a competitor's offer, promise or providing any benefit to the Member of the Board of Directors of another competitor or to a person employed by another competitor, in order to achieve the advantages or other unfair competitive advantage for himself or for another competitor.

It is the bribery in private law as one of acts of unfair competition. It is important to distinguish between "bribery" in matters of public interest, which is the subject of criminal law and commercial "bribery" as the act of the unfair competition. In addition, it should be borne in mind that the entity 'who pay bribes' can only be a competitor.<sup>12</sup>

## **5 SPECIAL LEGAL CLASSIFICATIONS OF UNFAIR COMPETITION WHERE IS AGGRESSION**

### **5.1 DENIGRATION (§ 2984 NCC)**

Denigration belongs among the most aggressive forms of competitive conduct. It may also damage the reputation of a competitor.

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<sup>10</sup> Sparkling fruit's drink for children

<sup>11</sup> Hajn, P. in: Bejček, J., Hajn, P., Pokorná, J. a kolektiv.: *Obchodní právo. Obecná část. Soutěžní právo*. 1. vyd., Praha: C.H.BECK, 2014, str.229-230 (Translated from Czech to English by Iveta Chadimová).

<sup>12</sup> Compare with Hajn, P. in: Bejček, J., Hajn, P., Pokorná, J. a kolektiv.: *Obchodní právo. Obecná část. Soutěžní právo*. 1. vyd., Praha: C.H.BECK, 2014, str.231

Denigration is an act of the unfair competition, when a competitor gives or (alternatively) disseminates untrue information about the situation, result of activity or product of another competitor and this untrue information is capable of causing damage to the another competitor.

Denigration is also an act of unfair competition when a competitor gives and disseminates (cumulatively) truthful information about the situation, result of activity or product of another competitor. It is important however to note that in the both cases, must be capability to cause harm. It may also be damage to reputation (goodwill).

Often denigration – damaging the goodwill of another entity- is marketing communication.

The competitor, who denigrates, then tries to point out his own strengths. There could be often the combination of denigration and comparative advertising. Denigration can be committed only by a competitor not by a consumer.

## **5.2 VIOLATION OF TRADE SECRET (§ 2985 NCC)**

It is an unauthorized disclosure or access to foreign trade secret to the third party, which may be used in the competition and on which the infringing entity learned under the conditions specified in the Act.

There is a double protection of trade secret in the Czech law.

A trade secret is first defined in § 504 NCC and protected under that provision as a right in rem. Then it is regulated even as the special legal classification of the unfair competition.

## **5.3 UNACCEPTABLE NUISANCES (UNSOLICITED COMMUNICATIONS) (§ 2986 NCC)**

This is a new special legal classification of unfair competition, which was inserted into NCC due to the development of electronic means of communication and unfair trade practices that appeared together with them.

There are doubts, in interpreting this provision, whether the special legal classification can be applied only to electronic means of communication or altogether with them on traditional ones.

Previously it used to be only judicial legal classification ‘nuisances of customer’. There are opinions that even if the special legal classification is not able to cover cases of unfair

competition carried out by traditional means of communication, it is always possible to sue under general clause and judicial legal classification 'nuisances of customer'.

#### **5.4 THREAT TO HUMAN HEALTH OR THE ENVIRONMENT (§ 2987 NCC)**

The unfair competition can be both a marketing communication, as well as the product itself, in case it threatens interest in protection of health and the environment. The infringer must obtain a benefit for himself or for someone else to the detriment of other competitors or customers.

As such an unfair act could also be qualified the conduct when competitor offers products for health or the environment harmless, but advertising would unjustifiably attributed them a positive impact on health and so it would unfairly being forced out of the market a product that truly meets these values. There would be a threat to the interests of health and the environment protection.<sup>13</sup>

We would also meet with the situation when there are toys at the market which are dangerous for the health of the child. For example, if there would be a risk of entrapment of small components for a small child. It is not directly a marketing communication, but the product itself, which occurs at the market and which is dangerous. Then it is an unfair competitive conduct. There is no doubt about no testing of that product in an Accredited Testing Institution, which was the obligation of the manufacturer. In fact, the Accredited Testing Institution would not approve the production of dangerous toys. The manufacturer obviously violated public law. In this case, there is also a combination of unfair competition with the public law. It would be possible to sue under this special legal classification 'a threat to health or the environment' or the judicial legal classification - 'breach of a public law rule with a negative impact on the competitive position.'

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<sup>13</sup> Compare with Hajn, P. in: Švestka, J., Dvořák, J., Fiala, J. a kol. Občanský zákoník. Komentář. Svazek VI. Praha: Wolters Kluwer, a.s., 2014, str.1220

## **6 PROTECTION AGAINST UNFAIR COMPETITION – MEANS OF LEGAL PROTECTION (§ 2988 NCC) AND PERSONS ENTITLED TO REQUEST APPLICATION (§ 2989 NCC)**

The means of legal protection against unfair competition include the following injunctions: **cease and desist order** (injunction), **order to withdraw or recall** (injunction), **compensation for the non-pecuniary damage, claim damages, unjust enrichment.**

**Cease and desist order** (injunction) can be as to refrain from specific advertising, specific designation of goods or services, or specific statements about a competitor or manufacture of the product in a specific design.

**Order to withdraw or recall** (injunction) may be the change of trade name which doesn't already violate any other law.

Defective state is removed registering of the new trade name in the Commercial Register. Sometimes, in practice, these injunctions are combined.

**Compensation** is intended to remedy the non-pecuniary damage. It has a compensatory function. It is used for example if there was the harm to the reputation of a competitor. It can be implemented mainly in the form of an apology in the press, but if there are reasonable grounds, it may also be provided in cash.

**Damages** mustn't be confused with compensation provided in cash. Damages are used when the property of a specific competitor diminished, because of the unfair competitive practices of another competitor. It is not applied in the unfair competition very often, because it's hard to prove (with respect to the amount of market influences) that the damage arose in connection with unfair competition.

**Unjust enrichment** is on the contrary illegal profit. Someone enriched himself at the expense of another entity by infringement. It can be for example a competitor who enriched himself through copying another imaginative product to which realization had been previously invested mental effort and finance by other competitor.

NCC distinguishes **persons in disputes** of unfair competition **who are actively (locus standi) and passively entitled to request application in the court.**

It is a person, who has "locus standi" to be protected against unfair competition, and therefore it may not necessarily be only a competitor or customer. This may be, for example, a natural person (man), whose name was unfairly used in advertising. The law also allows, in

identified cases, the reversal of the burden of proof, which can be applied - if the consumer (but not any customer) is entitled to request withdraw or recall injunctions against unfair competitor. Then it's the unfair competitor who must prove that he did not commit unfair competition.

Person (passively) entitled to request application in disputes arising from unfair competition is also a competitor who committed the unfair competition or auxiliary person (mediator), for example, for disclosure of trade secrets and bribery.<sup>14</sup>

## CONCLUSION

The most important private standard in the Czech Republic, which regulates the protection against unfair competition from the 1st of January 2014 is Civil Code no. 89/2012 Coll., commonly called "The New Civil Code".

New Civil Code regulates in an appropriate manner also the area of fair use of marketing communications. The most important is § 2976, so-called "the general clause" against unfair competition. There is the definition of unfair competition in the first paragraph of this provision and also the three conditions that are necessary and sufficient (if they are fulfilled cumulatively) to qualify the specific conduct as unfair. The so-called "special legal classifications" in §§ 2977 - 2987 NCC, that specifically define some of the most prevalent prohibited acts, follows under this provision. Furthermore, in §§ 2988 - 2989 NCC there are listed some procedural provisions required for enforcement of rights against unfair competition.

Overall it can be said that, except for some details that are in the legal community considered as questionable, the law against unfair competition in the new Civil Code does not differ significantly from previous legislation for unfair competition. For its contribution can certainly be considered that, as for legislation and practical use, the New Civil Code is built on the philosophy of natural law. It is natural, that alike a majority of legal standards, not even the New Civil Code is perfect and it can be expected that it will lead to amendments in the future. There are some indications of that, but the amendments would not concern the provisions on protection against unfair competition.

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<sup>14</sup> Compare with Hajn, P. in: Bejček, J., Hajn, P., Pokorná, J. a kolektiv.: Obchodní právo. Obecná část. Soutěžní právo. 1. vyd., Praha: C.H.BECK, 2014, str. 242-246



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## **INTERNET:**

For comparing the products of both producers use following address:

<http://www.detoa.cz/vyrobky/auto-montazni> (original) (on line). (quot. 26 April 2016).

<http://www.detoa.cz/vyrobky/auto-mix> (original) (on line). (quot. 26 April 2016).

<http://www.woodyland.eu/z10334-montazni-auto> (slavish imitation) (on line). (quot. 26 April 2016).

<http://www.woodyland.eu/z10335-montazni-automichacka-jedeme-v-tom-spolu> (slavish imitation) (on line). (quot. 26 April 2016).