The implementation of economic rights in three areas in seven Member States

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EXECUTIVE SUMMARY

This research paper assesses how a number of relevant EU instruments identified in D5.1 have been transposed in Belgium, Denmark, Greece, Hungary, Italy, Spain and the Netherlands. More in particular D5.2 focusses on the following three implementation-items:

1. Access of economic actors to the market
2. The protection of economic rights of consumers
3. The protection of citizens’ rights in the digital era

The difficulties that citizens face in exercising these economic rights differ. Some Member States are more accommodating than others as to the exercise of economic rights by non-nationals. Building on the seven country reports, this research report provides a combined presentation of how these Member States approach c.q. deal with the actual implementation of EU-economic actors’ and corresponding citizens’ entitlement to have access to their ensuing economic rights. Within each topic, a further selection was made to enhance both feasibility and comparability. When it comes to access of economic actors to the market, the report addresses the topic of professional qualifications. With regard to the protection economic rights of consumers, the focus is laid on unfair commercial practices and the implementation of the consumer rights directive. And with respect to the protection of citizens’ rights in the digital era, the effects of the Court’s judgment in Google Spain in the different Member States have been assessed.
INTRODUCTION

The objective of WP5 is to study, from the perspective of EU citizenship, the problems that EU citizens and third-country nationals face in gaining access to economic rights, which constitute the backbone of the European Union, as well as the question of how they can exercise these rights. Against this background we will identify different categories of specific substantive economic rights of citizens and the barriers that they face, i.e.:

a) the rights and barriers of citizens in managing, protecting and exercising intellectual property rights,

b) the rights and barriers of citizens in providing or receiving services,

c) the rights and barriers of citizens in practising their profession, and

d) the rights and barriers of citizens in their capacity of consumers, in choosing, in being informed and in being protected while purchasing goods and services in the internal market.

With a view to assessing the possibilities for citizens to exercise these rights, the manner in which EU legal instruments relevant to these rights have been transposed into national law and practice in a number of selected Member States will be thoroughly analysed.

In order to analyse these rights and possible barriers in detail, it will be necessary to categorise the goods and services markets in a number of Member States in terms that are relevant to the access by citizens from other Member States and non-EU citizens, e.g. conditions regarding language facilities, practices of the institutions or other obstacles, such as administrative or bureaucratic barriers. For each of the categories (a-d) the typical characteristics are mentioned that influence external access and internal impact. On the basis of three case studies involving a number of Member States across the European Union, the limitations and restrictions on these categories of economic rights will be further explored. (…)

Task 5.1. has covered the categorisation of economic rights a-d.

Task 5.2. addresses how EU instruments relevant to these rights have been transposed into national law and practice in a number of Member States and which problems occur for citizens in exercising their rights.

Task 5.3. will address a cross-national study via three in-depth case studies (D5.3-D5.5), involving a number of Member States and dealing with respectively (i) the barriers that professionals face in gaining access to the services market (D5.3), the capacity of the consumer to process information and make informed choices (D5.4) and the barriers that citizens face regarding their intellectual property rights (D5.5). It goes without saying that the case studies are not totally unrelated to implementation-issues, yet tasks 5.2. and 5.3. are separate tasks resulting in separate deliverables, thus leading to separate Research papers.

This research paper assesses how a number of relevant EU instruments identified in D5.1 have been transposed in Belgium, Denmark, Greece, Hungary, Italy, Spain and the Netherlands.

We have refrained from including a general part dealing with general tendencies of Member States in the implementation and application of EU law. First of all, these tendencies are well known to the
European Commission. Secondly, there are no indications that such tendencies would be substantially different for economic rights. In that respect, a general part would not be sufficiently focused for the bEUcitizen-project.

During the Utrecht-meeting (Kick-Off meeting in September 2013) WP5-participants agreed to not investigate sectorial/specific regulatory frameworks such as energy, telecommunications, transport, financial services (credit institutions, banks, investment firms/schemes) or for that matter SGEI’s. There are several reasons for these demarcations. First of all, sector-specific regulation is quite technical and insufficiently covered by the participants’ know how and expertise. The latter is not/far less the case for SGEI’s, yet recent EU-developments as to their financing have established such a close connection with the state aid rules, that the connection with citizens’ economic rights is too remote for present WP5-purposes. With regard to sectorial regulation, its exclusion is in addition partly due to the fact that its (overall) having far more tangible implications for the producers concerned than for citizens exercising their economic rights. Finally, the decision to not include sectorial/specific regulation has been taken with the express intention to provide the drafters of the case studies with sufficiently wide relevant background-information to allow them to address:

i. the barriers that professionals face in gaining access to the services market (D5.3),

ii. the capacity of the consumer to process information and make informed choices (D5.4) and

iii. the barriers that citizens face regarding their intellectual property rights (D5.5).

This negative delineation (i.e. matters not to include in D5.2) to not unduly hamper further D5-deliverables, as described above, was confirmed during the Copenhagen-meeting of 11 December 2014.

The D5.2 questionnaire focussed on the following three implementation-items:

4. Access of economic actors to the market
5. The protection of economic rights of consumers
6. The protection of citizens’ rights in the digital era

The difficulties that citizens face in exercising these economic rights differ. Some Member States are more accommodating than others as to the exercise of economic rights by non-nationals. Building on the seven country reports, this Research report intends to provide a combined presentation of how these Member States approach c.q. deal with the actual implementation of EU-economic actors’ and corresponding citizens’ entitlement to have access to their ensuing economic rights. Within each topic, a further selection was made to enhance both feasibility and comparability (cf. the questionnaire relating to deliverable 5.2). Some country reports provide more precise information on the three fore mentioned implementation issues than others. Not all country reports do allow to extrapolate the – at first sight – quite self-confident statement that due to the relative ‘openness’ of the Dutch economy and labour market, in the Netherlands for instance, actual obstacles appear to be relatively small. General conclusions can therefore not be drawn.
1. ACCESS OF ECONOMIC ACTORS TO THE EUROPEAN/INTERNAL MARKET

The issue of access of economic actors to the European/Internal market is multifaceted. Economic actors face multiple barriers to gain access to the market. To not unduly intrude upon the case study specifically dealing with the barriers that professionals face in gaining access to the European services market (D5.3), the first part of this research report focusses on the fundamental issue of the (limits of) recognition of professional qualifications (within) the European Union.

“The right of citizens to practice economic activities is a fundamental right enshrined in the EC Treaty. However, within the limits of Internal Market rules, each Member State is free to make access to a particular profession legally conditional upon the possession of a specific professional qualification which is traditionally the professional qualification issued on its national territory”¹.

Some Member States have substantially more regulated professions than others for historical, traditional and/or professional lobbying reasons². National legislators could have used the implementation of Directive 2005/35/EC as a momentum to revise the existing myriad of nationally regulated professions, but had no implementation-duty to actually do so. In (the) Member States with (the most) many regulated professions, the momentum was mostly left unused c.q. passed over for (very much of the same) historical, traditional and/or professional lobbying reasons³. In Greece, for instance, the issue of recognition of foreign qualifications is said to offer a textbook illustration of the lengths to which a Member State may be ready to go, under the pressure of strongly represented national interest groups, in order to avoid opening the domestic labour market to professionals “from abroad” (cf. infra, 1.1.). The number of regulated professions ranges from 72 (Lithuania) to 417 (Hungary).

The Regulated Professions Database of the European Commission covering 5915 items allows the following regrouping of the number of regulated professions⁴:

- < 100 in Lithuania (72), Sweden (88) and Estonia (97);
- > 100 in Luxemburg (107), Bulgaria (110), Cyprus (114), Romania (128), Belgium (130), Finland (134), Ireland (135), Malta (138), Germany (140), the Netherlands (148), Croatia (151), Greece (153), Latvia (160), Denmark (161), Italy (169) and Spain (189);
- > 200 in the UK (221), Austria (229), Portugal (240), France (260) and Slovenia (264);
- > 300 in Slovakia (311), Poland (347) and the Czech Republic (396), and

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¹ User guide Directive 2005/36/EC, Everything you need to know about the recognition of professional qualifications, 66 questions, 66 answers, p. 6. Available at www.ec.europa.eu


³ This partially back-fired after the adoption and during the implementation of Directive 2006/123.

⁴ http://ec.europa.eu/internal_market/qualifications/regprof/
The right of establishment and the free movement of services are part of the *acquis* since the start of European integration. In addition, from the outset the original EEC-Treaty made clear, that mutual recognition of diplomas, certificates and other evidence of formal qualifications c.q. the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons, would be *made easier* by EU-legislation (Article 57 EEC). The right to (actually exercising) the Treaty free movement of services and the freedom of establishment was therefore never conditional as in *dependent* on mutual recognition Directives. With regard to the legal profession, for instance, the European Court of Justice (hence: ECJ) ruled more than 35 years ago that *even in the absence of Directives ex Article 57 EEC*, Article 52 EEC prohibits both direct and indirect discrimination on grounds of nationality of holders c.q. of degrees (Reyners (1974), Thieffry (1977), and infra). After a period of vertical (per profession) mutual recognition Directives in the 70-ies and 80-ies, the Internal Market program (1986-1992) led to a shift towards general systems of (horizontal) mutual recognition with the adoption of Directive 89/48/EEC\(^6\), Directive 92/51/EEC\(^7\) and Directive 99/42/EEC\(^8\), and a general recast in 2005\(^9\).

All mutual recognition Directives have led to substantial judicial activity at both national and ECJ-level with many non-compliance proceedings for failure of (many) a Member State to either fulfill its implementing duties or to correctly apply the ensuing national rules as to recognising diplomas awarded by competent authorities of another Member State\(^10\). The adoption on 20 November 2013 of Directive 2013/55/EU\(^11\) requiring Member States to adopt implementing measures by 18 January 2016, does not detract from the relevance of illustrating how EU-Treaty rules and facilitating EU-rules in force/implemented prior to 2013/2016 have actually impacted on both free movement of services

\(^{5}\) Overview not included in this report.


\(^{10}\) The quickest overview of the number of cases and the Member States concerned is to search for a concrete Directive in eur-lex and looking (under all) at the cases mentioned.

and freedom of establishment in real judicial cases c.q. juridical life in the Member States (of origin c.q. reception) since the Internal Market was (first) supposed to come about by the end of 1992.

The first part of this research report combines the insights as to the recognition of professional qualifications offered in the seven country reports involved in this deliverable/task (Belgium, Denmark, Greece, Hungary, Italy, Spain and the Netherlands). In view of the focus on the problems that EU citizens and third-country nationals face in gaining access to economic rights, the related, yet clearly distinct issue of the academic recognition of educational diplomas, titles and certificates is not dealt with\(^{12}\).

With regard to the implementation rules to be studied, WP5-participants have been invited to address the (national fate of the) following categories of professional qualifications:

- qualifications obtained by EU citizens in another Member State (EU qualifications)
- qualifications obtained by EU citizens outside the European Union (non-EU qualifications)
- qualifications obtained by EU citizens prior to their country joining the European Union (pre-accession qualifications)
- qualifications obtained by nationals of EU associated third countries, when the relevant association agreement includes chapters on establishment and/or services.

Some country reports provide more information on some of these issues than others. The following analysis of the recognition of EU qualifications in the seven Member States under consideration exclusively relies on the information provided in the national reports.

1.1 RECOGNITION OF EU QUALIFICATIONS OF EU CITIZENS

Despite the first and second general systems of mutual recognition of professional qualifications (1989 resp. 1992), and their more recent recasting in 2005 and 2013, Member States keep questioning/resisting the full effect/impact of the mutual recognition rule with regard to professional qualifications obtained elsewhere\(^{13}\).

Overall, (some) Member States seem quite protective with regard to particular professional activities. Others seem quite reluctant to recognise qualifications with regard to professions that are not regulated in their own national legal order. Similar hesitations arise for asymmetrically regulated professions (regulated in host MS, yet not in home MS, or the other way round). In the (para)medical professions, non-recognition entails quite substantial financial implications for both the professional and his/her patients/clients (social security-coverage, reimbursement rules ...).

\(^{12}\) In addition, such academic recognition is basically an issue of the national (educational) law of the Member States.

\(^{13}\) See f.i. the Commission’s annual reports on the monitoring of the application of EU law for a systematic overview of non-compliance cases in this area, [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm)
The “principal question of law raised” in all mutual recognition of EU qualifications cases, at both ECJ and national level, is to what extent a Member State is under a legal duty “to recognise diplomas awarded following studies in an individual’s own Member State by the authorities of another Member State”\(^\text{14}\).

As the EU-mutual recognition rules – stemming from either primary or secondary EU legislation – aim at facilitating the exercise of the Treaty free movement rules by mobile EU-citizens, they do not apply to (purely) ‘internal situations’ nor to cases of ‘re-registration’ of a professional qualification.

With regard to purely internal registration, in 2012 the Dutch Council of State (Raad van State) thus declared Directive 2005/36/EC inapplicable when an applicant who had obtained her qualification as a psychologist in the Netherlands, the Member State of origin, requested the Netherlands to register and recognise her qualification. She had to register first as health psychologist before she could register as a clinical neuropsychologist, which decision she contested on the basis of the Services Directive (Directive 2006/123/EC) and Directive 2005/36/EC. The Council of State first held that health services are excluded from the scope of application of the Services Directive. It then stated, by referring to the case law of the European Court of Justice, that Directive 2005/36/EC does not apply to nationals who have obtained their qualification in the home (regulating) state\(^\text{15}\).

With regard to re-registration, an application by the holder of a Dutch professional qualification as internist, obtained in the Netherlands and recognised and registered as such in Belgium, was barred from automatic (transitive-revert) recognition in the Netherlands\(^\text{16}\).

Implementation of Directive 2005/36/EEC was due by 20 October 2007\(^\text{17}\). As for all mutual recognition Directives before it, all Member States were late in actually completing that process. Italy was the first to act by adopting Legislative decree n° 206 of 9 November 2007 (IT)\(^\text{18}\). In Belgium, Directive 2005/36/EC has been implemented by a series/myriad of legislative acts at federal (laws, royal decrees, ministerial orders), and regional level (Flanders, the Walloon Region, the French-Speaking Community, the German-speaking Community (decrees, orders) and the Brussels Capital Region (ordonnances)), adopted between August 2007 and October 2012. In Hungary, a similar variety of legal instruments was used to implement Directive 2005/36/EC (acts, government decrees

\(^\text{14}\) Description pertaining to Directive 89/48 provided in ECJ 23 October 2008, Commission v. Greece, C-274/05 [2008] ECR I-7969, paragraph 2, referring to the analogous question raised in the same day’s judgment in Case C-286/06 Commission v. Spain [2008] ECR I-8025. Note: publication of the European Court Reports was discontinued as from 2012. Judgments rendered after 2012 are referred to by ECLI:EU numbers.


\(^\text{18}\) Hence also referred to as Legislative Decree n° 206/2007, the Italian Act, or the Italian Decree.
and ministerial decrees) between 2006 and 2013. The Dutch legislator implemented an important part of Directive 2005/36/EC through the adoption of the General Act on the Recognition of EC-Professional Qualifications (Algemene Wet Erkenning EG-beroepskwalificaties, hereafter: General Act) in 2007\(^1\) (as amended in 2009, 2011 and 2013). Denmark duly communicated more than 129 measures to comply with the implementation requirements. In Greece, Directive 2005/36/EC was implemented with a delay of three years\(^2\). In Spain, the Directive was implemented with a delay of more than one year by means of Royal Decree 1837/2008 of 8 November, which covers both Directive 2005/36/EC and Directive 2006/100/EC related to the exercise of the profession of a lawyer.

In Hungary, compliance with professional qualifications directives does not appear to raise particular problems. Whereas there are a number of cases in which Hungarian citizens have succeeded in obtaining recognition of their qualifications in other Member States, no cases could be found with regard to ‘incoming’ EU-citizens. This is partly explained by the fact that Hungary is not an immigration country. In the health care sector, for instance, during 2013 1950 persons qualified in Hungary, whereas only 167 persons’ foreign qualification was recognised in 2013\(^3\), with major numbers (143/167) coming from the neighbouring countries with a significant ethnic Hungarian population (Romania, Serbia, Slovakia and Ukraine).

Greece, for its part, has for many years been the biggest exporter of higher education in the world in relation to its population\(^2\). As in Hungary, there are relatively few EU-citizens working in Greece\(^3\), and among them even fewer work as free-standing professionals with a need to acquire fully-fledged access to the Greek labour market. Partly due to the Greek Constitutional anchoring of education at university level in institutions which are fully self-governed public law legal persons\(^2\), and the corresponding limitation of private educational initiative, recognition of non-nationally acquired professional qualifications has, however, been fiercely opposed in Greece, and the recognition of foreign qualifications is an unfortunately long story of controversies and polemics at both the political and legal level. In a rather atypical way, in Greece, discrimination against EU degrees is rather about the degree itself – and the foreign delivering institution – than about non-Greek EU-nationals. From a (rather) legalistic point of view, one might be inclined to dismiss this rather peculiar Greek feature as

\(^1\) See also laws and regulations related to the General Act on the Recognition of EC-Professional Qualifications Act: <http://wetten.overheid.nl/BWBR0023066/geldigheidsdatum_26-06-2015> accessed 26 June 2015; The Architects Title Act was adapted to the Directive through a separate legislative procedure.


\(^3\) www.eekh.hu/hmr/etoltesek/beszamolok/HB_beszamolo_2013.pdf


\(^6\) Laid down in Article 16(5) of the 1975/1986/2001/2008 (Greek) Constitution, English version to be found at the Parliament’s website: www.hellenicparliament.gr
raising relatively few issues of genuine EU-citizenship. The legal implications for the actual ability of Greek citizens to fully exercise their citizens’ rights of an economic nature conferred by EU-law do, however, deserve appropriate attention and coverage\textsuperscript{25}.

Regarding Spain there have been no significant complaints after 2012 concerning compliance with Directive 2005/36/EC. Yet, a number of problems related to the recognition of qualifications obtained by Portuguese engineers and nurses, by professional drivers from the UK and by Italian medical specialists were reported to SOLVIT, and solved\textsuperscript{26}.

On the basis of the annual reports on the monitoring of the application of EU law of the European Commission\textsuperscript{27}, one can conclude that Denmark is not in the problem zone as regard incorrect implementation. No infringement procedure seems to have been launched for incorrect application of Directive 2005/36/EC, and no national case law was identified on the matter either.

The recognition of professional qualifications allows the beneficiary to gain access in a Member State to the same profession as that for which he/she is qualified in the home Member State and to pursue it under the same conditions as national citizens.

In the Netherlands, the responsibility for the recognition of professional qualifications is divided among the different ministries entrusted with the regulation of professions under Dutch law. Health care professions, for instance, fall under the responsibility of the Ministerie van Gezondheidszorg, Welzijn \& Sport (Ministry of Health, Welfare and Sports), whereas the qualifications for policemen are regulated by the Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (Ministry of the Interior and Kingdom Relations). The Ministries are also granted the power to set more detailed rules and to delegate the duties and competences conferred upon them under Articles 33 and 36 of the General Act. As a result, profession-specific regulations have been adopted, including specific rules for various categories of professions, ranging from lawyers to inland navigators.

The Italian act on the regulated professions (professioni regolamentate) applies to EU citizens wanting to pursue a regulated profession in Italy, including the so-called liberal professions (liberi professionisti), both on a self-employed and employed basis, with a view to permanent establishment or temporary provision of services, on the basis of a qualification obtained in another Member State, which provides them access to the profession concerned in their home State. The Department for European politics of the Italian Government (Dipartimento per le politiche europee presso la Presidenza del Consiglio dei Ministri) has been designated as both the Coordinator and the national contact point. The Italian contact point\textsuperscript{28} provides the citizens and contact points of the other Member States with the necessary information related to the application of Legislative decree n° 206/2007 with regard to in particular the rules governing the recognition of professional qualifications

\textsuperscript{25} Cf. infra.

\textsuperscript{26} [Link to Euroscoreboard]

\textsuperscript{27} [Link to Annual Reports]

\textsuperscript{28} [Link to Contact Point Information]
and on the Italian regulation governing the professions and the pursuit of those professions, including social legislation, and, where appropriate, the professional ethical rules. In the Netherlands, the Ministry of Education, Culture and Science is responsible for the coordination of the system of recognition of professional qualifications and the NUFFIC (Netherlands University Foundation for International Cooperation) and Colo (Centraal Orgaan Landelijke Opleidingsorganen) are appointed as contact points within the meaning of Article 57 of the Directive. The website of NUFFIC provides detailed information in Dutch and English, including flowcharts for prospective mobile workers and the way in which the Netherlands evaluates professional qualifications obtained abroad. Whilst the NUFFIC is responsible as overall contact point in the Netherlands they also cooperate with the SBB, the Foundation for Cooperation on Vocational Education, Training and the Labour Market. SBB is the National Reference Point (NRP) in the Netherlands, the national contact point for information on vocational education in European countries. In Belgium, the Federal Public Planning Service (FPS) Science Policy assures the coordination of Directive 2005/35. In Greece, SAEP (Συμβουλίων Αναγνώρισης Επαγγελματικών Προσόντων) assumes this role. In Denmark, the Agency for Higher Education (Styrelsen for Videregående Uddannelser), part of the Ministry of Higher Education and Science is the authority in charge of coordinating the assessment of foreigners’ qualifications and the national contact point as regards the regulated professions. The Agency not only runs a website that informs on the rules enforced, but also works in close cooperation with 21 competent authorities, in charge of admitting Danish nationals as well as foreigners to the regulated professions. To enhance coherence, since 2010 the Danish Agency receives all applications for recognition of professional qualifications in Denmark, to then be forwarded to the competent authority to carry out the procedure leading to authorisation.

In Spain, the Ministries are responsible for the recognition of professional qualifications in their respective fields of interest. The national contact point is placed at the Ministry of Education. Next to the competences of the State to deal with the recognition of professional qualifications, the authorities competent to recognize foreign qualifications also concern the correspondent organs of the autonomous communities. Due to the fact that health competences have been attributed to the autonomous communities, they – i.e. the so-called health counsellors - are particularly involved in the recognition of professional qualifications concerning the health sector. This is subject to judicial review. As a general rule the proceedings concerning recognition has a maximum length of 4 months.

It is interesting to note that in Spain a discussion has been going on about the role of the legislator and administration in regulating professions and the compatibility of the Spanish constitution, more specifically the principle of freedom enshrined in section 1.1 of the constitution.

30 See http://www.belspo.be/belspo/cultedu/edu_access_en.stm
31 Initially established, albeit under a different name, (only) in 2000 to implement Directive 89/48 (!), i.e. nine years after the formal deadline. See for its current composition, Article 56 of Presidential Decree 38/2010, as amended in 2013 by Law 4205/2013 (Chapter II Article 2).
33 Ministry of Education, Department of Qualifications and Recognition of Qualifications.
Directive 2005/35/EC distinguishes between three automatic recognition regimes: automatic recognition on the basis of the coordination of minimum training conditions; automatic recognition on the basis of common training principles, and automatic recognition based on professional experience. In addition, a “general system” applies for the recognition of evidence of training.

This variety of regimes is reflected in the implementation legislation under consideration. Holders of professional titles listed in Annexes V and VI of Directive 2005/35/EC benefit from the first and second type of automatic recognition. This applies to doctors of medicine, nurses, dental practitioners, veterinary surgeons, pharmacists, midwives and architects. Activities in the craft, commerce and industrial sectors, such as for instance electricians, beauticians or hairdressers, benefit from the automatic recognition of professional experience.

In the Netherlands, as regards the seven professions for which the principle of automatic recognition applies, i.e. architects, dentists, doctors, midwives, nurses, pharmacists and veterinary surgeons, Directive 2005/36/EC was integrated in different existing Dutch legislation, with the General Act serving a complementary function. As prescribed in Article 33 of the General Act, different ministries also adjusted their orders-in-council and ministerial regulations to incorporate Directive 2005/36/EC.

The Italian Decree does not impose compensation measures, such as adaptation periods or aptitude tests on EU citizens holding a professional title listed in Annexes V and VI of Directive 2005/36/EC. The Italian Professional Associations are, however, duly in charge of assessing the possessing the language knowledge necessary to the pursuit of the professional activity concerned.

This last element appears to be in line with established case-law of the ECJ which confirmed that knowledge of the national language of a Member States may be imposed as a condition for taking up work in a Member State, where knowledge of the language concerned is crucial for carrying out the tasks related to the job.

The general system applies to the remaining professions and/or to holders of qualifications that do not meet all requirements for automatic recognition.

From the outset, the general system for the recognition of higher diplomas is “based on the mutual trust that Member States have in the professional qualifications that they award. That system

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essentially presumes that the qualifications of an applicant entitled to pursue a regulated profession in one Member State are sufficient for the pursuit of that profession in the other Member States. 38

The Italian general system (Sistema Generale) laid down in Decree N° 206/2007 is (thus) based on general trust and leads to recognition after a case by case assessment based on a comparison of the applicant’s training conditions and qualifications with those required in Italy.

In cases of substantial differences (differenze sostanziali), compensation measures can be imposed in accordance with Article 22 of Decree n° 206/2007. The aptitude tests and adaptation periods are dealt with in its Article 23, and further regulated for each profession. This specific profession-regulation is prone to raising specific issues with regard to recognition of qualifications obtained elsewhere in the European Union. Law degrees provide a specifically poignant case of contention. In view of the long-standing case law and subsequent (consolidating) EU-legislation with regard to the legal profession, these cases are dealt with in a separate subsection.

When an aptitude test is called for after the conferenza di servizi (infra), the competent Italian authorities draw up a list of subjects which, on the basis of the comparison of the education and training required in Italy and that of the applicant, are not covered, while being essential for the pursuit of the given professional activity in Italy. The actual test consists of either a written, a practical and oral, or oral exam. The test can be repeated, but not within six months after the first attempt. 39

As far as the actual operation of the recognition of professional qualifications is concerned, the Italian legislative decree provides for a so-called conference of services (conferenza di servizi) 40 after consultation with the National University Council (Consiglio Universitario Nazionale), between the authorities charged with the application of the decree, the Dipartimento per le politiche europee and the Italian Ministry of Foreign Affairs. In addition, a delegate of the Professional Association and/or professional category concerned will be consulted.

In Italy, as in many other member states, professional rules, disciplinary responsibility, rules of professional ethics and the role traditionally attributed to professional associations play a specific role in the access to and the pursuit of a regulated profession by EU citizens. Whereas this clearly constitutes an important guarantee of professional competences, thus safeguarding public interests, this systematic professional involvement is at the same time liable to raise barriers to mobile EU citizens. When actually amounting to curbing mobility, Internal Market principles are at risk. 41


40 Pursuant to Law N° 241 of 7 August 1990, the Italian law on administrative proceedings and access to administrative documents.

In a number of Member States, professional associations seem to find it particularly difficult to fully abide with the consequences of automatic mutual recognition.

The Greek constitutional limitation of private educational activity and the strong constitutional grounding to trade-unions in the education sector to resist for many years the recognition of any qualification delivered in Greece by/with the help of private entities, has for a long time contributed to the strong (if not obstinate) tendency of the Professional Chambers in the various professions – and most notably the Technical Chamber of Greece and the Bar Associations – to try and block professionals qualified in other countries.

As indicated earlier, these are not mostly EU-citizens intent to become economically active in Greece, but mainly Greek nationals who have studied abroad or in “Colleges” in Greece under franchise/homologation agreements with EU-Universities.

Despite its obligation to recognise education and training provided by a private body in Greece homologated by a competent authority of another Member State which awards diplomas to students who have received that education and training within the framework of such homologation agreement, laid down (already) in Directive 89/48, the SAEP started to recognise education and training within the framework of such a homologation agreement only after both the Commission and a number of alert citizens acted to have national (referring) courts and ECJ rule on the entitlement to such recognition for diplomas awarded directly or indirectly by authorities of other Member States.

Presidential Decree 165/2000 which provided SAEP with the/a legal basis to systematically exclude all Colleges alumni from any recognition, was only changed after a direct non-compliance case, and only fully complied with also ‘in spirit’ after three further rulings of the ECJ.

As recent as 2011, the Belgian Order of Architects challenged the legality of the Royal Decree of 23 March 2011 on the general (unconditional) exemption of architects for EU- and EEA-citizens holding an architectural degree who can establish that they have been active as architects for at least three


42 Cf. supra.


years, from a two year-internship in Belgium\textsuperscript{45}, claiming that such waiving of internship belongs to the discretion and realm of the Order of Architects, to be decided on a case-by-case basis.

On 20 June 2013, the Belgian Council of State decided to stay its proceedings and refer a preliminary question to the ECJ, asking \textit{“in essence, whether Articles 21 and 49 of Directive 2005/36 (…) must be interpreted as precluding the host Member State from requiring the holder of a professional qualification obtained in the home Member State to undertake a traineeship, or to prove that he possesses equivalent professional experience, in order to be authorised to practise the profession of architect”} in Belgium\textsuperscript{46}. After reiterating that Directive 85/384 – repealed by Directive 2005/36 – already precluded host Member States \textit{“from imposing additional requirements for the recognition of professional qualifications which satisfy the conditions for qualification laid down by the EU rules”} \textsuperscript{47}, and referring to that effect to its earlier rulings in cases C-43/06 (2007)\textsuperscript{48} and C-111/12 (2013)\textsuperscript{49}, the ECJ ruled on 30 April 2014 that the \textit{“system of automatic recognition of professional qualifications provided for, as regards the profession of architect, in Articles 21, 46 and 49 of Directive 2005/36 leaves the Member States no discretion. (…) where a national of a Member State holds any of the formal qualifications and certificates set out in point 5.7.1. of Annex V or in Annex VI of that directive, he must [therefore] be permitted to practise the profession of architect in another Member State, without the latter being able to require him to obtain additional professional qualifications or to prove that he done so”}\textsuperscript{50}.

Although the ECJ cannot actually decide the case brought before it by the referring Council of State, it follows from the foregoing that the Belgian Order of Architects cannot uphold its resistance against the internship exemption for EU- and EEA-architects wanting to become economically active in Belgium, and that it has to accept that holders of the professional qualifications referred to above are authorised to practice their profession of architect in Belgium without having to undertake a traineeship, or to prove that they possess equivalent professional experience.

\textsuperscript{45} Arrêté royal relatif à la dispense du stage d’architecte – Koninklijk Besluit betreffende de vrijstelling van de stage van architect, Moniteur Belge – Belgisch Staatsblad 11 April 2011, p. 2307, available via \url{www.ejustice.just.fgov.be/wet/wet.htm}. This Royal Decree was adopted to comply with/implement both Directive 2005/36/EC – in particular its Articles 21 (1) and 49 – and Directive 2006/123, after a reasoned opinion of the Commission addressed to Belgium on 24 November 2010.

\textsuperscript{46} Conseil d’État, section du contentieux administratif, arrêt n° 224.009 of 20 June 2013 available via \url{www.jura.be} and \url{http://www.raadvst-consetat.be/?page=caselaw_page3&lang=en}. The question of the Council of State was reformulated to its “essence” by the ECJ in its ruling of 30 April 2014, Ordre des architectes v. État belge, C-365/13 (ECLI:EU:C/2014:280), paragraph 18.


\textsuperscript{49} ECJ 21 February 2013, Ordine degli Ingegneri di Verona e Provincia and Others, C-111/12 (ECLI:EU:C:2013:100), para 43 and 44.

\textsuperscript{50} ECJ 30 April 2014, Ordre des architectes v. État belge, C-365/13 (ECLI:EU:C/2014:280), para 24, emphasis added.
In the Netherlands, profession-specific difficulties arose with regard to veterinary surgeons and architects.

Regarding veterinary surgeons, the Faculty of Veterinary Medicine of Utrecht University lodged a complaint with the Ministry of Agriculture, Nature and Food Quality (now merged with the Ministry of Economic Affairs) submitting that the automatic recognition of professional qualifications for veterinary surgeons was not desirable considering the differing quality of the educational programmes across the EU. Approximately 10 to 15% of the veterinary surgeons in the Netherlands comes from another EU Member State, particularly Belgium, Germany, Denmark, Italy and Sweden.

With respect to the profession of architects, Dutch legislation – almost mirroring the Belgian case dealt with above – initially did not require professional experience as a precondition for registration as an architect. As a consequence, architects from other Member States, where professional experience is required, sought to register in the Netherlands, allowing them to use their title in other states (a so-called U-turn construction). To block such constructions – commonly frowned upon in the Netherlands – Dutch legislation was amended and now includes a requirement of two years professional experience before one can register as an architect.

In its 2010 report on the application of Directive 2005/36/EC to the European Commission, the Dutch government, however, indicated that in general no major problems occurred in applying the system of recognition of professional qualifications. Yet, in its view there was room for improvement, for instance with regard to information on the quality and differences of educational programmes, and/or disciplinary or criminal procedures involving professionals in other Member States, with information ranging from poor, insufficient to lacking altogether. With regard to minimal training

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54 cf. infra.
requirements, the Dutch government noted that the criteria remained open to multiple interpretations, while at the same time submitting that encompassing codification of training requirements could have a stifling effect on (the development) of national educational systems.

For EU citizens intending to provide services on a temporary basis, for some professions Italy – as other Member States – requires prior notification of the professional activity to the Professional Association of the Italian province where the service will be provided. In Denmark, temporary or occasional provision of services similarly requires a declaration from the worker to the authority stating that he/she meets the criteria listed for the exercise of the regulated profession.

A substantially more encompassing obligation existed in Belgium between 2006 and 2013, effectively requiring all self-employed persons providing cross-border services in Belgium to file a prior notification to the social security administration, with a view to set up a cross-border information system for the investigation of migration, feeding into a central register. The ensuing one-stop shop for all formalities related to employment in Belgium, would be made accessible, for purposes of statistics and monitoring, in particular to the Belgian federal and regional inspection services, by means of a common IT platform.

The so-called LIMOSA-declaration called for a substantial amount of information relating to inter alia identification data of the self-employed, the national identification number in the country of origin and the VAT number in the country of origin, and was sanctioned with imprisonment sanctions and fines. During the procedure before the Court, Denmark intervened in support of the submissions made by Belgium, mainly “because Danish law also contain[ed] provisions requiring a prior declaration to be made by foreign service providers, applicable to self-employed workers.”

Although Belgium – with the support of Denmark – argued that the system was set up and intended to “combat the abusive use of self-employed status for workers who are, in reality, employees (‘bogus self-employed persons’) in order to circumvent the minimum standards applicable as regards the social protection of workers,” the ECJ ruled that the LIMOSA-provisions amounted to an obstacle to the freedom to provide services, and were to be regarded as disproportionate to achieve the

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objectives of public interest relied upon by the Kingdom of Belgium\textsuperscript{61}, such as the prevention of unfair competition and/or social dumping, combating (social security) fraud and the protection of workers\textsuperscript{62}.

In Italy, EU professionals making use of their Treaty freedom to provide services are fully subject to the disciplinary power – including the "local" code of professional ethics – exercised by the Italian Professional Association with regard to Italian professionals registered in the Professional Register\textsuperscript{63}. At first sight, this seems consistent with Article 5(3) Directive 2005/35 which submits the service provider "to professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications, such as the definition of the profession, the use of titles and serious professional malpractice which is directly and specifically linked to consumer protection and safety, as well as disciplinary provisions which are applicable in the host Member State to professionals who pursue the same profession in that Member State". Whereas this clearly covers (many – yet not by definition all, cf. infra – of the) national rules designed for the protection and safety of service-receivers such as patients in the healthcare sector, it is, however, far less clear whether the (Italian) full and straightforward application of all disciplinary provisions of the host-state professions to all services provided on a temporary and occasional basis by EU-mobile service providers – subject to equivalent/similar rules in their home-state –, is fully EU-proof.

In Konstantinides (2013), a preliminary ruling dealing with the freedom to provide medical services and the applicability of the rules of professional conduct of the host Member State, in particular those relating to fees and advertising, the ECJ clarified that the full applicability of (i.c. German) professional rules can only be upheld with regard to EU service providers (i.c. the Greek physician Dr. Konstantinides) when they are directly linked to the actual practice of medicine and failure to observe them harms the protection of patients\textsuperscript{64}.

To reach that finding, the ECJ observed in general terms in paragraph 44 that “according to settled case-law, Article 56 TFEU requires not only the elimination of all discrimination against providers of services on ground of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services where he lawfully provides similar services (Case C-577/10 Commission v. Belgium [2012] ECR, paragraph 38 and the case-law cited)”. In addition the ECJ recalled that “in particular, the concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect the


\textsuperscript{62} Objections advanced by the European Commission, cf. ECJ 19 December 2012, Commission v. Belgium, C-577/10 (ECLI:EU:C:2012:814), para 18-23, as in essence upheld by the ECJ.


\textsuperscript{64} ECJ 12 September 2013, Konstantinides, C-475/11 (ECLI:EU:C:2013:542).
freedom to provide services in other Member States (see, to that effect, *inter alia*, Case C-565/08 Commission v. Italy [2011] ECR I-2101, paragraph 46 and the case-law cited)*. In paragraph 50, the ECJ recollected that as “regards the justification for such a restriction, it is settled case-law that national measures which are liable to hinder the exercise of fundamental freedoms guaranteed by the Treaty or make it less attractive may be allowed only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued (see, *inter alia*, Case C-202/11 *Los* [2013] ECR, paragraph 23 and the case-law cited)

When the safety of EU-citizens/patients is at stake and national professional rules comply with these conditions – which is i.e. for the German referring court to decide – the role of Professional Associations along with other competent national public authorities enacting such rules remains crucial and needs to be properly taken into account when evaluating the concrete national framework for the temporary/occasional professional activity of mobile EU-actors in host Member States. On the national plane(s), one should, therefore not lose sight of the caveat advanced by AG Cruz Villalón in point 61 of his Opinion of 31 January 2013 in *Konstantinides* (Case C-475/11, ECLI:EU:C:2013:51).

After recalling the ECJ case law regarding rules of professional conduct, AG Cruz Villalón pointedly evokes that “although a measure laying down standards of professional conduct does not *of itself* restrict the freedom to provide services, that conclusion changes radically if those standards are formulated in ambiguous and equivocal terms and are accompanied by strict disciplinary rules. The sum of those features – ambiguity and penalties – is an outcome which clearly discourages medical professionals from other Member States from advertising, an activity which may be decisive for the purposes of securing their entry into the professional market in another State”.

In its 2010 report, the Dutch Government specifically notes that Article 7(4) of Directive 2005/36/EC restricts the legality of prior inspection of professional qualifications in case of temporary or incidental provision of services, even this might compromise public health and safety in the field of health care. Article 56a Directive 2013/55/EU introduces an alert mechanism for a number of medical professions, requiring Member States “to inform the competent authorities of all other Member States about a professional whose pursuit on the territory of that Member State of (...) professional activities in their entirety of parts thereof has been restricted or prohibited, even temporarily, by national authorities or courts”. As this (upcoming) alert mechanism clearly has the potential to remedy the (current) information gap, the Netherlands has been acting proactively by already establishing a ‘black list’ of both Dutch and foreign professionals working in the healthcare

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sector, who are prohibited or temporarily suspended from exercising their activities due to a court order. In the Italian context of professional regulations, the procedures for EU professionals both with a view to establishment and the free movement of services are well explained and rather easily available on institutional websites. Yet, the role and the nature of the multiple codes of professional conduct are still controversial. In comparative terms, the disciplinary framework and its implementation remains fairly ambiguous, and may therefore discourage – if not unduly hamper – EU professionals from actually providing services in Italy. In Hungary, litigation related to recognition of professional qualifications is not abundant. In Denmark, no case law could be identified specifically dealing with the matter of recognition of foreign professional qualifications.

A profession that consistently keeps raising problems in Italy is that of tourist guides, as currently subject to both Directive 2005/36/EEC and Directive 2006/123/EC. An 2012 EU Pilot file – a pre-infringement procedure with regard to the Italian stipulation that accreditation to exercise the profession of tourist guide is only valid in the region of issue – induced the Italian Parliament to adopt European Law N° 97 on 6 August 2013, which allows tourist guides accredited in any Member State to exercise their profession in Italy without being required to obtain an additional authorisation or accreditation from the Italian authorities. Notwithstanding the particularly rich cultural Italian heritage, which according to some requires tourist guides to acquire such a particularly deep knowledge in a limited Italian area (provincial or regional) available only to tourist guides trained on the spot, Mr. Barnier replied, on behalf of the European Commission, that “based on the information available, it would not appear to the Commission that promotion and conservation of national heritage can as such be considered an overriding reason, justifying a restriction to the exercise of certain activities [and that it] would appear that the promotion of national heritage can be ensured independently from the question of where the provider of the service comes from, the


important issue being the knowledge that the provider of the service has of a certain territory and its culture.”

A profession that also quite consistently keeps raising problems, is that of practising (Bar/Bench) lawyers. Because of its recurrent nature in more than one Member State, the recognition issues are briefly dealt with separately. As indicated earlier, the ECJ indicated in Reyners (1974) and Thieffry (1977) that even in the absence of Directives under Article (then) 57 EEC, recognition of foreign diplomas was required under (then) Article 52 EEC (now Article 49 TFEU), prohibiting discrimination on grounds of nationality. Reyners, born in Brussels of Dutch parents who retained his Dutch nationality enjoyed his legal education in Belgium and acquired a Belgian law degree, and wanted to be admitted to the practice of advocaat/avocat in Belgium, but was refused for not having the Belgian nationality. Thieffry, a Belgian national “held a Belgian law degree recognised to the University of Paris as equivalent to a French law degree. He acquired the qualifying certificate for the profession of advocate, but the Paris Bar Council refused to allow him to undergo practical training on the ground that he did not possess a French law degree.” In both cases, the ECJ held that the refusal amounted to direct resp. indirect discrimination prohibited by (then) Article 52 EEC, and could not be accepted, as the exercise of the right to establishment was not dependent on measures for its facilitation.

Since 1977 the EU-legislator adopted a series of Directives as to the mutual recognition of EU-law degrees with a view to facilitating the freedom of establishment and the free movement of legal professional services.

In Italy, recognition of law degrees either gives rise to the registration in the Professional Register (Bar), allowing the lawyer not only to have access to the profession and to pursue it under the same conditions as Italian trained lawyers as avvocato. This recognition is subject to an aptitude test which entails a written and oral exam. Alternatively, lawyers with a qualification obtained in another EU Member State can apply for registration in a special Italian register held at the Tribunal of the district under the terms of the Directives.

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where he/she is domiciled, thus becoming a “established lawyer” (avvocato stabilito)\textsuperscript{77}. After having pursued the profession for three years, sustained by an Italian colleague (avvocato), one can ask to be exempted from the aptitude test with a view to become a “integrated lawyer” (avvocato integrato). This corresponds fully with the situation of Italian lawyers (avvocato) in terms of both registration and use of the title\textsuperscript{78}.

Problems have centred mostly around the refusal of registration of EU nationals who obtained their professional legal qualifications in Spain, where – at least until 2011 – registration with the Bar Association was not subject to specific Bar exams. Some Italian Bar Associations have been refusing the recognition of Italian citizens who obtained the Spanish title of abogado and then applied for the Italian title of avvocato after three years of profession activity in Italy.

In 2011, the Italian Supreme Court (Corte di Cassazione) ruled that professional associations are not allowed to refuse to Italian lawyers which went to Spain to graduate and then came back to Italy to pursue the profession the registration granted to EU lawyers established in Italy\textsuperscript{79}. According to the Court neither the Bar Councils nor the Consiglio Nazionale Forense can disregard the mentioned European directives.

In 2013, the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato) established that some Bar councils infringed Article 101 TFEU restricting competition by hindering the access to the Italian market to services of legal counselling by EU lawyers which wanted to use the procedure of establishment and integration granted by Directive 98/5/EC\textsuperscript{80}.

Notwithstanding the 2011 ruling of the Corte di Cassazione, in 2013 the Italian Consiglio Nazionale Forense referred a preliminary question to the ECJ as to the interpretation and validity of said Directive in two actions brought before it by two Italian citizens (Mr Angelo Alberto Torresi and Mr Pierfrancesco Torresi) against the Consiglio dell’Ordine degli Avvocati di Macerata concerning the latter’s refusal to grant their applications for registration in the special section of the lawyers’ register. Both applicants obtained a university law degree in both Italy and Spain and were registered in 2011 as lawyers in the register of the Ilustre Colegio de Abogados de Santa Cruz de Tenerife (Bar of Santa Cruz de Tenerife, Spain). In 2012 they lodged with the Italian Bar Council applications for registration in the special section of the register concerning lawyers holding a professional title issued in another Member State established in Italy, pursuant to Article 6 of Legislative Decree No 96/2001 on registration.

The Consiglio Nazionale Forense was of the initial opinion “that the situation of a person who, after he or she has obtained a legal qualification in one Member State, travels to

\textsuperscript{77} Cf. Legislative Decree n° 96 of 2 February 2001, implementing Directive 98/5/EC.

\textsuperscript{78} See for instance the website of the Italian National Bar Association (Consiglio Nazionale Forense): http://www.consigionazionaleforense.it/site/home/area-avvocati/riconoscimento-titoli-stranieri/avvocato-nella-comunita-europea/lavvocato-stabilito-integrato.html

\textsuperscript{79} Cass., Sez. Un., no. 28340 of December 2011.

\textsuperscript{80} AGCM, decision no. 24327 of 23 April 2013. See also R. Danovi, Ordinamento forense e deontologia, Milano, 2015, at 186.
another Member State in order to obtain there the title of lawyer with a view to returning immediately to the former Member State and entering into professional practice there, seems at odds with the objectives of Directive 98/5 and may constitute an abuse of rights, and decided to ask to ECJ for additional information as to the interpretation to be given to Article 3 of Directive 98/5.

In *Torresi* (2014), the Grand Chamber recalled that whereas “in accordance with settled case-law of the Court, EU law cannot be relied on for abusive or fraudulent ends” (para 42, and case-law cited there), a “finding of abuse requires a combination of objective and subjective elements” (para 44, and case-law cited there). With regard to the objective element, it “must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved” (para 45, and case-law cited there). As regards the subjective element, it “must be apparent that there is an intention to obtain an improper advantage from the EU rules by artificially creating the conditions laid down for obtaining it” (para 46, and case-law cited there).

Since the “right of nationals of a Member State to choose, on the one hand, the Member State in which they wish to acquire their professional qualifications and, on the other, the Member State in which they intend to practice their profession is inherent in the exercise, in a single market, of the fundamental freedoms guaranteed by the Treaties” (para 48, and case law cited there), the “fact that a national of a Member State who has obtained a university degree in that State travels to another Member State, in order to acquire there the professional qualification of lawyer, and subsequently returns to the Member State of which he is a national in order to practise the profession of lawyer under the professional title obtained in the Member State where that qualification was acquired, constitutes one of the possible situations where the objective of Directive 98/5 is achieved and cannot constitute, in itself, an abuse of the right of establishment stemming from Article 3 of Directive 98/5” (para 49, emphasis added). Further, the mere “fact that the national of a Member State has chosen to acquire a professional qualification in a Member State other than that in which he resides in order to benefit there from more favourable legislation is not, in itself, (...) sufficient ground to conclude that there is an abuse of rights” (para 50, emphasis added).

In the ECJ’s view, the fact “that a national of a Member State who has successfully obtained a university degree in that State travels to another Member State in order to acquire there the professional qualification of lawyer and subsequently returns to the Member State of which he is a national in order to practice there the profession of lawyer under the professional title obtained in the Member State where that professional qualification was acquired”, can thus not be identified as an abuse of EU rights (para 52). Italian lawyers travelling to Spain to acquire the Spanish professional qualification of lawyer and then return to Italy to practice law under the Spanish title, can therefore not be barred from obtaining the Italian title of *avvocato* after three years.

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In Greece, the Council of State (Conseil d’Etat, CE) had to resolve the issue of trainee lawyers intending to move from another MS to Greece. Following the ECJ’s ruling in Morgenbesser (2003)\(^{83}\), the Greek Council of State held that trainees may not be assimilated to lawyers and do not come within the category of ‘regulated professionals’; to the extent, however, that they offer remunerated services they come under primary law on free movement (as workers) and their applications may not be dismissed. Hence, in the absence of any formal (academic or professional) recognition, the Bar association is, nevertheless, under an obligation to examine their qualifications.\(^{84}\) This is so even if the applicant has not followed legal studies but has become trainee lawyer following a conversion course.\(^{85}\) What is more, once a Bar association has accepted to enrol a trainee, it may not question the grounds for such enrolment at the time when such trainee wants to sit the qualification examination.\(^{86}\)

The situation is quite diffuse as far as the recognition of degrees leading to non-regulated professions is concerned. In Greece, the SAEP has consistently rejected any claim for the recognition of such degrees. In essence it thus deliberately ignored consistent case-law of the ECJ as to the mutual recognition of diplomas by virtue of primary EU law. As indicated earlier, the right of EU-citizens to make use of their Treaty right to establishment c.q. the free movement of services has never been dependent on as in only materialising after the adoption of harmonisation directives.\(^{87}\) Yet, for the recognition of professional equivalence for cases not falling under secondary legislation, it lasted until the adoption of Law 4093/12 to provide the SAEP with a procedural framework to that effect. This procedure is, however, less favourable in terms of f.i. deadlines, compensatory measures imposed, than the one flowing from Directive 2005/36/EC. This amounts to a discrimination in procedural terms between EU degree holders within the scope of secondary legislation (for regulated professions) and those relying on the application of primary law (for non-regulated professions).

Overall, the operation of SAEP is not as swift as one might expect in terms of speed and effectiveness. Recognition is for instance complicated by the fact that SAEP is not inclined to take any professional experience gained by applicants in Greece prior to their recognition application into account. The particular issue of professional experience has been dealt with by the ECJ in a number of preliminary rulings.

In Vandorou, Giankoulis and Askoxilakis (2010), all applicants sought “to pursue a regulated profession in Greece on the basis of his or her authorisation to pursue a corresponding regulated profession in [the UK]”, and in each of the cases, the SAEP “found there to be substantial differences between the education and training acquired by the applicants (…)
and that normally undertaken in order to pursue the corresponding professions in Greece. Consequently, [it] found that it was necessary to impose supplementary requirements [and moreover] decided that the practical experience acquired (...) could not be taken into account, without examining whether that experience might, in whole or in part, cover those substantial differences in education and training. After reiterating in paragraph 66 its established case-law that “the effective exercise of the fundamental freedoms guaranteed by Articles 39 EC and 43 EC can be unjustifiably hindered if the competent national authorities responsible for recognition of professional titles acquired in another Member State disregard relevant knowledge and qualifications already acquired by an applicant seeking entitlement to pursue, in that Member State, a profession which according to national legislation is subject to holding a diploma or professional qualification (see, to that effect, Case C-340/89 Vlassopoulou [1991] ECR I-2357, paragraph 15, and Case C-234/97 Fernández de Bobadilla [1999] ECR I-4773, paragraph 33)”, the ECJ ruled that a national authority such as the SAEP is bound, pursuant to Articles 39 EC and 43 EC, to take into account, when setting any supplementary requirements to compensate for substantial differences between the education and training undertaken by an applicant and the education and training required in the host Member State, all practical experience which, in whole or in part, covers those differences.

In *Toki* (2011) on the other hand, the ECJ upheld SAEP’s refusal to take into consideration professional experience as a University researcher/lecturer while assessing the application for the title of environmental engineer.

In addition, successful applicants face additional hurdles after a positive decision from SAEP. It is, for instance, not unusual for applicants opting for an adaptation period, to be faced with a refusal, explicit or tacit of the competent professional body to designate the apprenticeship frameworks. Similarly, professional bodies have been quite reluctant in organising aptitude tests for holders of SAEP’s decisions. In the few cases where SAEP grants full recognition with no compensatory measures, several bodies finally plainly refuse to enrol the professionals concerned. Ms. Spiliotopoulou’s application for enrolment with the Chamber of Economists (*Oikonomiko Epimelitiro Elladas*), for instance, is pending since 2011, and has not advanced since, despite her serving a writ and threatening with criminal proceedings against its president.

The difficulties faced by holders of EU qualifications has led to a rich body of case law, both before the Greek courts and the ECJ.

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90 See f.i. *Stathopoulos v Panellinion Sylogos Fysikotherpefton*, pending before the AthAdmCAppeal, reg.n° AK216/2-2-20150

91 See f.i. the minutes of the Technical Chamber of Greece, included in the Greek report (footnote 29).
The first wave of case law has been triggered by the very important delays (of ten years) with which Greece transposed Directives 89/48 and 92/51. Hence, the question of the direct effect of Directives 89/48 and 92/51 has been brought by the Greek Council of State (CE) to the ECJ, in cases Peros (2005) and Aslanidou (2005). Mr Peros held a title from a German Fachschule and was seeking to enrol as an engineer with the Techniko Epimelitirio Elladas (TEE, the Technical Chamber of Greece). Ms Aslanidou held a title of occupational therapist from a German ‘College’ and was seeking to obtain an authorisation to practice by the relevant Ministry. Both referrals were made prior to the ECJ judgment in Beuttenmüller (2004) which ruled for the first time on this point, and confirmed it and enriched its reasoning. Following this series of judgments, the ECJ has been resolving similar issues by way of simple orders.

Following the recognition of direct effect of the relevant Directive provisions, a second wave of cases reached the Council of State, and after a transfer of competences, the Administrative Courts of Appeal. In these cases, Greek nationals challenge SAEP’s negative decisions, typically reached in violation of Directives 89/48 and 92/51 and/or 2005/36. SAEP’s refusal to take into consideration professional experience acquired in Greece has already been discussed above.

SAEP’s refusal to recognize degrees delivered by Colleges under franchise and/or validation agreements has repeatedly been condemned by the CE, fully in line with the ECJ decisions on that matter.

Holders of SAEP’s recognition have not always had an easy life either. Employees of the state-controlled public utility for energy distribution (DEH, nowadays DEDDHE) were, for instance, faced with the entity’s internal regulation which (still today) only foresees academic recognition, by DOATAP, as a valid condition for hiring/upgrading holders of foreign degrees. Hence they had to go all the way up to the Court of Cassation, in a legal battle which went on from 2003 to 2011, in order to obtain hierarchical and salary adjustment corresponding to their degrees.

In the same vein, the Technical Chamber of Greece (TEE), to which affiliation is mandatory for anybody wishing to exercise any technical profession in Greece, has systematically opposed holders of

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92 Dealt with above.


95 Which was – and still is - one of the main actors blocking the transposition and proper implementation of relevant EU secondary legislation.


98 See eg CE 853/2010 (mechanical engineer); CE 4161/2011 (optician).

SAEP’s recognition. Not only has it constantly refused to enroll them as members, but occasionally it has even introduced annulment proceedings against individual recognition decisions.

To conclude, it is observed that in Greece damages for breach of EU rules on the recognition of qualifications are not abundant. Either the causality of damage has been difficult to prove, or the delay for the award of damages has been extremely long, or both.

Despite the absence in general of major mutual recognition problems in the Netherlands, Dutch courts have been called upon to rule on the registration in the Dutch architects’ register, the recognition in the Netherlands of qualifications to practice as a health psychologist, and the recognition of the qualification as a nursery teacher.

The refusal to be registered in the architects’ register on the basis of professional experience requirement of Article 13(2) Directive 2005/36/EC involved an applicant who obtained a bachelor degree at the Faculty of Architecture of the Polytechnic University of Minsk. She then worked in the Netherlands, where after she obtained a Master of Arts (MA) degree from the Architectural Association School of Architecture (AA) in London by following an approved programme in Housing and Urbanism. As the AA programme does not concern a regulated programme, the Bureau Architectenregister ruled that she first had to pursue the profession as an architect for two years in another Member State before her profession could be registered in the Netherlands.

The Trade and Industry Appeals Tribunal, known as Administrative High Court for Trade and Industry, agreed and held that this requirement was not met, as the applicant, who had acquired her professional qualification in the United Kingdom, exercised her profession as an architect in the Netherlands, the host Member State.

With regard to the recognition of qualifications to practice as a health psychologist, the Council of State dealt with Article 14 Directive 2005/36/EC, which concerns the possibility for

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100 See eg CE 249/2009, 4881/2012 and 4882/2012; Athens Administrative Court of Appeal 1454/2013; TEE’s practice still today is that it refuses to enrol holders of SAEP’s recognition; against such refusal they have to bring annulment proceedings and TEE will only accept to conform to the judicial decision, delivered 3-10 years later and following considerable expense.

101 CE 2636/2011; CE 3741/2009

102 See e.g. CE 339/2012.

103 See e.g. Athens Administrative Court of Appeals 3296/2013, on a claim initiated in 1999 (!) awarding the amount of 3.000 euros (!).

104 Cf. supra.

105 This Article prescribes that “[a]ccess to and pursuit of the profession […] shall also be granted to applicants who have pursued the profession referred to in that paragraph on a full- time basis for two years during the previous 10 years in another Member State which does not regulate that profession, providing they possess one or more attestations of competence or documents providing evidence of formal qualifications”.

the host Member State to require from the applicant to complete an adaptation period of up
to three years or to take an aptitude test under certain conditions.

In this case the applicant had followed courses in France, that were significantly different
from the training required for health psychologists in the Netherlands. She also obtained a
PhD in clinical and social psychology. The knowledge she had acquired during her education,
training and work in France could, however, not compensate the substantial differences that
existed between the requirements for practising as a health psychologist in the Netherlands
and the education and training acquired in France, which in part concerned pedagogics
rather than psychology. In an interim judgment of 2010, the Dutch Council of State in
essence relied on both the Directive and the case-law of the European Court of Justice107 to
hold that the initial decision of the Minister of Health, Welfare and Sport of 18 December
2008 violated Articles 39 and 43 of the EC Treaty (now Articles 45 and 49 TFEU) and Article
14 of Directive 2005/36/EC, in that the existing framework for assessing the obtained
qualifications did not comply with the requirements of EU law and therefore needed to be
adapted108. As a new decision of the Minister fully acknowledged the requirements set by
Directive 2005/36/EC, allowing the applicant to choose between completing an adaption
period, or taking an aptitude test, the Council of State could confirm the validity thereof109.

In a series of cases dealing with the recognition of the qualification to practice as a nursery
teacher, Dutch courts reviewed the Minister’s decision more extensively.

In 2010 the Minister of Education, Culture and Science refused recognition of applicant’s
qualification as a nursery teacher. The applicant – of Belgian nationality – obtained her
professional qualifications in Belgium. In the following procedure the District Court of
Arnhem noticed that in Belgium, the Member State of origin, the profession of a nursery
teacher was a regulated profession, which was not the case in the Netherlands. However, in
the Netherlands the profession of a primary schoolteacher is a regulated profession.
Furthermore, in the Netherlands the nursery teacher’s training course is part of the
schoolteacher’s training course. Hence, recognition of her professional qualifications would
mean that she would in part get access to a regulated profession in the Netherlands – the
profession as a schoolteacher –. According to the Minister the applicant’s admission as a
nursery teacher on the basis of her qualifications obtained in Belgium would lead to
organizational problems within Dutch schools. According to the District court, these are,

107 Joined Cases C-422/09, C-425/09 and C-426/09 Vandorou v Ipourgos Ethnikis pedias kai Thriskevmaton [2010]
ECR I-12411 (Vandorou).

108 Council of State (22 December 2010) Judgment 200908415/1/T1/H2 <
2015.

<https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-
however, not substantial enough to amount to involving public interests to justify restricting the free movement of persons\textsuperscript{110}.

1.2 Recognition of non-EU qualifications of EU citizens

Directive 2005/36/EC does not apply to the recognition of professional qualifications obtained by citizens in non-EU countries. Such recognition is therefore fully dependent on national legislation. Not all country reports provide additional information as to this type of professional recognition.

In Spain there are no general rules concerning this situation, however, regarding health professions there are specific rules and procedures on the recognition of non-EU qualifications. One of the main features of these rules is that the procedure of recognizing foreign qualifications must not be detrimental to the high standards that apply in Spain and other EU Member States. The recognition is carried out by the federal Ministry of Health through a procedure that is regulated by Royal Decree 459/2010, which implements the Law on the Regulation of Health Professions (Law 44/2003). The applicant must not only demonstrate equivalence of documents but also needs to undergo training, which is supervised by the Ministry in close collaboration with the autonomous communities.

Furthermore, where diplomas are obtained outside the EU or EEA, the diploma may be recognized in Spain after three years of professional experience in another EU Member States prior to the application for recognition.

In Italy, Articles 39, 49 and Article 50\textsuperscript{111} of Decreto del Presidente della Repubblica (DPR) Presidential Decree N° 394/99 on immigration, as modified by DPR N° 334/04, organises the recognition of non-EU titles and qualifications. Holders thereof who want to be registered in Italian professional associations or included in the special lists established by the competent administrative authorities may apply for their recognition to gain access or to pursue the profession concerned in Italy.

The formalities are far more substantial than is the case for EU qualifications and may take longer\textsuperscript{112}. Citizens applying for the recognition of a non-EU qualification must provide the competent authority with a so-called statement of value (dichiarazione di valore in loco), issued by the Italian consular authorities abroad. The statement serves to verify – in Italian – the authenticity, the validity, the value and the correspondence of the foreign qualification with qualifications issued by Italian recognise educational institutions (schools, colleges, universities) and professional bodies. In addition it includes information as to the issuing institution and the value of the title concerned in the country concerned.


\textsuperscript{111} Article 50 deals in particular with healthcare professionals.

This covers elements such as the educational status of the institution, access requirements, duration of education and training conditions, the ensuing right to exercise a given profession, and the activities covered under the title.

The recognition process thus amounts to a full and substantial comparison of the non-EU title. When compensation measures are needed, it is up to the competent administrative authority to decide on the need for an aptitude test or an adaptation period.

Recognition of non-EU qualifications does not operate in any ‘transitive’ way; the recognition of the title in another Member State does not automatically lead to recognition in Italy.

1.3 RECOGNITION OF PRE-ACCESSION QUALIFICATIONS

Directive 2005/36/EC has been amended to accommodate the recognition of pre-accession qualifications to a significant extent.

In the case of health professionals for instance (doctors, nurses, dentists, veterinary surgeons, midwives and pharmacists), automatic recognition applies even if the training undertaken before the reference date specified in Annex V if one can demonstrate that the profession has been effectively and lawfully practiced for at least three consecutive years during the five years preceding the issue of the certificate. This proof is adduced by way of an attestation of the Member State of origin. A similar quasi-automatic recognition applies to qualifications attesting acquired rights specifically dealt with in Directive 2005/36/EC, such as qualifications obtained in the former Yugoslavia, the former Czechoslovakia, the former Soviet Union, or for that matter the former German Democratic Republic. When meeting the requirements as to professional experience, the certificate testifying to that will allow automatic recognition.

For architects on the other hand, the approach differs, in that automatic recognition is in essence made dependent on whether the qualification was obtained prior or in the academic year of reference specified in Annex V or VI of Directive 2005/36/EC.

1.4 RECOGNITION OF QUALIFICATIONS OF THIRD COUNTRY NATIONALS

With regard to the recognition of qualifications of third country nationals, the situation is most straightforward when the country concerned has an agreement with the European Union which includes chapters on the free movement of persons (establishment and/or services). This was the case in the 1990’s association agreements with the Central and Eastern European countries. For Switzerland, the issue was initially covered by the EU-Switzerland agreement of 21 June 1999 (as subsequently amended to accommodate later EU-accasions), which extended the applicability of the EU Directives on recognition of professional qualifications to Swiss citizens. After the adoption of Directive 2005/36/EC, in 2008 Switzerland proceeded to adjusting its domestic legislation accordingly.
The Swiss Federal Law of 14 December 2012 and the Order of 26 June 2013 on the obligation of prior declaration and verification of professional qualifications of services providers entered into force on 1 September 2013, and marks the full applicability of EU rules on the recognition of professional qualifications in Swiss-EU relations.

For Nordic citizens, agreements among the Nordic countries (Denmark, Finland, Norway, Iceland and Sweden) grant automatic recognition of professional qualifications for the exercise of some medical and teaching professions in Denmark.

For other third country nationals, recognition and access to regulated professions depends on national law. Their possibility to present a declaration to the competent authority so as to exercise a regulated profession on a temporary basis in Denmark is for instance admitted only in those cases where the national legislation for the regulated profession at stake allows it. In addition, the extent of compensatory measures may differ for third country applicants. Whereas a conditional decision of the Danish Agency for instance may entail an aptitude test or an adaptation period, up to the choice of the EU-applicant, this is not necessarily the case for third country nationals. In the latter cases, the Agency may effectively prescribe supplementary education as a condition for recognition. Overall, the applications in Denmark decided on the basis of EU rules outnumber the cases where the applicant was a third country national or had an educational background from a third country. In addition, the number of positive and conditional decisions of the Danish Agency is substantially higher for recognition of EU qualifications. In 2014 for instance, positive and conditions decisions based on EU rules amounted to 93% resp. 5%, whereas the equivalent percentages accounted for 14% (positive decisions) and 74% (conditional decisions) for all other decisions.

Whereas Directive 2005/35/EC does not apply to persons having a nationality other than EU, EEA or Switzerland, Denmark does provide for specific rules for persons that have been granted a residence permit in Denmark according to the implemented Residence Directive 2004/38/EC. Whereas no automatic recognition applies, the worker or his employer can apply for recognition in Denmark. This procedure is lengthier, and can involve additional costs and further education or training requirements in order to access a regulated profession. In the maritime industry, some categories of professionals are regulated by international conventions that take precedence over the Professional Qualification Directive.

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113 See in particular Figure 1 in the Danish Country Report.


116 The Danish Working Environment Authority (2010), Want to work in Denmark?, p. 7.

2. THE PROTECTION OF ECONOMIC RIGHTS OF CONSUMERS

One of the overall aims of WPS is to provide additional insight into the rights and barriers of citizens in their capacity of consumers, in choosing, in being informed and in being protected while purchasing goods and services in the internal market. Consumer protection has been one of the transversal/integrational policies of the European Union for some time (cf. for its current explicit expression, Article 12 TEU). Since 2008, the European Commission regularly reports on consumer evidence via Consumer Scoreboards which show “how the single market in performing for EU consumers and warn of potential problems. The scoreboards are a tool for evidence-based consumer policy, and allow European and national policymakers and stakeholders to estimate the impact of their policies on consumer welfare and to benchmark performance over time”\(^\text{118}\). On 22 May 2012, the Commission established its strategic vision for EU consumer policy for the years to come with the adoption of its European Consumer Agenda, aiming at maximising consumer participation and trust in the market\(^\text{119}\). To enhance both feasibility and comparability, D5.2 reporters have been invited to concentrate on the national (implementation) rules and (enforcement) difficulties surrounding the application and enforcement of the Unfair commercial practices Directive 2005/29/EC, the Consumer rights Directive 2011/83/EU, and on the issue of solving consumer disputes via injunctions and/or (collective) judicial redress (such as class actions-initiatives), since the Directives mentioned above and the 2013-recommendation on collective redress\(^\text{120}\).

2.1 UNFAIR COMMERCIAL PRACTICES – DIRECTIVE 2005/29/EC

Directive 2005/29/EC was to be implemented by 12 June 2007 at the latest. According to the EC Report on the application of Directive 2005/29/EC (2013)\(^\text{121}\), only a few Member States managed to implement on time.

Italy has opted for the incorporation of most EU-provisions dealing with the protection of economic rights of consumers into a single Consumer Code. Both Directive 2005/29/EC and Directive 2011/83 have thus been implemented in the Codice del consumo (Consumer Code\(^\text{122}\)). Of particular relevance for the implementation of Directive 2005/29/EC (also referred to as UCPD) are Legislative Decree n° 145 and n° 146 of 2 August 2007, which replaced and completed previously existing rules as to misleading advertising\(^\text{123}\). In Denmark, the Consolidated Marketing Practices Act and the Act on

\(^\text{118}\) http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/index_en.htm
\(^\text{120}\) Not all country reports provide information on all aspects. In addition, some are more substantial than others.
\(^\text{123}\) See, among others, E. Minervini and L. Rossi Carleo (eds.), Le modifiche al codice del consumo, Torino, 2009; Id., Le pratiche commerciali sleali : direttiva comunitaria ed ordinamneto italiano, Milano, 2007. See also A. Fachechi, La pubblicità, le pratiche commerciali e le altre comunicazioni, in G. Recinto, L. Mezzasoma, S. Cherti, Diritti e tutele dei consumatori, Napoli, 2014, p. 45-84; M. Cerioni, Diritti dei consumatori e degli utenti, Napoli,
Consumer Contracts are the main legal sources of reference for the implementation in Danish law of Directive 2005/29/EC and Directive 2011/83/EU.


This act describes which provisions of the Dutch Civil Code have been adjusted and adapted in order to implement the UCP Directive. The main changes concern the amendment of Article 3:305d and a new section on ‘unfair commercial practices’ in Volume 6 of the Civil Code. Other national laws implementing the UCP directive are the UCP Act on the establishment of an Authority for Consumer & Markets, Act on Enforcement Consumer Protection, General Administrative Act, the Door-to-Door Selling Act, the Gas Act and the Book Pricing Act.

Since Directive 2005/29/EC aims at full harmonisation, the text of the Dutch Unfair Commercial Practices Act is very close to that of the Directive. Critics have argued that by simply copy-pasting abstract EU-terms into national legislation, Member States create a situation in which businesses and consumers do not know how to act and national judges do not know how to interpret the rules. Instead of harmonizing the national laws of the Member States, this might even cause more differentiation between the various levels of consumer protection in Member States. Nevertheless, it is expected that the open norms will be further explained and elaborated by the ECJ in its case law, which will facilitate the implementation of the Directive both for national judges as well as consumers.


125 The proposal was presented on 15 January 2007, and accepted by the Dutch Assembly (Tweede Kamer) on 6 November 2007.


With regard to the enforcement of (the implementing provisions of) Directive 2005/29/EC, the Dutch legislator did not choose between strictly or administrative enforcement; both are possible.  

Regarding administrative enforcement, the Authority for Consumers & Markets (Autoriteit Consument en Markt; hereafter: ACM) is entrusted with the enforcement of the UCP Directive based on the Act on Enforcement Consumer Protection. Its sanctions may include an administrative penalty or an order subject to a penalty (section 2.9 of the Act on Enforcement Consumer protection). Next to the ACM, the Advertising Code commission (Stichting Reclame Code) is also authorized to act against unfair commercial practices. Based on the Advertising Code, also competitors can file a complaint for the Advertising Code commission. Consumers can file a complaint by phone, e-mail or regular mail at Consuwijzer, which is constituted by ACM.

With regard to enforcement through court action, section 3:305 d prescribes the following specific procedure: The Court in The Hague may order the cessation of any infringement, within the meaning of Article 1.1k of the Consumer Protection (Enforcement) Act. Furthermore, the general civil procedure against an unlawful act applies. The consumer as well as the ACM can start a court action.

Looking at the case law of the Dutch courts, there have been a number of cases decided by different courts on the UCP Directive.

The judgments of the Dutch courts firstly concern the general scope of application of the UCP Directive. One case concerned a manufacturer and trader of jewellery, who claimed that the defendants, also active in the jewellery business, infringed plaintiff's copyrights by trading in identical and/or similar jewellery. They invoked *inter alia* section 3A of book 6 of the Dutch civil code but the District Court of Roermond held that legal provisions in national law implementing the UCP Directive cannot be applied in a business-to-business ("B2B") context. Their scope is limited to a business-to-consumer ("B2C") environment. Yet, under certain circumstances small and medium sized enterprises can seek legal protection under the UCP-rules in case they can be considered equivalent to a consumer on the basis of certain factors. According to the District Court of North-Holland in this case on advertising, the following factors were relevant: the plaintiffs were small organizations with a low budget, while the defendants, on the contrary, were commercial companies concluding commercial contracts on a daily basis; in the case at hand, the plaintiffs concluded contracts containing clauses that went beyond the scope of their normal businesses; the defendants had taken the initiative to contact the plaintiffs by phone to offer services, and a consumer could have entered into such agreements as well.

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Most other cases concern the interpretation of concepts, like, what does constitute a misleading commercial practice within the meaning of the Directive and Dutch law, 133 misleading omissions, whereby the average consumer is taken as a point of departure, 134 or who is ultimately responsible for the unfair commercial practice? In the latter case, the question arose as to whether someone could be regarded as offender of the UCP-rules in case the violations have not been committed by himself but by people for whom he is ultimately responsible. The District Court of Rotterdam answered this question in the affirmative. 135 It held that considering the role of the plaintiff in the violations of the rules regarding unfair commercial practices - i.e. the plaintiff carried the ultimate responsibility in respect of the recruited sellers - the plaintiff was considered to be liable for the acts of the sellers on the basis of the author in an organization context-concept.


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139 By judgments No 55/2011 of 6 April 2011 (Moniteur belge/Belgisch Staatsblad of 8 June 2011, p. 33389) and No 192/2011 of 15 December 2011 (Moniteur belge/Belgisch Staatsblad of 7 March 2012, p. 14196), the Constitutional Court held that Articles 2(1) and (2), and 3(2) of the Law of 6 April 2010 were unconstitutional in so far as they had the effect of excluding members of a profession, dentists and physiotherapists from its scope.

140 ECJ 10 July 2014, Commission v Belgium, C-421/12 [ECLI:EU:C:2014:2064].
(Belgian) provisions, going beyond the level of protection provided by Directive 2005/29/EC is still being debated in (some) Belgian legal circles.\footnote{This is partly due to longstanding (effective) Belgian legislation as to unfair market practices, initially launched in 1971 (and amended by Law of 14 July 1991), and strongly embedded in enforcers’, businesses’ and consumers’ minds. From a correct implementation point of view, however, this should not make a genuine difference, and does not provide a legitimate legal basis to contravene Article 4 Directive 2005/29/EC.}

Hungary, with many of the other new Member States, adopted implementation legislation during 2008-2009. Act n° 47 of 2008 transposed the Directive almost verbatim.\footnote{The Hungarian national case law included in the Hungarian country report with regard to Directive 2005/29/EC mentions a series of cases dealing with Bait advertising, “Buy Hungarian” movement; Children’s products – vulnerable consumers – aggressive commercial practices; Mobile phone services and Public Interest Litigation, all carrying “EC website” as source. These cases are well known to the European Commission.} In Greece, the implementation of Directive 2005/29/EC led to amendments of Law 2251/1994, the general law on the protection of the consumer, in 2007. The most important innovations brought by Law 3875/2007 in Greek consumer protection law are: a) the upgraded role of the National Consumer Council, b) the recommendation of Child Protection Committees, which aim to protect minors from risks caused by products on their mental, spiritual or moral development, c) the competence of the Minister of Development to turn into legislative acts (ministerial decisions) consumer issues of general interest irrevocably decided in courts, d) as well as the ability of consumer associations to exercise collective actions and to demand damages for loss suffered by consumers. Additionally, the notion of product and that of supplier is further expanded, while the meaning and scope of unfair commercial practices, as well as misleading acts and omissions is being fully determined in accordance with relevant case law (Arts 9a-9i). In order for its enforcement to be assured, the law also sets out the penalties to be applied in each case, alongside stricter fines for infringements.

The Greek General Secretariat for Consumer Protection and Market Supervision (GSCPMS) has been responsible for consumer protection for many years.\footnote{See for the current legal basis, Presidential Decree 116/2014, FEK A 185.} Its main task is to ensure the health and safety of consumers, mostly by investigating complaints, petitions and grievances stemming from the violation of the consumer protection legislation. Complaints can be filed by consumers, either electronically, by phone at a dedicated hotline, by fax, post or in person.\footnote{http://www.1520.gov.gr/ypovoli-kataggelia. The hotline at number 1520 is operational only during public sector opening hours.} The GSCPMS is not obliged to open a full investigation as it has some discretion, based on criteria such as the gravity of the alleged misconduct, the need to protect public interest, the possible impact on consumer behaviour, or the results expected from the intervention in an individual case. Decisions may impose administrative sanctions on suppliers.
In 2013 the GSCPMS received a total of 17,142 calls and an unspecified number of complaints. 13,173 cases were investigated, and concerned mostly banking and insurance services, telecommunication services and defective products. In 82 cases, fines were imposed for a total amount of 1,307,500 euro.

The Greek Civil courts are competent to deal with granting compensating for either material or moral damage suffered by an individual consumer, and can compel suppliers to return overpayments.

In Spain the Directive has been incorporated in the Spanish legal system through Law 29/2009 of 30 December, modifying the legal regime of unfair competition and advertising to improve the protection of consumers. This law has had important ramifications for a number of laws, specifically Law 3/1991 on Unfair Competition, Law 7/1996 on Retail Trade and Law 34/1988 on Advertising.

When it comes to enforcement of the laws on consumer protection in general, there is an important role for the Spanish courts but also, depending on the powers of the autonomous communities in the field of consumer policy, for administrative enforcement including sanctions and administrative controls.

In Italy, the framework for unfair commercial practices consists of a general clause (Article 20 of the Italian Consumer Code) and two main sub-chapters dealing with misleading commercial practices (Article 21 et seq.) and aggressive commercial practices (Articles 24 et seq.). According to the general clause contained in Article 20, a commercial practice is deemed unfair:

- if it is contrary to the requirements of professional diligence, and
- if it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

Initially, some (Italian and other) national authorities wondered whether these concern cumulative or alternate situations, requiring them to always demonstrate breach of professional diligence in addition to a breach of the articles concerning misleading and aggressive practices. The European Commission clarified the issue by indicating that professional diligence is automatically violated in such cases, while also leaving room for the application of the rule of diligence to ensure that any unfair practice can be penalised.

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146 Source: Yearly report of the GSCPMS (2013). In 2013, the number of calls dropped considerably (24,615 in 2012), the number of cases dealt with increased substantially (11,662). Whereas substantially more fines were imposed (82 vs. 47 in 2012), the total amount did not drastically change (1,307,500 vs. 1,317,500 in 2012).

In a case dealing with water supply, the Italian Competition Authority (AGCM) thus held an interruption without prior communication to be in breach of professional diligence. In particular, considering the relevance of water, the AGCM held that the trader was expected to guarantee a higher level of professional diligence by adopting specific measures before interrupting the water supply (AGCM, decision of 12 March 2009 PS 166 – Acea Distacco fornitura d’acqua).

The implementation of Directive 2005/29/EC led the Italian legislator also to devote specific attention to codes of conduct and codes of professional ethics established by professionals, business associations and organisations.

These codes shall be drawn up in the Italian and English languages and made accessible also via the Internet, in order to guarantee a high level of knowledge (Article 27bis of the Italian Consumer Code) and the breach of their rules is considered an unfair practice (Article 21.2 of the Italian Consumer Code). In compliance with the UCPD, the Italian Law also introduced the notion of “code owner” ("responsabile del codice"), i.e. “any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it.”\footnote{See, among others, F. Pinto, "I codici deontologici e la direttiva 2005/29/CE", in E. Minervini and L. Rossi Carleo (eds.), Le pratiche commerciali sleali : direttiva comunitaria ed ordinamento italiano, op. cit., 219-234.}

As to the concrete role of these codes, the AGCM has considered the violation of them to ascertain the existence of a breach of professional diligence; whereas the respect of these codes is not considered as sufficient to exclude the breach of professional diligence. This principle has been confirmed also by the "Tribunale Amministrativo Regionale (TAR)" (regional administrative court) of Lazio in decision no. 10185 of 24 December 2011.

The Institute for Advertising Self-Regulation (IAP – Istituto dell’Autodisciplina Pubblicitaria) is an important interlocutor of the AGCM with regard to the self-regulatory codes\footnote{http://www.iap.it/?lang=en}, in that it aims at ensuring that commercial communications are honest, true and correct.
In Greece, the efforts to adopt a horizontal code of conduct have not bore fruits. Although a draft “Consumer Code of Ethics” was elaborated after the adoption of Law 3587/2007 by the Consumer Ombudsman, the final draft does not seem to have been formally adopted and remains of indicative value only. Sector specific codes have, however, been developed in the energy sector, for banking services, and for multimedia information services. In addition, self-regulatory activity has led to a number of professional codes of conduct.

In Spain a new chapter on the regulation of codes of conduct was introduced by Law 29/2009. Before, there were no rules recognizing and regulating in a general and systematic fashion codes of conduct in the Spanish legal order. Unilaterally adopted codes of conduct adopted by a company are rejected.

**Misleading commercial practices**

Commercial practices are considered to be misleading if they contain false information and are therefore untruthful, or if they deceive or are likely to deceive the average consumer (even if the information is factually correct) and in either case cause or are likely to cause him/her to take a transactional decision that he/she would not have taken otherwise. The distortion of the transactional decision-making process may relate to aspects such as “the existence or nature of the products, fitness for purpose, usage, quantity, specification, the price or the manner in which the price is calculated, the need for a service, part, replacement or repair”.

Besides (actively) misleading commercial practices, omissions concerning specific information are also considered “misleading” when causing the average consumer to take a transactional decision that he/she would not have taken otherwise. This is the case, for instance, of a commercial practice by which the trader “omits material information that the average consumer needs, according to the context, to take an informed transactional decision” (Italian Consumer Code, Article 22.1). This also applies to cases in which a trader “hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information [...] or fails to identify the commercial intent of the commercial practice if not already apparent from the context” (Italian Consumer Code, Article 22.4). Paragraph 4 specifically lists the information whose omission in considered a misleading practice in the case of an invitation to purchase.

The rules just mentioned aim at fostering transparency in negotiations in order to ensure really conscious decisions. Since the power imbalance between professionals and consumers is mainly

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151 Cf. Greek report, p. 24-25 for further details on these sector-specific codes.


154 A. Fachechi, *La pubblicità, le pratiche commerciali e le altre comunicazioni*, op. cit, at 59.
due to the use of communication tools, the guarantee of the conformity of the advertising message to the features of products or services gains specific importance and is expressly considered by the case-law.

Risks for consumers are particularly likely to arise in cases where the advertisement proposes the easy achievement of solutions in sensitive fields, such as the efficacy of beauty and slimming treatments.

See, for instance, the cases dealing with slimming treatments, where the Italian Authority considered some advertisements as misleading on the basis of the lack of scientific evidence of the effects and of the absence of contraindications as boasted instead by the advertising message (among the most recent cases of the Italian Competition Authority: AGCM, 14 December 2011, no. 23105 – PS 6555 (“3 giorni dimagrante”; see also AGCM, 17 January 2002, no. 10344 – PI 25551B (Kalocell Line) available at: www.agcm.it).

Issues connected to misleading advertising arose also with reference to cigarettes, and namely to the notice “light” on some packages. See for instance the decisions by the Italian Supreme Court (Corte di Suprema di Cassazione) no. 15131 of 4 July 2007 and no. 794 of 15 January 2009.

Misleading practices may also stem from redundant and excessive, although correct, information, which cloud instead of clarifying. Nonetheless according to the focus on the conditioning on the consumer’s economic choice and behaviour, really exaggerated advertising messages containing excessive boasting are not considered as misleading practices by the Italian Competition Authority since they cannot be literally understood by the consumer (AGCM, 28 April 2011, no. 22346 – PS5921 (SNAI – Pubblicità gioco d’azzardo).

In many cases the Italian Competition Authority censured as unfair some traders’ practices aimed at taking advantage of the incompetence or the mistake of the consumer, although not directly caused by the trader itself. Among the most recent cases considering the omission of relevant information, see for instance: AGCM, 21 December 2011, no. 23155 – PS7256 (Comet-Aplice – Prodotti di Garanzia); 6 October, no. 21656 – PS1097 (Errebi Auto – Estensione Garanzia Peugeot); 22 December 2009, no. 20628 (Passante di Mestre); 26 May 2010, no. 21186 – PS5129 (Trenitalia – Modifica biglietto elezioni).155

The Consiglio di Stato (the Italian Council of State) referred the interpretation of Article 6(1) Directive 2005/29/EC in proceedings between on the one hand, Trento Sviluppo srl (‘Trento Sviluppo’) and Centrale Adriatica Soc. coop. arl (‘Centrale Adriatica’) and, on the other, the Italian Competition Authority, regarding a commercial practice adopted by Trento Sviluppo and Centrale Adriatica which

the AGCM classified as misleading (Case C-281/12). In particular, the doubt of the Italian Council of State concerned the actual scope of the concept of “misleading commercial practice”. The question arose from the differences between the language versions of Article 6, namely the contrast between the English and French versions of the expression “and in either case” (“et dans un cas comme dans l’autre” in French), on the one hand, and the Italian and German versions on the other (“e in ogni caso”; “und ... in jedem Fall”).

In essence, the referring court questioned whether the part of Article 6(1) which in the Italian-language version uses the words “e in ogni caso”, is “to be understood as meaning that, in order for the existence of a misleading commercial practice to be established, it is sufficient if even only one of the elements referred to in the first part of that paragraph is present, or that, in order for the existence of such a commercial practice to be established, it is also necessary for the additional element to be present, that is to say, the commercial practice must be likely to interfere with a transactional decision adopted by a consumer?” In other words the Italian judge asked whether a commercial practice must be classified as misleading “on the sole ground that practice contains false information or that it is likely to deceive the average consumer, or whether it is also necessary that that practice be likely to cause the consumer to take a transactional decision that he would not have taken otherwise”.

On 19 December 2013, the ECJ established that the conditions are effectively cumulative. In Greece, commercial practices have been considered to be misleading in the following cases:

- publishing an advertisement in the newspapers, claiming that every day 400 customers would win the value of their purchases in the stores of the defendant, without any further explanation regarding the participation terms, the value of the prizes, the procedure for obtaining the prizes, and the like; this, despite the fact that documents including all such essential information could be obtained in the defendant’s stores;

- the advertisement, by an educational institute, that it had been honored by the 10th Directorate General of the European Commission as one of the seven best Educational Institutions in Europe, while this was not true;

- the advertisement of educational services that contained misleading statements regarding the validity and recognition under Greek law of the diplomas delivered, and in relation to the legal nature of the entities offering such services;

- the advertisement of a GPS device with the mention that the maps were periodically updated, without specifying that such update came at an extra charge;

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156 ECJ 19 December 2013, Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato, C-281/12 (ECLI:EU:C:2013:859).


158 Consumer Ombudsman, 6 October 2011 (Protocol No 9039).

159 Consumer Ombudsman, 10 October 2007 (Protocol No 1428).

160 Consumer Ombudsman, 9 August 2010 (Protocol No 1752).
- the advertisement of electrical devices which supposedly would limit energy consumption and reduce the electricity bills, while research conducted by the GSCPMS established no such reduction;  

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- the inclusion, in a daily newspaper, of a leaflet which urged consumers to participate in a competition that was supposed to offer money to anyone that could find the same three symbols after scratching a specific area of the leaflet, while all leaflets led to the same result;  

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- the omission, by a telecom operator, to make clear to a subscriber that in order for him to benefit from an extra discount to his monthly standard fee, he had to comply with specific conditions within a specific time period;  

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- the provision of only general pre-contractual information about the risk of a given financial product (bonds issued by the bank Landsbanki Islands), which led the consumer to find out the risk of his investment only when the issuer of the bonds stopped paying the interest coupons;  

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- the inclusion, by an insurance company, of an arbitration clause in the General Terms and Conditions of an insurance contract;  

- the advertisement, by a car importer, of prices which did not include the (mandatory) special registration tax applicable to all car imports;  

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- the refusal, by a company selling electronic equipment, to grant to the consumer a product’s extensive guarantee which included replacement in case of theft of the product, even though the conditions of this guarantee were not fulfilled, since the guarantee was broadly advertised without any explicit constraints or restrictions;  

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- the practice of TV stations to advertise banking products and then, separately, state the additional charges applicable.  

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Conversely, no infringement of the terms of the Directive was, however, found in the following cases:

161 General Secretary for the Consumer, press release – 5 January 2011.

162 General Secretary for the Consumer, press release – 8 March 2011.

163 Consumer Ombudsman, 12 November 2009 (Protocol No 3664).

164 Consumer Ombudsman 1 April 2013 (Protocol No 8377).

165 Consumer Ombudsman, 21 November 2011 (Protocol No 10329); in the same sense (but with different products) see also Consumer Ombudsman, 25 February 2013 (Protocol No 4995); Consumer Ombudsman, 27 December 2012 (Protocol No 11394); Consumer Ombudsman, 28 December 2009 (Protocol No 4084); Consumer Ombudsman, 8 November 2012 (Protocol No 9868).

166 Ombudsman Consumer 23 April 2010 (Protocol No 906).

167 Consumer Ombudsman, 5 December 2012 (Protocol No 10793).

168 ESR Recommendation no 1/03-05-2008; it is interesting to note the role played here by a body not directly involved in consumer protection.
- an insurance company who had clearly stated in the written documentation of the insurance policy concerned, that the proposed return is only indicative, that the defendant does not guarantee its future clients any potential benefits from the proposed investment product and that the return on the investment may change from year to year; 169

- a medical instruments and machines seller who in his advertisements towards the industry overstated the qualities of its goods, in view of the fact the addressees of such advertisement belonged to a group which was relatively informed; 170

- a television advertisement stating that the specific products (tickets) were offered with a “lowest price guarantee”, since the very brief air-time did not allow for the detailed terms of that guarantee to be made plain. 171

Aggressive commercial practices

The aggressive nature of a commercial practice is defined on the basis of its nature, its timing, its forms and the possible use of harassment, coercion, including the use of physical force, or undue influence. In particular, a commercial practise shall be regarded as aggressive if by using these kinds of behaviour the trader “significantly impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct” as to the product, thereby causing him/her or being likely to cause him/her to take a transactional decision that he/she would not have taken otherwise.

According to the Italian Competition Authority coercion also includes threats of legal actions. For instance, in 2012 the AGCM classified as aggressive the behaviour of some businesses which sent summons (atti di citazione) to consumers before an incompetent judge, only aiming at frightening them 172.

In Greece, the Consumer Ombudsman found the following to amount to aggressive commercial practices within the meaning of Directive 2005/29/EC:

- the refusal, by an aesthetics laboratory, to accept the consumer’s demand to cancel the provision of certain services (yet to be provided) and to offer refund for them from a front-payment already completed; 173

- the fact that a financial institution invested the plaintiff’s savings into investment products without her prior approval; 174


171 Consumer Ombudsman, 19th of April 2013 (Protocol No 10179).


173 Consumer Ombudsman, 2 April 2008 (Protocol No 392).

- the fact that the defendants issued credit cards on the name of the consumers without their prior written consent;\textsuperscript{175}

- the refusal by an insurance company to pay the entire cost for the repair of the complainant’s vehicle after an accident, supposedly based on a progressive depreciation of the vehicle, while such clause was not clearly described in the contract;\textsuperscript{176}

- the practice of several insurance companies to delay payments at the termination of life insurance contracts, by creating obstacles, requiring additional documents, systematically omitting material information that is necessary for consumers to execute their contractual rights, and by providing information in an unclear way in order to hinder consumers in submitting the requested supporting documents on time;\textsuperscript{177}

- the fact that a mobile telephony operator charged roaming services to its clients while they were on holidays on a remote Greek island, because its network was not strong enough in the area;\textsuperscript{178}

- the practice of a maternity clinic to charge parents for the collection of their children’s blastocysts, without actually providing any additional service for such collection and without prior information thereon;\textsuperscript{179}

- the practice of several newspapers of giving out DVDs with hard pornographic material as a present for every issue bought;\textsuperscript{180}

- the issuance, by a telecom company, of invoices which had already been paid by the plaintiff, even if this occurs due to a mistake of the trader;\textsuperscript{181}

- the practice of an electricity supplier to demand payment from a consumer for debts caused by other consumers (his wife).\textsuperscript{182}

\textit{Misleading advertising}

\textsuperscript{175} Consumer Ombudsman, 10 March 2011 (Protocol No 2528).

\textsuperscript{176} Consumer Ombudsman, 16 December 2009 (Protocol No 3990); see also Consumer Ombudsman 3 October 2011 (Protocol No 8947).

\textsuperscript{177} Consumer Ombudsman, 9 December 2010 (Protocol No 2853).

\textsuperscript{178} Consumer Ombudsman, 10 March 2011 (Protocol No 2532).

\textsuperscript{179} Consumer Ombudsman, 1 June 2010 (Protocol No 1192), NoB (2010), 1853; see also Consumer Ombudsman, 10 September 2010 (Protocol No 1912).

\textsuperscript{180} Consumer Ombudsman, 25 April 2007 (Protocol No 926).

\textsuperscript{181} Consumer Ombudsman, 3 May 2010 (Protocol No 1002).

\textsuperscript{182} Consumer Ombudsman, 3 November 2011 (Protocol No 9842).
As to misleading advertising (at present relating to traders), Directive 84/459/EEC was transposed in Italy, with reference to consumers as well as to traders and generally to the public, by Legislative Decree no. 74/1992, then amended in 2000 (D.lgs. no. 67/2000) implementing Directive no. 97/55/EC and by Law no. 49/2005. With the enactment of the Consumer Code these rules have been included in its articles (from 18 to 27). As already mentioned, since the regulation on misleading and comparative advertising (as amended by the UCPD) concerns at present only traders, these Articles of the Italian Consumer Code have been repealed and replaced by D.lgs no 145/2007 (transposing the UCPD). The decree therefore mainly reproduces the previous legal framework, except for the scope of application. Moreover the power concerning administrative and judicial protection is conferred to the Italian Competition Authority, which, similarly to what is provided for misleading commercial practices, may also act on its own authority (Article 8).

The legal definition of advertising is wide, and includes all forms of promotional communication, irrespective of the means or methods of their distribution. The Italian Legislative Decree defines indeed advertising as “the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations” (Article 2). Non-commercial advertising (i.e. messages not addressing economic activities, such as for instance social or political propaganda) is excluded. Nonetheless the notion of advertising includes forms of communication promoting business images as perceived by consumers, although not immediately involving forms of sales push.

In addition, Italian regulation contains a number of provisions specifically addressing the advertising of products that are dangerous to health and safety (Article 6), and the advertising involving children and adolescents (Article 7). The latter is meant to prohibit advertisements exploiting the natural credulity or lack of experience of children and adolescents, as well advertisements that, by using them, exploit the natural sentiments of adults towards children.

The Italian Competition Authority has thus held commercial practices “that lead the consumer to neglect ordinary rules of caution and watchfulness related to the usage of products that could be dangerous for his health and safety or practices that could, even indirectly, threaten the safety of children and teenagers” to be illegal.

2.2 Consumer rights – Directive 2011/83/EU

Directive 2011/83/EU was to be implemented by 13 December 2013 at the latest.

In Italy, it has been implemented by Legislative Decree n° 21 of 2014, which entered into force in June 2014, and for its main part applies to contracts concluded after 14 June 2014. The rules on the competence of the Italian Competition Authority for their part are in force since 26 March 2014. In Belgium, Directive 2011/83/EU has been implemented by Books/Titles I, XV, VI and XIV of the Code of

183 www.agcm.it
Economic Law. \(^{184}\) In Hungary, Directive 2011/83/EU was implemented by Act n° 5 of 2013 and Government Decree n° 45/2014. In Greece, implementation came about by the adoption of Ministerial Decision Z1-891/2013 \(^{185}\). In the Netherlands, implementation was realised through the Act of 12 March 2014 bringing Volumes 6 and 7 of the Civil Code, the Consumer Protection (Enforcement) Act and some other Acts into line with Directive 2011/83/EU (hereafter: Implementation Act Consumer Rights) \(^{186}\). As for Directive 2005/29/EU, the Dutch legislator chose to closely follow the text of Directive 2011/83/EU, while also duly guarding against ‘gold plating’, and thus not using the opportunity to introduce additional legal rules in the field \(^{187}\). In Denmark, Directive 2011/83/EU is implemented in the Act on Consumer Contracts of 17 December 2013 \(^{188}\), and enforced as of 13 June 2014.

In Italy, the most significant change concerns the protection of (Italian) consumers with regard to specific information duties in the pre-contractual stage, stressing the need for clear and understandable information. Prior to the introduction of Legislative Decree 21/2014, similar information requirements only applied to specific types of contracts on the basis of their object (package travel and timesharing for instance) or negotiation techniques. Rules have thus been introduced for both distance and off-premises contracts \(^{189}\).

In contracts concluded via Internet, the button or the link with a similar function can be labelled in an easily legible manner only with the words “order with obligation to pay” (ordine con l’obbligo di pagare) or a corresponding formulation to unambiguously indicate that the order entails an obligation to pay. Failing such label, the consumer will not be bound by the contract (Article 51.2 of the Italian Consumer Code).

In contracts concluded by telephone, the trader must confirm that the consumer is only bound after he signed the offer or has sent his/her written consent (Article 51.6 of the Italian Consumer Code).


\(^{185}\) FEK B 2144.

\(^{186}\) Staatsblad 2014, p. 1400


\(^{188}\) Lov om forbrugeraftaler nr. 1457 af 17.12.2013.

\(^{189}\) See for a more detailed analysis on the information duties in the field of E-commerce, and with specific reference also to Directive 2011/83/EU, for instance, G. Dore, I doveri di informazione nella rete degli scambi commerciali telematici, in Giurisprudenza di Merito, XLV – Decembre 2013, no. 12, 2569 – 2583.
Another series of significant changes concern withdrawal rights, extending for instance the withdrawal period (to 14 instead of 10 days before), and the introduction of new information duties on terms and procedures necessary to exercise the right to withdrawal and facilitating its exercise (Articles 52 to 57 of the Italian Consumer Code).

In Spain the Consumer Rights Directive originally met with fierce resistance, as it would undermine the hitherto standards of consumer protection recognized at state level. The Directive has been implemented into the Spanish legal order by Law 3/2014 of 27 March 2014, which revises the General Law for the Defence of Consumers and Users (GLDCU). As the Directive constitutes full harmonisation, some modifications were necessary to clarify its scope of application in the Spanish legal system, also in respect of sector-specific legislation. Another issue was the definition of the concept of consumer, as Spanish law generally includes legal persons in its definition as well, whereas the EU system does not. Furthermore, the transposition of the Consumer Rights Directive also had effects for the Law on Retail Trade and on the Decree on Phone and Electronic Contracts. In addition the Law on Civil Procedure as amended in order to solve the contradiction between procedural legislation and the entities that are entitled to bring an injunction and are given locus standi to the Public Prosecutor to bring any action in defence of consumers’ interests.

In line with a general trend in the Netherlands to prevent a systematic, encompassing, revision of pre-existing national legislation, the Dutch legislator has not, or hardly used the (limited) possibilities that the Directive offers to extend the reach of consumer rights.190 One the questions was whether or not the scope of the CRD was to be expanded to all contracts, or to be limited to B2C-contracts, and whether or not the provisions should be applied also to these contracts which were excluded from the scope of the CRD, such as contracts for the construction or sale of immovables. Aanwijzing 331, which is a non-binding instruction for regulation but followed by the legislator, indicates that the Dutch legislator should not make use of the options in a directive to derogate from the directive or to provide additional rules.191

No addition language requirements. The fact that the Dutch legislator stays as close as possible to the text of the CRD implies that no additional pre-contractual information or language requirements are imposed on sellers or service providers. M. Loos refers in his paper to the Italian seller, who may provide the information he is required to give in Italian, as long as he does so in a clear and comprehensible manner.192 However, where the information is provided in a language which is


191 M. Loos, ‘Consumer sales in The Netherlands after implementation of the Consumer Rights Directive and with a view to the future Common European Sales Law’, Centre for the Study of European Contract Law, Working Paper Series No. 2014-12, p. 1 and 3; “Aanwijzing 331” reads as follows: ‘Bij implementatie worden in de implementatieregeling geen andere regels opgenomen dan voor de implementatie noodzakelijk zijn.’ (In case of implementation, the implementing act will not include any other rules than are required for the implementation.)

192 M. Loos, ibid, p. 3.
different from the contracting language, this is probably in breach with the transparency principle and
considered to be an unfair commercial practice.\(^{193}\)

*[The use of optional possibilities.]* The European Commission has published a survey on the use of
regulatory choices under Article 29 of the CRD. These are the ‘may’ provisions of the Directive, which
the Member State can choose to implement or not. Although according to the explanatory
memorandum of the Act implementing the CRD in principle no use will be made of these possibilities
that the Directive offers, it is striking to observe that the Dutch legislator has in fact implemented four
out of seven of these ‘may’ provisions.\(^{194}\) They concern:

- Article 3(4), which stipulates that the CRD does not apply to off-premises contracts less than
  50 euro; the legislator was of the opinion that this would be too burdensome for the trader
  and thus hereby copied the exception of the Doorstep Selling Act.\(^{195}\)

- Article 7(4), which makes it possible to not apply the light information regime for repair
  works under 200 euro; according to the Dutch legislator, applying the light information
  regime would not lead to a significant decrease in the administrative burden.

- Article 8(6), which requires written confirmation of contracts concluded by telephone; the
  Dutch legislator, though, restricted the scope of this provision to contracts between
  consumers and suppliers of services of gas, electricity, water or district heating, which are
  concluded as a result of a telephone call. The government believes that with respect to these
  types of contracts there is a substantive risk that the contracts are concluded as a result of
  aggressive or misleading conduct.\(^{196}\)

Directive 2011/83/EU – and/or its implementation – seems not to have led to substantial litigation at
national and/or ECJ level. The Italian and Belgian country reports do not mention substantial
problems or difficulties surrounding its application or enforcement. In view of the length of judicial
proceedings in Greece, and the delay in reporting on the activities of the various extra-judicial Greek
bodies, the application of this Decision has not led to reported Greek case-law either. The situation is
very much the same for the public enforcement by the Dutch Authority for Consumers and Markets
(ACM) and the private enforcement in courts or by Alternative Dispute Resolution.

In April 2014, the Court of Appeal of ‘s Hertogenbosch did, however, refer to Directive
2011/83/EU when assessing whether the concept of consumer should or could be extended to firms.

\(^{193}\) M. Loos, *ibid*, p. 3.

\(^{194}\) S.S. van Kampen, ‘De Europese Richtlijn voor consumentenrechten, een onzeker resultaat? – De
implementatie van de richtlijn in Nederland, België en het Verenigd Koninkrijk ander bekeken’, 2014 Tijdschrift
voor Consumentenrecht en handelspraktijken 3, p. 119.

\(^{195}\) M. Loos, ‘Consumer sales in The Netherlands after implementation of the Consumer Rights Directive and with
a view to the future Common European Sales Law’, Centre for the Study of European Contract Law, Working
Paper Series No. 2014-12, p. 4.

\(^{196}\) M. Loos, *ibid*, p. 4.

\subsection*{2.3 Solving Consumer disputes – Enforcement mechanisms}

The issue of solving consumer disputes via injunctions and/or (collective) judicial redress (such as class actions-initiatives), since Directive 2005/29/EC and Directive 2011/83/EU and the 2013-recommendation on collective redress regroups the enforcement mechanisms consumers have at their disposal to protect and judicially enforce their economic rights when no amicable c.q. ADR-solution can be reached\footnote{This report does, therefore, not cover the role played by Consumer Ombudsmen and other out of court settlement mechanisms within or outside the European Consumer Centres Network (ECC Net), dealt with in some of the country reports.}.\footnote{Adding the procedure of collective redress to Book XVII (on special Court Proceedings) of the Code of Economic Law, MB/BS 29 April 2014.}

In Belgium, consumer judicial redress is, in essence, a private enforcement-issue before civil judges, and involves either injunctions or – since fairly recently – class actions. Collective redress is only possible since the Law of 28 March 2014 entered into force on 1 September 2014\footnote{Lov om ændring af retsplejeloven og forskellige andre love (Gruppesøgsmål m.v.) nr. 181 af 28/02/2007.}. In Denmark, the possibility to present a class action was introduced in 2007, enabling the Consumer Ombudsman to act as group representative in a class action on marketing practices.\footnote{S. Kristoffersen, (2015), Forbrugerretten i Markedsføringsretten i en civil- og offentligretlig kontekst. Jurist- og Økonomforbundets Forlag, S. udg., p. 356 et seq.} This model offers the possibility to effectively handle litigation of cases that have a large number of similar claims.\footnote{See \url{http://www.consumerombudsman.dk}}

The Danish Consumer Ombudsman (\textit{Forbrugerombudsmand}) is the primary administrative institution to ensure the application of Directive 2005/29/EC. He carries out supervisory tasks and ensure that the legislation on the Danish Marketing Practices develop with a view on protecting consumers’ rights\footnote{See \url{http://www.consumerombudsman.dk}}. The Danish Competition and Consumer Authority (\textit{Konkurrence- og Forbrugerstyrelsen}) for its part covers an array of areas relating to the well-functioning of the Danish markets. The Authority works as a secretariat for the Competition Council (\textit{Konkurrencerådet}), the Council for Public-Private Cooperation (\textit{Rådet for Offentlig-Privat Samarbejde}), the Energy Supply Complaint Board (\textit{Ankenævnet på Energiområdet}), the Consumers’ Ombudsman (\textit{Forbrugerombudsmand}), and the Consumer Complaints Board (\textit{Forbrugerklagenævnet}). The Authority can assist a consumer in bearing the cost of a lawsuit, and operates the website \url{www.Forbrug.dk} (the Public Consumer Portal) and
funds the European Consumer Centre Denmark (*Forbruger Europa*) that gives advice to consumers and also assists consumers in presenting complaints about purchases in another EU country, Norway or Iceland.

The Danish systems for enforcement of rules on marketing practices and consumer protection are developing in close connection, and based on a combination of public administration and private enforcement via court action. For contravention of the Marketing Practices Act, Section 27 establishes the possibility to directly go to court for any private actor with a legitimate interest in the case. This can therefore happen without prior evaluation of the Consumer Ombudsman. Interest organisations and consumer protection organisations can also take legal action. The Consumer Ombudsman as well can file a suit in court. As regards collective redress, no collective actions has been brought to the courts under section 28 of the Marketing Practices Act, which opens for the possibility of the representation by the Consumer Ombudsman of a collective claim.

In Spain a compensatory collective redress mechanism has been running for a number of years. The scope of the injunctions is broader than the scope of application of the Directive as these include, for instance, the application of the Consumer Credit Directive. Organizations defending collective interests of consumers are exempted from court fees and can apply for a subsidy under the general legal aid system. The problem with injunctions in the Spanish legal system is particularly related to the limited (ex tunc) effect of judicial decisions, which apply only *inter partes*.

Furthermore, the Spanish law provides a system of collective redress to protect a series of individual interests and to protect collective consumer interests. The *acción colectiva para la defensa de derechos e intereses de los consumidores y usuarios* (collective action in defence of consumers and users’ rights and interests) is the first Spanish version of a collective redress mechanism, through which most relevant cases in consumer law are currently dealt with.


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203 [http://www.forbrugereuropa.dk](http://www.forbrugereuropa.dk)


207 FEK A 191.
extrajudicial settlement of consumer disputes\textsuperscript{208} and Recommendation 2001/310/EC on the criteria to be applied in the process of amicable settlement\textsuperscript{209}, Law 3297/2004\textsuperscript{210} introduced the Independent Authority “Consumer Ombudsman”.

Greek consumers associations – established under Article 10 of Law 2251/1994 and enrolled with the Consumer Association Public Registry\textsuperscript{211} – protect consumers’ interests, by representing consumers in front of competent administrative, judicial and extra-judicial bodies, providing information and advice, and by submitting collective actions without having to prove individual interest.

As indicated above, the GSCPMS is responsible for the administrative-public enforcement. Judicial enforcement depends on claims being filed before the Greek civil courts. Procedures can be initiated by individuals, or take the form of a collective action by consumer associations. Competitors can, however, not start proceedings, since they are not consumers within the meaning or Article 1(4) and (9) of Law 2251/1994 and Article 12 of Law 3587/2007. Collective claims filed by consumer organisations typically follow a special, faster track than ordinary procedures. In cases of urgency, interim measures may be ordered. Of particular relevance is the reversal of the burden of proof in favour of the plaintiff/consumer laid down in Article 9i(3) of Law 2251/1994.

Infringements of Greek legislation on consumer protection can lead to the imposition of civil, administrative and/or criminal sanctions.

Civil courts can order to end unfair commercial practices and to refrain from repeating it in the future c.q. prevent it to materialise. Claims of non-pecuniary losses and the seizure of goods that are suspicious or harmful to the public and public health are common practice.

Administrative sanctions for infringements of Law 2251/1994 can take the form of a recommendation to comply within a specified deadline, stop the infringement and refrain from future similar action, a financial penalty, or the temporary suspension of the business operation.

Although Law 2251/1994 does not contain specific provisions as to criminal sanctions, such penalties can be imposed in specific cases of unfair trade practices covered by specific penal law, such as unfair competition or misleading advertising in f.i. insurance, food or medicinal products, as well as in case of violations of provisions of the Greek Penal Code.

\textsuperscript{210} FEK A 259.
\textsuperscript{211} http://www.efpolis.gr/el/library2.html?func=startdown&id=185.

The most prominent associations are the Consumer Protection Centre (Kentro Prostasias Katanaloton (KE.P.KA.), website http://www.kepka.org/), the Institute for Consumers (Institouto Katanaloton (IN.KA.), see http://www.inka.gr/), and the General Federation of Consumers/INKA (Geniki Omospondia Katanaloton Ellados (G.O.K.E.) website http://www.inka.gr/).
In Italy, the enforcement system is based on a double-track model, confirmed also by the recent regulation implementing the European directive on consumers’ rights: public and private enforcement, such as, for instance, restrictive actions by consumers associations under articles 139 and 140 of the Italian Consumer Code; class actions according to Article 140 bis of the same code212.

The *administrative-public enforcement* is conferred to an Independent Authority, the General Division for user’s and consumer’s rights of the Italian Competition Authority (AGCM). This Division is separate from the General Division for Competition, which is in charge for the enforcement of antitrust laws. It is, however, worth stressing that in Italy both competences (consumers’ rights and competition) are gathered in a single Authority. As a result, the protection of consumers is fully included in the Authority’s task of protecting both free competition and the market213. The link between these two aspects is also underlined by the Communication from the European Commission on “A European Consumer Agenda - Boosting confidence and growth”, 22 May 2012: “well designed and implemented consumer policies with a European dimension can enable consumers to make informed choices that reward competition, and support the goal of sustainable and resource-efficient growth, whilst taking account of the needs of all consumers”.

The AGCM was established by law no. 287/1990 as an independent body: its decisions are based on the competition law without interference by the Italian Government214. The AGCM is in charge of protecting consumers against misleading advertising and comparative advertising which may bring discredit on competitors’ products or cause confusion. It also enforces the rules as to unfair commercial practices among undertakings. At the same time, the Authority monitors competition, and enforces competition rules with regard to cartels and other anticompetitive agreements between undertakings, abuses of dominant position and concentrations. The AGCM may also send official opinions to State and Local Authorities in cases where legislative and administrative measures proposed are likely to hinder competition. Another task concerns the enforcement of rules against conflicts of interest for government officials.

The Consumer Code (Articles from 18 to and Article 37 bis) and Legislative Decree no. 145/2007 empower the AGCM in particular to protect:

- a) consumers from unfair commercial practices used by traders (as provided for by Directive 29/2005/CE);
- b) micro-enterprises from unfair commercial practices used by traders;
- c) traders in the case of misleading and illegal comparative business-to-business advertising by competitors;
- d) consumers against unfair contract terms.

212 See for instance the website of the AGCM: http://www.agcm.it/trasp-statistiche/doc_download/4175-tutelamercatiregolamentaticommercianti.rdf


214 For more information see the general website of the AGCM available at http://www.agcm.it/index.htm.
In addition, Article 66 of the Consumer Code, as amended in 2014, extends the competence of the Authority to matters covered by the implementation of Directive 2011/83/UE.

Thanks to recent reforms the AGCM has rather wide investigation powers: accessing relevant documents, requesting documents or information from any party (private or public) and imposing penalties in the case of refusal, inspections (also using the office of the Italian “Guardia di Finanza”), and ordering expert testimony.

The Authority can start investigation on its own authority or on request. From a general perspective, administrative complaints may be filed by any individual or legal entity, and no specific procedural requirements apply (consumers can either call a special Call Centre, created by AGCM to receive oral complaints, or send a written complaint). There is an obligation to investigate but the AGCM can overturn a request if there are no convincing grounds for proceeding. In case of dismissal, the Case Handler must, however, inform the complainant, which can appeal the decision issued by the Authority before the Administrative Court (see for instance Article 27 of the Consumer Code).

The ACGM is entitled to impose administrative sanctions. The actual amount of the injunctions and fines roughly ranges between 5000 and 500,000 euro. In specific cases the minimum fine is higher, such as for instance when the commercial practice concerns hazardous products that are likely to threaten the safety of children215. Other administrative fines may be imposed by the Authority if the traders fail to comply with the issued injunctions. A trader may also be ordered by the AGCM to suspend trading for a given period of time in cases of repeated non-compliance.

The civil-private enforcement through court action is endowed to the ordinary courts. Since the Italian decree implementing EU law does not provide for special procedures applicable to these cases, consumers that have been victim of an unfair commercial practice can start ordinary procedures and actions for damages. Actions can be brought by individuals with an interest in the case or by consumers associations in the form of collective actions or class actions. Competitors can, however, only start judicial proceedings where an unfair commercial practice amounts to an unfair competition practice within the meaning of Article 2598 of the Italian Civil Code, and if they can prove a direct and legitimate interest (ibidem).

The civil remedies and sanctions available to judges are laid down in the Italian Civil Code: the action for injunction and the action for damages. Furthermore, the judge may declare the invalidity of a contract concluded by the consumer in cases where mistaken consent is proved.

215 See, for instance, the information on Italy available at the website of the Database on the Unfair Commercial Practices Directive developed by the European Commission as a tool to support national enforcers in achieving a common understanding and a uniform application of the Directive https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.showCountry&countryID=IT.
A major issue regarding the actual private protection of consumers’ rights relates to effectiveness and the possibilities for consumers to actual redress. In general terms, redress is dependent on either bringing an individual court action or starting a class action. In many Member States, appropriate procedure instruments easily available to consumers have, however, been lacking until fairly recently.

In Italy, for instance, a group of consumers originally had to bring actions in a separate way in order to obtain relief since they did not have the power to jointly sue a business entity. This situation made the possibility to obtain redress more difficult compared to class actions and raised also problems concerning the risk of conflicting judgements and the burden on the judiciary system. A first instrument was provided by the restrictive actions under Article 140 of the Italian Consumer Code, available for consumer associations and aimed at opposing behaviours damaging the rights of consumers and users. Nonetheless these remedies proved not to be sufficient for an effective protection of consumers and there was still a lack in the guarantee of an adequate possibility to obtain redress.

The availability of actual class actions have only been introduced relatively recently in most (continental) Member States, and definitely prone to some improvement(s).

In Italy, a first step was the introduction in 2007 of a specific rule in the Italian Consumer Code by the Italian Budgetary Law. Article 140bis concerning collective actions explicitly aimed at strengthening the possibility for consumer association and committees to claim for damages on behalf of their members. Article 140bis has been amended several times. Yet, class actions are only possible since January 2010 with reference to events dating later than 16 August 16, 2009. Specific amendments have been introduced in 2009 (Law no. 99/2009) to safeguard the equal c.q. identical treatment of individual and collective rights. The class action effectively meant to enforce: “a) the contractual rights of a number of consumers and users who find themselves in the same situation in relation to the same company; b) identical rights due to final consumers of a given product in relation to its manufacturer, even in the absence of a direct contractual relationship; c) identical rights to payment of damages due to these consumers and users and deriving from unfair commercial practices or anti-competitive behaviour”.

**Ratione personae**, Article 140bis of the Italian Consumer Code, allows only consumers or users (and not all individuals), as defined by Article 3 of the same code, to file a class action, either individually or through associations to obtain redress in cases where their rights appear to be violated. The Italian law does not specify a minimum number of consumers needed for a class action. With reference to the defendant, these kinds of action may be brought only against business, i.e. against entities acting within the scope of their business.

**Ratione materiae**, Article 140bis, section 2, delineated class actions as aiming at the protection of the following rights:

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- rights arising out of standard contractual terms and conditions binding the plaintiffs and the business entity;
- rights in respect of defects of products or services, regardless of any contractual relationship between the plaintiffs and the manufacturer;
- rights to compensation accorded to consumers or users for unfair commercial practices or anticompetitive conducts.

A first significant change concerned the actors allowed to introduce a class action. Whereas originally, only national consumer associations and committees were acceptable, the personal scope was extended to include single consumers and users, either individually or represented by an association or committee.

Law n° 27 of 2012 introduced another crucial amendment. To make class actions effective, Article 6 – expressly concerning “rules to make class actions effective” (Norme per rendere efficace l’azione di classe) – extends the admissibility of class actions to cases where class members’ rights are “homogeneous” and not only if they are “identical”. This wider concept comes down to lowering the threshold to bringing this kind of actions.

Despite this (positive) legislative evolution, in Italy class actions are still not frequently used. Until now only a small number of class actions have been brought before Italian judges, and in most cases they were dismissed on admissibility grounds or rejected on the merit. The former may be partially due to the Italian choice for the so-called “opt in” system (therefore the decision on the claim action is binding only for those who formally joined the class action), which probably makes the collection of a large number of participants more complicated and difficult compared to legal system in which the opt-out method is applied. Finally, the lack of specific and adequate financial incentives in this field is a further factor hindering the use of class actions.

Yet, a landmark decision cannot be left unmentioned. On 28 February 2013, the Court of Naples upheld for the first time a private class action, involving many participants. The case concerned ruined holiday compensation linked to the purchase of all-inclusive tourist packages in Zanzibar in 2009. Although the Court dismissed the claims of a part of the members on the ground of a strict interpretation of the wording of the law applicable at that moment (the 2009 version of Article 140bis), namely the requirement of “identical” rights, in a significant obiter dictum the Court stated that the concept of “homogenous” rights introduced in 2012 is likely to improve the effectiveness of the protection of consumers’ right through the instrument of class actions. Awaiting further decisions, it remains fair to conclude that in Italy the remedy of a private class action still needs to be fully implemented to enable consumers to more effectively enforce their rights, thus increasing their

217 M. Cerioni, Diritti dei consumatori e degli utenti, op. cit., at 320 ff.
218 Ibid., at 329.
confidence and preventing unfair commercial practices or misleading advertising from bringing a competitive advantage.
3 THE PROTECTION OF ECONOMIC CITIZENS’ RIGHTS IN THE DIGITAL ERA


In the list of corresponding responsibilities, Commissioner Ansip explicitly mentions, among others: breaking down national silos in (...) copyright and data protection legislation (...); helping build the framework conditions for protecting citizens online, including fighting against cybercrime, and simplifying consumer rules for online shopping219. This section focuses on the protection of online citizens. To enhance both feasibility and comparability, D5.2 reporters have been invited to cover the implications of EU Data protection legislation in their national legal order, with particular attention to EU citizens’ right “to be forgotten” after the ECJ ruling in Case C-131/12 of 13 May 2014. In topic three, “citizens” thus include companies, in that their economic freedom to conduct a business may be hampered by the (corresponding) duty to forget220.

Rapid technological developments in the field of the Internet have considerably increased the possibilities for citizens to do business, also cross-border, to provide and receive information via the Internet and to process and store data. The positive effects of these developments can hardly be denied. But at the same time there are growing concerns about the protection of citizens’ personal data and privacy in the digital society, not only as a result of the state seeking to collect personal data in its fight against crime and terrorism, but also of the increasing ability and desire of companies using these data for business purposes.

Trust is essential for the development of the Digital Single Market and the abolishment of barriers for citizens to sell and purchase goods and services cross-border. A number of measures have been adopted at EU level to enhance the internal market and to protect citizens’ privacy and data.221 Within the European Union, data protection flows essentially from Directive 95/46/EC and Directive 2002/58/EC222. In addition, a number of Articles of the Charter of Fundamental Rights of the European Union are directly or indirectly relevant for data protection.


The Hungarian country report contains no information on these aspects.


3.1 Data Protection Legislation in the Member States

In Italy, the Italian Data Protection Code (IDPC, Legislative Decree n° 196 of 30 June 2003) embodies the current rules on privacy matters. It specifically aims to ensure that personal data are processed with respect to individuals’ rights, fundamental freedoms and dignity, particularly with regard to confidentiality, personal identity, and the right to personal data protection. The Privacy Authority offers three remedies: the circumstantial claim (reclamo circostanziato), with a view to report an infringement of the rules regarding personal data protection; the report (segnalazione) when the option of asking for the monitoring of the Privacy Authority by a reclamo is not open to you, and the claim (ricorso) with regard to specific rights (Article 141, IDPC).

In Belgium, the implementation of Directives 95/46/EC and 2002/58/EC led to the adoption of a series of laws and royal decrees, adopted between 1992 and 2014. In addition, a plethora of specific laws and rules was put in place containing provisions on the protection of privacy and personal data. The specific rights of opposition, cancellation and to obtain free removal or prohibition of use of any personal data relating to him – i.e. the right to be forgotten – exists in Belgium since the adoption of the 1992 Belgian Privacy Act (See, in particular, Article 12 Law of 8 December 1992). The competent Belgian regulatory authority is the Privacy Commission, which supervises compliance with the Belgian Data Protection Law, issues guidance on its application, keeps a register of notifications, and offers advice on various matters related to the protection of personal data. Its sanctions and remedies are listed in Articles 37-39 of the Data Protection Law.

In Greece, Directive 95/46/EC was incorporated into the national legal order by Law 2472/1997. The Hellenic Data Protection Authority (HDPA) is responsible for monitoring the application of the rules, giving advice to the government about administrative measures and regulations, and starting legal proceedings when data protection regulations have been violated. Moreover, the Authority may impose penalties on data controllers or on their representatives for violation of their obligations under this law and any other regulation on the protection of individuals against the processing of personal data. These penalties can be of an administrative (warning aiming at the withdrawal of the breach, fines, temporary or permanent revocation of licenses), of a criminal (fine, imprisonment) or of a civil nature (compensation for moral damage, according to the provisions of the Greek Civil Code). The adoption of Law 3471/2006 - implementing Directive 2002/58/EC – reinforced HDPA’s role substantially.


224 MB/BS 18 March 1993.

225 www.privacycommission.be

226 FEK A 50.


228 FEK A 133.
In the Netherlands, Directive 95/46/EC was implemented by the Law on the Protection of Personal Data (Wet Bescherming persoonsgegevens, hereafter Wbp). The law does not include an explicit right to be forgotten but rather a right to resist the (un)lawful processing of data (Article 36 and 40 Wbp). In case of lawful processing of data (Article 40 Wbp), other principles such as proportionality and subsidiarity have to be taken into account.

The Dutch Data Protection Authority (College Bescherming Persoonsgegevens -DPA) supervises processing of personal data in order to ensure compliance with the provisions of the law on personal data protection and advises on new regulations.\(^\text{229}\) The Dutch DPA is entrusted with the administrative enforcement of the Wbp (particularly Article 60 Wbp). The tasks and powers of the Dutch DPA particularly concern: supervision – the Dutch DPA can use its (administrative) enforcement powers, for example by issuing an order to cooperate or by issuing a conditional fine –; providing advice; providing information, education and accountability; international assignments.

Next to administrative enforcement, the Wbp can be enforced by means of criminal or civil law.

Denmark is characterised by a high degree of digitalisation, where both citizens and public authorities use digital media, where digitalisation is seen as a part of a modern and efficient public sector, and where a high level of trust exists between citizens and the State.\(^\text{230}\) Therefore, a big amount of data is gathered and exchanged, but at the same time the vulnerability of the system of data protection is increasingly exposed. Moreover, the area of data protection covers many different sectors and the exchange of data can happen at national but also international level, without much debate about the consequences for the protection of individual citizens’ rights.\(^\text{231}\)

As regards the implications of EU Data protection legislation for economic citizens’ rights in the Danish legal system,\(^\text{232}\) Directive 95/46\(^\text{233}\) has been transposed with considerable delay into Danish law by means of Act on Processing of Personal Data no. 429 of 31.05.2000 (Lov om behandling af personoplysninger – Persondataloven). The Danish Act on Processing of Personal Data ensures that EU standards of protection are enforced at the national level, and the Act regulates both the handling of data by private actors and public authorities. The Act has the aim of strengthening the citizens’ legal certainty (retdsikkerhed) by creating transparency about the handling of data; by setting up procedures and conditions for the treating of data depending on their degree of sensitivity; and by

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\(^{231}\) Danish Institute for Human Rights (2015), ibid.

\(^{232}\) The following is partly based on the national report written for Deliverable 7.2.

\(^{233}\) Directive 95/46 on the protection of individuals with regard to processing of personal data and on the free movement of such data [Data Protection Directive] [1995] OJ L281/31.
giving citizens the right to object to certain types of treatment of data.\textsuperscript{234} The Act is supplemented by the Executive Order on Security Measures for the Protection of Personal Data.\textsuperscript{235}

The Danish Data Protection Agency has the duty and authority to monitor the enforcement of the Act on Processing of Personal Data.\textsuperscript{236} The agency provides guidance and advice to authorities, companies, and individual citizens. The agency also controls the more sensitive processing of personal data by companies and authorities via notifications and authorisations. Moreover, the Agency handles complaints from citizens; it can take up cases out of its own initiative; it conducts visits and inspections; and can issue criticism, bans, or enforcement notices for violations of the Act on Processing of Personal Data. On its website, the Agency publishes its decisions from the year 2000 onwards.\textsuperscript{237} The decisions of the Agency are binding and final, and cannot be brought to another administrative authority. However, a decision can be brought to the Parliamentary Ombudsman or the Courts.

An infringement of the Act on Processing of Personal Data can entail compensation for damages or sanctions in the form of fines or even prison sentences.\textsuperscript{238} The Danish Data Protection Agency does not have the authority to sanction infringements, but it can report infringements to the Police. Not respecting the decision of the Agency does also entail a sanction.\textsuperscript{239} However, although being important “symbolic signs” from the legislator’s side, neither sanctions nor compensation play a relevant part in practice, and the level of sanctions is also considered low in comparison to other countries.\textsuperscript{240} Offenders do not incur high value fines in Denmark,\textsuperscript{241} and this has led to the question of whether the protection of personal data is taken seriously in the Danish legal system.\textsuperscript{242}

In Spain the EU rules on Data Protection have been incorporated in a number of laws, such as the Organic Law 15/1999 on Personal Data Protection, Law 32/2010 on the Catalan Authority for Data Protection, Law 2/2004 on Personal Data Files of Public Ownership and Creation of Basque Agency on

\textsuperscript{234} Danish Institute for Human Rigths (2015), ibid.

\textsuperscript{235} Executive Order on Security Measures for the Protection of Personal Data handled by Public Administration (\textit{Bekendtgørelse om sikkerhedsforanstaltninger til beskyttelse af personoplysninger, som behandles for den offentlige forvaltning}), BEK no. 528 of 15/06/2000.

\textsuperscript{236} <http://www.datatilsynet.dk/english/>.

\textsuperscript{237} <http://www.datatilsynet.dk/afgoerelser/>.

\textsuperscript{238} Compensation has to be decided by the Courts. See f.ex. U.2007.1967V.


\textsuperscript{241} In case U.2004.2204Ø, a 5.000 Dkk. (ca. 670 €) fine was given for collecting data without a legitimate purpose (violation of Art. 5(2) and 6 (1) of the Act on Processing of Personal Data).

\textsuperscript{242} P. Blume (2013a), p. 185-186.
Data Protection and a number of other laws and royal decrees. The implementation and enforcement of the rules on data protection are entrusted to independent administrative authorities, i.e. the Spanish Agency for Data Protection and the Catalan and Basque Agencies on Data Protection.

3.2 Google Spain and its Ramifications as to the Right to Be Forgotten

On 13 May 2014, the ECJ rendered its judgement in what is commonly referred to as the Google Spain-case. The factual and legal constellation can be summarised as follows:

In 2010 a Spanish citizen submitted to the Spanish Data Protection Authority (AEPD) a complaint against La Vanguardia Ediciones SL (the publisher of a newspaper widespread in Spain), as well as against Google Spain and Google Inc., since, typing his name on Google the list of results shown links to two pages of the newspaper La Vanguardia, dated January and March 1998, announcing an auction of properties connected with attachment proceedings for the recovery of social security debts. By means of the claim to the Data Protection Authority, the Spanish citizen asked, on the one hand, to order La Vanguardia to delete or edit these pages (so that his personal data would not be displayed anymore) or to implement certain tools provided by search engines to protect such data. On the other hand, he asked to order Google Spain or Google Inc. to remove or conceal his personal data, so that they will cease to appear among the search results and no longer feature in the links of La Vanguardia. The basis for his claims was that the attachment proceedings had been fully resolved for a number of years and that reference to them was now entirely irrelevant.

The AEPD dismissed the complaint against La Vanguardia, believing that the publisher had legitimately published the information in question. However, the claim was upheld against Google and Google Inc. The AEPD therefore asked the two companies to take the necessary steps to remove the data from their indices and to make future access to the data concerned impossible. Both Google Spain and Google Inc. brought actions before the Audiencia Nacional (National High Court), seeking annulment of that decision. After joining the actions, the National High Court referred a series of questions to the European Court of Justice.

For present purposes, the most important findings of the Court’s judgment are that search engines such as Google are “data controllers” within the meaning of Article 2(d) Directive 95/46, which enables the data subject to directly request them to remove the indexing, regardless of any request to the holder of the website that actually published the information.

With regard to the scope of the right of erasure and/or the right to object, in relation to the right to be forgotten, the referring court asked, in essence, whether “a data subject is entitled to require the operator of a search engine to remove from the list of results displayed following a search made on the basis of his name links to web pages published lawfully by third parties and containing true
information relating to him, on the ground that that information may be prejudicial to him or that he wishes it to be ‘forgotten’ after a certain time.”\footnote{Third question of the referring court, as reformulated by the ECJ in para 89 of its judgment.} After observing that “even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of time that has lapsed” (C-131/12, para 93), the ECJ ruled that such “information and links concerned in the list of results must be erased” (C-131/12, para 94), provided that there are no particular reasons “substantiating a preponderant interest of the public in [still] having access to that information” (C-131/12, para 98).

Whereas this proviso might prevent a data subject with a particular role in public life to successfully invoke his right to be forgotten, this does not seem the case for the Spanish data subject concerned with regard to information initially published 16 years earlier. His fundamental rights under Articles 7 and 8 of the Charter of the former thus override “not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to [his] name” (C-313/12, para 99).

The importance and relevance of Google Spain should not detract from the fact that similar issues have been dealt with at national level prior to this ruling. In Italy, a number of cases preceded Google Spain in both the administrative system (via appeals to the Italian Data Protection Authority, IDPA) and before traditional courts.\footnote{See A. del Ninno, “Dopo la sentenza della Corte di Giustizia UE sull’obbligo di Google di cancellare i link a siti web di terzi: quali regole in Italia sul diritto all’oblio on line?”, in Diritto e Giustizia, 16/05/2014, available at: http://www.alessandrodelninno.it/upload/art_articoli/documenti/00000067.pdf} A series of these cases dealt with the processing of personal data for journalistic purposes, involving issues of privacy, consent and the fundamental right to information and the press, either on paper or on the Internet.

The IDPA intervened several times with measures meant to protect the equally fundamental right to be forgotten. The adoption on 8 April 2009 of the Provision online historical archives of newspapers and availability of data concerned by external search engines, for instance, explicitly recognises the right of individuals to object to the processing for legitimate reasons.

The Italian Supreme Court (Corte di Cassazione) in 2012 ruled that the “person whose personal data are processed must be considered as holder of the right to be forgotten even in the case of storage on the Internet, mere deposit of archives of individual users accessing the network and, therefore, owners of the sites which represent the source of the information. He/she must see recognized his/her control in order to protect his/her social image, that, even in the case of real news, and a fortiori if a news, can result in the claim to the contextualization and update of the data, and, where appropriate, having taken into account the purpose of preservation in the archive and the interest that underlies it, even to its cancellation” (see Cass. civ., sec. III, 5 May 2012, no. 5525). The Supreme Court further
ruled that “if the public interest underlying the right to information (Art. 21 of the Italian Constitution) constitutes a limit to the fundamental right to privacy (Art. 21 and 2), the person to whom the data pertain is correspondingly given the right to be forgotten (see Cass., 4 September 1998, no. 3679), and that is that news is not further disclosed, when due to the passage of time it is already forgotten or unknown to the majority of associates. Since the processing of personal data may involve also public or published data (see Cass., 25 June 2004, no. 11864), the right to be forgotten actually safeguards the social projection of personal identity, the subject’s need to be protected from disclosure of information (potentially) harmful, since missing the topical character (because of the lapse of time), so that its processing is no more justified and indeed likely to hinder the subject in the developing and enjoyment of his/her own personality”.

In Greece, the Data Protection Authority (HDPA) has been extremely active in pursuing its tasks and has issued several decisions with important political and social implications (such as e.g. banning the police from using traffic cameras for filming street demonstrations, limiting banks’ access to personal data, banning the issuance of ID cards with reference to the religious beliefs of the holder, restricting the use of CCTVS in public areas etc.). According to the classification of the incoming, pending and completed cases the sectors which occupied the Authority (in 2013, last year for which statistical data is available) are electronic communications (38,08%), followed by the financial sector (8,54) other private economy activities (5,87%) public administration (5,34%), labour relations (3,56%) and healthcare provision (3,38%).

Hence, HDPA’s decisions are being felt – and may impose restrictions – in all important sectors of the economy. Restrictions may concern i.e. the source of data to be used, the retention and further exploitation of data, spamming, the use of technical means for recording transactions etc.

In addition, all data controllers are supposed to notify to the HDPA their data protection policy and the use to be made of the data under their possession not only where a) they keep and/or manipulate personal data, but also when b) they intend to transfer data to some non-EU country (unless such country has been approved by the EU as satisfying a satisfactory level of protection or complies with the US ‘safe harbour’ programme) and c) they intend to interconnect data bases. What is more, anyone who wishes to establish a CCTV also need to notify to the HDPA.

In Spain, the Constitution recognizes the right to privacy and the Spanish Constitutional Court has developed in its case law a right to data protection as an independent right related to privacy. Already

248 For a selection of the most important HDPA decisions in English see:

http://www.dpa.gr/portal/page?_pageid=33,435908&dad=portal&schema=PORTAL; it is worth noting, however, that very few decisions are available in English compared to the load of all the decisions issued by the HDPA.

249 HDPA Annual Report 2013, p. 26, available at:

http://www.dpa.gr/pls/portal/docs/PAGE/APDPX/ANNUALREPORTS/AR2013/ARXH%20PROSTASIAS_APOLOGISMOS%202013%20WEBUSE.PDF

250 See HDPA Directive n 1/2011, available at:

in 2010 the Spanish Agency for Data Protection (AEPD) had been receptive to claims by individuals asking for the erasure of personal references on the net. The AEPD considers that a search engine like Google Spain is subject to the rules on data protection, since it is engaged in the processing of data and act as intermediaries in the information society. The decisions adopted by AEPD were systematically contested by Google Spain, which eventually led to the judgment of the European Court of Justice. As the Court confirmed the practice of the AEPD, it issued guidelines for the Spanish courts as to how the judgment in Google Spain should be enforced.

In Italy, it did not take long for Google Spain to have repercussions. In November 2014 and February 2015, the IDPA adopted eleven decisions on the basis of as many reports by citizens resulting from the rejection, by Google, of their requests for de-indexing the web-pages that reported personal data (in all cases, new articles relating to legal proceedings).

The case-law of the IDPA is fully in line with Google Spain. In nine of the eleven cases decided, the Authority actually rejected the request to prescribe to Google the de-indexation, in view of the prevailing public interest in access to information, with regard to events related to trials that had not yet been dealt with at all possible judicial instances.

The Decision of 18 December 2014 can serve to illustrate the reasoning of the IDPA. The suspect asked to delete the reference to a journal article because, in his/her view, the text reproduced was “extremely misleading and highly prejudicial”. During the investigation carried out by the Authority, however, the news appeared to be challenged very recently and especially to secure public interest, covering a major judicial investigation which involved many people, albeit locally. Personal data contained, among other things, had been processed in compliance with the principle of materiality of the information. The Authority has, therefore, rejected the applicant’s request to prevent Google from the processing of his personal data – not associating anymore in search results his name mentioned in the article – because, in this case, the freedom of the press rather than the right to be forgotten appeared to prevail. It also recalled that the person concerned, if he/she considers false the news regarding him/her, has the option of asking the publisher for the updating, rectification and integration of the data contained in the article. In the same procedure, for the first time, even the problem of consistency with the original texts scanned by the engine of the so-called “snippet” took place, i.e. the automatic synthesis generated by Google and available along with the search results. The applicant had in fact asked Google, as an alternative to de-indexation, to wipe out or alter the snippet that appeared under the link to the article, since it associated his name to more serious crimes than those for which he was under investigation. From the findings of the IDPA, the abstract proposed was, actually, possibly misleading as not in line with the narration of the facts reported in the article. This request, considered legitimate, was individually greeted by the American multinational that has, thus, taken steps to eliminate the summary generated by its own algorithm.

In two other cases, the Authority has accepted the request for erasure of citizens. For instance, in a Decision as a result of a request for erasure from the list of results returned by a search engine of the
links to webpages that contain the name of the data subject (Decision of February 2015\footnote{Available at: http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/3793836.}): in this case, the IDPA declared founded the request of the reporting of removal from the search results of Google of the URL containing the newspaper article under analysis.

The article subject to report, findable among the list of results generated by Google as a result of research carried out starting with the name and surname of data subject, gave notice of the visit by the person reporting of an inmate at one prison, in a special area, and that, following this meeting, the anti-mafia prosecutor of Palermo would open an investigation to understand whether the visit was only aimed at controlling the "general conditions of detention" as prescribed by law for members of the Parliament. The IDPA noted that the processing of personal data that is referenced by the reporter, at the time carried out for purposes of journalism, about facts of public interest, involves now, because of the indexing the article in question, a violation considered disproportionate because of the significant amount of time lapsed between the facts and the statement made by the reporting data subject according to whom no criminal investigation was ever initiated against him. This is precisely the kind of measure “legitimized” by the decision of the ECJ.

In Greece, the Google Spain-right to be forgotten has not yet occupied the HDPA or, for that matter the courts. It is worth noting that the HDPA did not find it necessary to post anything relevant on its website or even update the content of the answer to the relevant FAQ\footnote{See http://www.dpa.gr/portal/page?_pageid=33,148908&_dad=portal&_schema=PORTAL#3, available only in Greek.}.

The Belgian Privacy Commission for its part on 13 May 2015 adopted an own-initiative recommendation relating to 1) Facebook, 2) Internet and/or Facebook users as well as 3) users and providers of Facebook services, particularly plug-ins\footnote{Recommendation n° 4/15 of 13 May 2015 (CO-AR-2015-003), with full text available at www.privacycommission.be. As this recommendation focuses quite specifically on jurisdiction issues – depending on the view as to who actually is to be seen as the data controller (Facebook Ireland, or Facebook Inc.) within the meaning of Article 4.i.a of Directive 95/46/EC), this Recommendation will not be analysed in detail.}. No follow-up case-law of Belgian courts has been reported.

In the Netherlands, there have been three national follow-up judgements of Dutch courts since Google Spain on the question of whether Google is required to remove certain links from the search results of its search engine. The three cases concern ‘right to be forgotten requests’ by a businessman and a convicted criminal respectively, which were rejected by Google.

\textit{Court of Amsterdam, 12 February 2015 – preliminary injunction}

This case was initiated by a business partner of KPMG (hereafter: X), a large accountancy firm in the Netherlands. He had requested Google to remove the links that refer to websites on which newspaper articles were published, \textit{inter alia} by the tabloid ‘De Telegraaf’. The newspaper articles concerned a conflict between X and a construction company regarding the payment for the construction of a luxurious house. According to the newspaper article, the construction company claims from X an amount of 200.000 euro for additional work, which it has never received, and as a
consequence replaced the locks of the house. X was therefore forced ‘to camp’ in three containers on his estate.

In the procedure before the Court of Amsterdam X requested Google to remove the URLs of the webpages, which connect X with the so-called ‘retention or container story’. In assessing the case the court refers to Dutch law, the Wet bescherming persoonsgegevens (Wbp) and in particular Article 36 thereof, the Data Protection Directive (Directive 95/46/EC) and the ECJ’s judgment in Google Spain. The court then reiterates the ECJ’s judgment in Google Spain and holds that if the “information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased”. 255 The Court, whilst referring to Article 40 Wbp, states that it must be examined whether there are important and justified reasons relating to the specific personal circumstances of the claimant. And in applying Articles 36 and 40 Wbp, various fundamental rights that are at issue must be taken into account, i.e. the right to privacy (Article 8 ECHR) and the freedom of information (Article 10 ECHR and Article 7 of the Dutch constitution). Interestingly, the Court does not refer to the EU Charter and the right to protection of personal data as contained in Article 8.

The Amsterdam district court then concludes that are no important and justified reasons for X to claim a right to request Google to remove the links to the newspaper articles. In short, the court is of the opinion that the freedom of information prevails over the right to be forgotten, the right to privacy of the business man. The court considers that the right to remove the links following a search on the Internet constitutes an exception to the general rule (point of departure), which concerns the right of Google Inc. to freedom of information. 256 This seems to be an erroneous interpretation of the ECJ’s judgment in Google Spain, in which it assumed that the right to protection of personal data and the right to privacy take precedence over other, conflicting, fundamental rights.

District Court of Amsterdam, 18 September 2014

This case concerned a criminal who was sentenced to 6 years in prison for an attempt to evoke an assassination. A writer, who found inspiration in this event, wrote a book in a crime series, which was published in 2013. In this book, which is described as a mixture of facts and fiction, the person who carries the name of the convicted criminal commits a murder.

The criminal had requested Google to remove a number of URL’s of websites for books, which include information of the book containing his name, from the search results following a search on his name. The district court of Amsterdam in the following procedure refers to two fundamental rights that are at issue, i.e. the right to privacy as laid down in Article 8 ECHR and the freedom of information as contained in Articles 10 ECHR and 7 of the Dutch Constitution. The court does not mention the EU Charter of Fundamental Rights.

255 See also Case C-131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (ECJ, 13 May 2013) para. 94 (Google Spain).

Furthermore, it is noteworthy that the court speaks of the freedom of information – or the fundamental ‘right’ to information – of Google and mere ‘interests’ of others, who include the users of the Internet, webmasters and other providers of information.

As in the above-mentioned case, the Court adopts a restrained approach when it comes to the right to be forgotten and the corresponding restrictions imposed on search engines like Google. According to the district court of Amsterdam, the judgment in Google Spain does not aim to protect people against negative information on the Internet, but against being chased for a long time or against announcements, which are irrelevant, excessive or unnecessarily defaming. The fact that you commit a crime has, according to the court, the consequence that you come up negatively in the news, which leaves traces on the Internet for a considerable amount of time. As a result, Google did not have the obligation to remove the links to the webpages, which concerned the convicted.

The judgment was happily received as giving more justice to the right to information. Yet it is questionable whether the interpretation of the court of Amsterdam of Google Spain in this case, similarly to the above-mentioned case, is entirely correct. The right to privacy is (too) strictly interpreted – particularly by introducing the condition that announcements should be unnecessarily defaming or excessive –, which at least gives the impression that the freedom of information of Google prevails. In the hereafter discussed follow-up case as a result of an appeal lodged by the convicted, the Court of Appeal of Amsterdam appears to correctly interpret and apply the criteria set out by the ECJ in Google Spain.

Court of Appeal of Amsterdam, 31 March 2015

The Court of Appeal of Amsterdam firstly refers to the Data Protection Directive (Directive 95/46/EC) and states that the point of departure is that every person (data subject) will have the right to rectification, erasure or foreclosure of data, if it appears that processing of these data is incompatible with the Directive. It then continues by stating that ‘such an incompatibility cannot only be the consequence of inaccuracy of the data, but also of the data being inadequate, extraneous or excessive in relation to the aims of processing, because they have not been adapted meanwhile or because they are being stored longer than is necessary’. The court explicitly refers to Articles 7 and 8 of the EU Charter, which allows the data subject to request, that the information in question no longer be made available to the general public by its inclusion in such a list of results. And this,


261 See also Case C-131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (ECJ, 13 May 2013) para. 97 (Google Spain).
however, will not be the case, if interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question, such as the role played by the data subject in public life. 262

Although eventually the court of appeal rejects the claim by the convicted, as he had been convicted for a serious crime and the public has an interest in getting access to information on serious misdemeanours and as a consequence the conviction of the ‘escort boss’, its reasoning substantially differs from that of the district court of Amsterdam. The judgment implies that the average criminal who has not been convicted for ‘serious’ crimes should have ‘a right to be forgotten’.

3.3 Google Spain and its Ramifications as to the Duty to Forget

After the ruling of the ECJ, Google introduced a module on its European websites to remove search results263. These modules allow user to request that results related to a specific name be removed. Google then communicates to the person who actually posted the content that it has removed the link, but it does not allow him/her to replicate, pleading the existence of one of the “special reasons” succinctly evoked by the Court.

Other search engines might, however, take a different approach and not inform the publisher of the content. In case of failure of removal upon request at the search engine concerned, the reporting person might want to achieve his/her intended result by applying to Data Protection Authorities or courts. When they then establish that the data should have been removed (erasure of the data), this would amount to establishing the liability of the operator of the search engine either as data controller, for the unlawful processing of personal data, or by way of tort law for separate damage inflicted by not removing the data.

In the light of these circumstances, one can almost expect the holders of the search engines to find it more cost effective to agree with requests, rather than systematically analysing each individual request. This could, however, lead to a phenomenon of “over-deterrence”, pushing operators to opt for the least risky outcome (i.e. the removal of search results), regardless of whether there is a real right to be forgotten.

If, however, the search engines operators decide to reject the majority of requests, this may overburden national data protection authorities, probably unprepared to handle hundreds of appeals. This could yield two possible consequences: on the one hand, raising the “political” issue of the impossibility of implementing effective protection; on the other, search engines operators appropriating the selection criteria for the choice of links to be removed altogether. As last element to be mentioned, is that measures deriving from the implementation of the judgment will be applied only to search engines established in Europe. This might create a competitive advantage for operators outside Europe (see Baidu in China, and Yandex in Russia) that will index a higher number information and, being accessible from Europe, could attract users, at the expense of their competitors.

262 Idem, para. 97.

The above-mentioned cases have been decided against the backdrop of two conflicting fundamental rights: the company’s freedom of – or right to – information (Google Spain), and the data subjects’ rights to privacy and protection of personal data. The freedom to conduct a business did not play a role in the judgment of the ECJ. In cases, however, where Internet service providers are confronted with Internet pirates, e.g. illegally downloading music, and intellectual property right holders, the European Court of Justice – and now also the national (Dutch) courts – have referred to the freedom to conduct a business as contained in Article 16 of the EU Charter. It has sometimes given preference to the Internet service providers’ freedom to conduct a business with a view to prevent them from having to install expensive and complicated filtering or blocking systems, but thereby outflanking other fundamental rights, such as the rights of Internet users to privacy and to the protection of personal data.

The case law in the field of the Internet is developing and so is the way in which the different economic interests and rights, and other fundamental rights, of the various parties are balanced by the ECJ and the national courts.

CONCLUSION

This report has analysed how economic rights have been implemented in three areas in a number of Member States. Three different perspectives have been used with a view to examine the difficulties that citizens face in getting access to economic rights. First, we have looked into the citizen as economic actor in gaining access to the market with a view to exercise a profession. Although a system of mutual recognition of professional qualifications has been in place in the EU since a considerable time, there are still Member States resisting the full impact of mutual recognition with regard to diplomas obtained elsewhere. Factors that are relevant in this respect are *inter alia*: the type of profession, whether it is regulated or not, whether professional experience is taken into account, to what extent Member States take into consideration the case law of the European Court of Justice, which is particularly relevant outside the regulatory framework; furthermore, the constitutional framework may play a role as well (e.g. in Greece, where private educational activity has been limited and trade unions in the educational sector have been awarded an important role).

The second perspective that has been used is that of citizens as consumers and the protection of their economic rights. We have looked into the national implementation of the unfair commercial practices directive and the enforcement thereof and of the consumer rights directive. Generally Member States have not encountered many problems in implementing the Directives in the field of consumer rights. Some chose to adopt a separate law on consumer protection (Italy, Greece), while others incorporated the requirements of EU Directives into their already existing civil codes (the Netherlands and to some extent Denmark). In all Member States a system of civil and administrative enforcement is in place, whereas the possibility to start class actions for consumers is still underdeveloped.

The third and last perspective concerns that of the protection of economic rights of citizens in the digital internal market. We have specifically focused on the field of data protection and the right to be forgotten and the effects of enforcing the right to privacy and protection of personal data for the economy. In Greece the Data Protection Authority has been particularly active in the enforcement of rights of EU citizens in nearly all areas of the economy, including the banking sector, health care, electronic communications etc. In Spain the Data Protection Agency seems to be more receptive to claims of individuals asking for the erasure of personal references on the Internet than in other Member States, like Italy and the Netherlands, which (also) focus on the freedom to receive information.
ANNEXES: COUNTRY REPORTS
DELIVERABLE 5.2

COUNTRY REPORT
BELGIUM

CONTRIBUTOR: UA
ACCESS OF ECONOMIC ACTORS TO THE EUROPEAN / INTERNAL MARKET.


INTRODUCTION.

“The rights of citizens to practice economic activities in another Member States is a fundamental right enshrined in the EC Treaty. However, within the limits of Internal Market rules, each Member States is free to make access to a particular profession legally conditional upon the possession of a specific professional qualification which is traditionally the professional qualification issued on its national territory”\(^1\).


The Service Directive, had the goal to create a legal framework to eliminate obstacles of the free movement of services within the European Union. It aimed to achieve by 2010 a genuine internal market for services. The objective was to reduce the limitations on the freedom of establishment stated in the article 43 of the EC Treaty; in order to facilitate the establishment of service provider in another Member State. The Directive, also implemented the right to freedom of establishment as provided for in the articles 49 and 50 of the EC Treaty. It concerned both nationals of other Member States wishing to settle in Belgium and entrepreneurs of other Member States wishing to offer their services in Belgium without being established permanently in Belgium\(^3\).

Then it is necessary to give an overview about the transposition and the implementation of the Services Directive in the Belgian context. To exercise the transposition and the implementation of the Services Directive in Belgium was very complex, and thus because of several reasons. In first place, all levels of power were involved, i.e. the Federal, the community, the regional and the local. This is because the Services Directive affects to the Federal State, the regions, the communities as well as the province and municipalities. The second reason, is that the transposition required not only legal modifications, but also significant adaptations at the organizational level and a great investment in electronic services. Another significant reason that made that step more difficult in Belgium was that


\(^2\) The deadline for the implementation of the Directive was the 28 of December 2009.

certain obligations imposed by the Directive required a common horizontal approach, for all power levels. The last and more obvious reason was that the implementation period was very tight, given the adaptations and implementation to be done.⁴

In this context in the following lines, the transposition and the implementation of the Service Directive in Belgium will be analyzed. The analysis is set up from the point of view of the access of the economic actors into the Belgian market in two sides, the recognition of professional qualifications and the establishment (temporary –or just occasional- and permanent).

**RECOGNITION OF PROFESSIONAL QUALIFICATIONS.**

With regard to the implementation rules to be studied, WP-participants ideally cover the (national fate of the) following categories of professional qualifications:

1. **QUALIFICATIONS OBTAINED BY EU CITIZENS IN ANOTHER MEMBER STATES (EU QUALIFICATIONS).**

2. **QUALIFICATIONS OBTAINED BY EU CITIZENS OUTSIDE THE EUROPEAN UNION (non-EU QUALIFICATIONS).**

3. **QUALIFICATIONS OBTAINED BY EU CITIZENS PRIOR TO THEIR COUNTRY JOINING THE EUROPEAN UNION (pre-accession qualifications).**

4. **QUALIFICATIONS OBTAINED BY NATIONALS OF EU ASSOCIATES THIRD COUNTRIES, WHEN THE RELEVANT ASSOCIATION AGREEMENT INCLUDES CHAPTERS ON ESTABLISHMENT AND/OR SERVICES.**


This Directive has been implemented by Belgium by the following laws:

- The Ministerial Order of 31 January 2008 establishing the list of specialist medical training permits issued by Member States of the European Union⁵.

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⁵ Arrêté ministériel fixant la liste des titres de formation de médecin spécialiste délivrés par les Etats membres de l’Union européenne / Ministerieel besluit tot vaststelling van de lijst van opleidingstitels van geneesheerspecialist afgeleverd door de lidstaten van de Europese Unie. Published in the Moniteur Belge / Belgische Staatsblad the 25 of April 2008. The full text can is available in <www.ejustice.just.fgov.be>.
- The Royal Decree of 2 June 2008 on the recognition of professional qualifications and the freedom to provide veterinary services.

- The Royal Decree of 10 February 2008 relating to training requirements and professional experience and recognition of professional qualifications EC for the exercise of the profession of private detective, as well as the approval of training courses.

- The Royal Decree of 10 February 2008 on the recognition of professional qualifications EC for the activities covered by the law of 10 April 1990 regulating private and personal security.

- The Act of 13 December 2007 establishing a new framework for the recognition of professional qualifications EC.

- The Ministerial Order of 31 January 2008 establishing the list of dental specialist training qualifications issued by the Member States of the European Union.

- The Royal Decree of 27 March 2008 amending the Royal Decree No. 78 of 10 November 1967 on the exercise of the health professions.

6 Arrêté royal relatif à la reconnaissance des qualifications professionnelles et la libre prestation de service des vétérinaires / Koninklijk besluit betreffende de erkenning van beroepskwalificaties en het vrij verrichten van diensten van dierenartsen. Published in the Moniteur Belge / Belgische Staatsblaad the 6 of June 2008. The full text can is available in <www.ejustice.just.fgov.be>.

7 Arrêté royal du 10 février 2008 relatif aux conditions en matière de formation et d'expérience professionnelle et à la reconnaissance des qualifications professionnelles CE pour l'exercice de la profession de détective privé, ainsi que l'agrément des formations / Koninklijk besluit betreffende de vereisten met betrekking tot de opleiding en de erkenning van de EG-beroepskwalificaties voor het uitoefenen van het beroep van privé-detective en de erkenning van de opleidingen. Published in the Moniteur Belge / Belgische Staatsblaad the 3 of March 2008. The full text can is available in <www.ejustice.just.fgov.be>.

8 Arrêté royal du 10 février 2008 relatif à la reconnaissance des qualifications professionnelles CE pour l'exercice d'activités visées par la loi du 10 avril 1990 réglementant la sécurité privée et particulière / Koninklijk Besluit van 10 februari 2008 betreffende de erkenning van beroepskwalificaties EG voor de door de wet van 10 april 1990 regeling van de private en persoonlijke veiligheid activiteiten.

9 Loi instaurant un nouveau cadre général pour la reconnaissance des qualifications professionnelles CE / Wet tot instelling van een nieuw algemeen kader voor de erkenning van EG-beroepskwalificaties. Published in the Moniteur Belge / Belgische Staatsblaad the 2 of April 2008. The full text can is available in <www.ejustice.just.fgov.be>.

10 Arrêté ministériel fixant la liste des titres de formation de dentiste spécialiste délivrés par les Etats membres de l'Union européenne / Ministerieel besluit tot vaststelling van de lijst van opleidingstitels van tandarts-specialist afgeleverd door de lidstaten van de Europese Unie. Published in the Moniteur Belge / Belgische Staatsblaad the 25 of April 2008. The full text can is available in <www.ejustice.just.fgov.be>.

11 Arrêté royal modifiant l'arrêté royal n° 78 du 10 Novembre 1967 concernant l'exercice des professions de la santé / Koninklijk besluit tot wijzigen van het koninklijk besluit nr. 78 van 10 november 1967 betreffende de uitoefening van de gezondheidszorgberoepen.
- The Ministerial decision of 28 February 2008 establishing the list of the qualifications of general care nurse delivered by Member States of the European Union. 12


- The Ministerial decision of 31 January 2008 establishing the list of qualifications of dentists issued by the Member States of the European Union 16.

- The Decree of 31 March 2011 of the Government of the French Community amending the Decree of Government of the French Community of 6 March 1995 laying down the conditions for nurses snack of patent (AD) hospital (AD) and nurse (AD) hospital (AD). - Orientation mental health and psychiatry 17.
- The Decree of 1 December 2010 of the Government of the French Community on various measures in higher education.\(^{18}\)


- The Order of 24 April 2009 the Flemish Government concerning the transposition of the European Directive 2005/36 for recruitment posts in education and for some functions in basic education.\(^{20}\)

- The Order of 19 November 2010 of the Flemish Government establishing the Flemish regulation on recognitions relating to the environment.\(^{21}\)

- The Decree of 13 July of 1994 of the Flemish Community on university colleges in the Flemish Community.\(^{22}\)

- The Law of 21 November 2008 transposing the Directives 2005/36 / EC and 2006/100 / EC and amending laws of 20 February 1939 on the protection and respect of the profession of architecture and 26 June 1963 establishing a College of Architects.\(^{23}\)

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\(^{18}\) Décret portant diverses mesures dans l’enseignement supérieur. Published in the Moniteur Belge / Belgische Staatsblad the 24 of December 2010. The full text can be available in <www.ejustice.just.fgov.be>.


\(^{21}\) Besluit van de Vlaamse Regering tot vaststelling van het Vlaams reglement inzake erkenningen met betrekking tot het leefmilieu. Published in the Moniteur Belge / Belgische Staatsblad the 1 of February 2011. The full text can is available in <www.ejustice.just.fgov.be>.

\(^{22}\) Decreet betreffende de hogescholen in de Vlaamse Gemeenschap. Published in the Moniteur Belge / Belgische Staatsblad the 31 of August 1994. The full text can is available in <www.ejustice.just.fgov.be>.

- The French-Speaking Community Order of 18 July 2008 fixing the conditions for obtaining diplomas in midwifery and bachelor's degree in nursing, reinforcing student mobility and containing various measures regarding higher education.  

- The Order of 4 July 2008 of the Government of the French Community determining the models of diplomas and their supplement issued in the framework of a cooperation agreement for the organization of studies by several higher education institutions.

- The Decree of 3 January 2009 of the French-Speaking Community of the provisions on the recognition of professional qualifications for the exercise of functions in preschool education institutions, primary, ordinary and specialized secondary, artistic, social advancement and higher non-university, short-time artistic secondary of the French Community and depending boarding of these institutions, and the psychological, medical and social centers, on leave for various sports and urgent measures in education.

- The Order of 5 October 2007 of the Government of the French Community amending the orders of the Government of the French Community of 3 July 2003 determining the models of diplomas and supplements to diplomas issued by the High Schools and juries higher education of the French Community of 2 June 2004 determining the form and the particulars of diplomas and supplements to diplomas issued by higher institutes of Architecture and academic jury of the French Community of 18 June 2003 determining the form and the particulars of diplomas and supplements issued by the Colleges of Arts.
- The Decree of 13 July 2012 of the Flemish-Speaking Community amending and lifting of the decree of 2 March 2007 concerning the charter of Travel Agencies. 28

- The Royal Decree of 23 March of 2011 on the exemption from the internship architect. 29

- The German-Speaking Community Decree of 25 May 2009 on measures in education and in training of 2009 (Article 1 to 11). 30

- The Order of 22 April 2010 of the Brussels Capital Region "on the status of travel agents. 31"

- The German-Speaking Community Decree of 26 June 2009 to amend the Decree of 26 February 1997 laying down the standards for reception facilities for senior citizens (article 5). 32

- The French-Speaking Community Order of 12 June 2008 of the Government of the French Community determining the models of diplomas and supplement issued by their superiors Architecture Institutes and higher education of the French Community jury delivering the same degree. 33

- The German-Speaking Community Decree of 7 May 2009 on the non-emergency patient transport. 34

déterminant les formes et les mentions des diplômes et des suppléments délivrés par les Ecoles supérieures des Arts. Published in the Moniteur Belge / Belgische Staatsblad the 12 of November 2007. The full text can is available in <www.ejustice.just.fgov.be>.

28 Decreet houdende wijziging en opheffing van het decreet van 2 maart 2007 houdende het statuut van de reisbureaus. Published in the Moniteur Belge / Belgische Staatsblad the 14 of August 2012. The full text can is available in <www.ejustice.just.fgov.be>.

29 Arrêté royal relatif à la dispense du stage d'architecte / Koninklijk besluit betreffende de vrijstelling van de stage van architect. Published in the Moniteur Belge / Belgische Staatsblad the 11 of April 2011. The full text can is available in <www.ejustice.just.fgov.be>.

30 Dekret über Maßnahmen im Unterrichtswesen und in der Ausbildung 2009 (Art. 1 bis 11).

31 Ordonnance « portant statut des agences de voyage » / Ordonnantie " houdende het statuut van de reisagentschappen ". Published in the Moniteur Belge / Belgische Staatsblad the 3 of May 2010. The full text can is available in <www.ejustice.just.fgov.be>.


33 Arrêté du Gouvernement de la Communauté française déterminant les modèles des diplômes et de leur supplément délivrés par les Instituts supérieurs d'Architecture et le jury d'enseignement supérieur de la Communauté française délivrant le même diplôme / Besluit van de Regering van de Franse Gemeenschap tot bepaling van de modellen voor de diploma's en hun toevoegsel uitgereikt door de Hogere Architectuurinstituten en de examencommissie voor Hoger onderwijs van de Franse Gemeenschap die hetzelfde diploma uitreikt . Published in the Moniteur Belge / Belgische Staatsblad the 12 of August 2008. The full text can is available in <www.ejustice.just.fgov.be>.

34 Erlass der Regierung über den nicht dringenden Krankentransport.
- The Royal Decree of 17 May 2007 amending the Royal Decree of 6 September 1993 protecting the professional title and the practice of the profession of real estate.\(^{35}\)

- The Decree of 5 October 2012 of the Flemish Government in implementation of the Decree of 2 March 2007 concerning the charter of Travel Agencies.\(^{36}\)

- The Order of 13 June 2008 of the Government of the French Community determining the models of diplomas and their supplement issued by the Colleges of Arts.\(^{37}\)


- The most important one we can find it in the recital 25 in which with the introduction of a new article 49.a. a new common training framework will be introduced. This in order to make wider automatic recognition for professional qualifications. With this measure a large group of Member States will be allowed to agree in curricula base on common sets of knowledge, skills and competences.\(^{39}\)

\(^{35}\) Arrêté royal modifiant l’arrêté royal du 6 septembre 1993 protégeant le titre professionnel et l’exercice de la profession d’agent immobilier / Koninklijk besluit tot wijziging van het koninklijk besluit van 6 september 1993 tot bescherming van de beroepstitel en van de uitoefening van het beroep van vastgoedmakelaar. Published in the Moniteur Belge / Belgische Staatsblaad the 19 of June 2007. The full text can is available in <www.ejustice.just.fgov.be>.

\(^{36}\) Arrêté du Gouvernement flamand modifiant différents arrêtés en matière de l’hébergement touristique et du statut des agences de voyage / Besluit van de Vlaamse Regering tot uitvoering van het decreet van 2 maart 2007 houdende het statuut van de reisbureaus. Published in the Moniteur Belge / Belgische Staatsblaad the 23 of November 2012. The full text can is available in <www.ejustice.just.fgov.be>.

\(^{37}\) Arrêté du Gouvernement de la Communauté française déterminant les modèles des diplômes et de leur supplément délivrés par les Ecoles supérieures des Arts. Published in the Moniteur Belge / Belgische Staatsblaad the 29 of August 2008. The full text can is available in <www.ejustice.just.fgov.be>.

\(^{38}\) It was published in the Official Journal on 28 December 2013 and it will come into force the 18 of January 2014. The Member States will have 2 years transposition period, this means till the end of 2015, in which to make the necessary adjustment to the national legislation. As far as the present report is written Belgium has not transposed it yet. Nevertheless it has still time to do it. The Directive covers the 28 EU Member States and the 3 EEA countries. The full text can be found in <www.ec.europa.eu>.

Another implementation in regard with the previous, is the one included in article 49.2.d. which indicates that the common training frameworks will be designed in line with the European Qualification Framework. It is the recital 11 the one which describes the European Qualification Framework as “a tool designed to promote the transparency and comparability of professional qualifications”. The scope of the European Qualification Framework is much broader, embracing all qualifications in the post-secondary education sectors, whether in vocational education and training or in higher education, whether professional or academic.\textsuperscript{40}

However of this amendments of the Recognition Directive, it is time to move to the professional qualification recognition system in Belgium. Here it is necessary to take into account the monist legal tradition applicable in Belgium, and that has been broadly explained in the first Belgian report, to which I refer to. So having this in mind, the Directive will be direct applicable in Belgium.

The present report will be focused on the general qualifications recognition systems. This means that specific professions, named ‘regulated professions’ will be not under the present study. A ‘regulated profession’ or a ‘protected profession’ is a professional activity which access and practice is determined by law\textsuperscript{41}. For those professions, specific professional qualifications are necessary\textsuperscript{42}. In this respect, it is important also to highlight that certain professions are excluded from the ambit of application of the Directive and they are covered by another directives. This is the case of the official auditors who are covered by the scope of the Directive 2006/43/EC, insurance intermediaries who are covered by Directive 2002/92/EC, or lawyers wishing to work in another Member State under their home-country professional titles who are covered by the Directive 77/249/ECC and 98/5/EC. So the Directive 2005/36/EC applies to all the professions that are not covered by specific directives. However this specific professions are not a part of the present report they will be considered.

Once we have the legal framework some questions in order to have a clear overview about the qualification recognition will be answered, in general terms.

The first question that it will be answered it how the recognition of diplomas works in Belgium. This comes in first places, as in many professional activities this will be the first step in order to exercise a profession. In this sense a distinction has to be made, mainly between the different Communities


\textsuperscript{41}“What is the value of a foreign certificate in Flanders?” Naric-Vlaanderen in 15 questions. The full text can be found in <www.ond.vlaanderen.be/naric/en/procedures/professional-recognition/index.htm#wat>.

\textsuperscript{42}The list of protected professions in Belgium are the physician, nurses responsible for general care, midwife, pharmacist, veterinarian, surgeon and surgeon, which are also considered regulated professions in the rest of the Member States of the European Economic Area and Switzerland.
existing in Belgium. As depending on which one of them we would like to work, the authority to refer the recognition application is different.

In Flanders, it will be NARIC - Vlaanderen the competent authority to refer to. This authority is responsible for recognizing the equivalence of foreign study certificates. NARIC also works as information center responsible for giving information on the recognition of foreign certificates delivered for degrees obtained in higher education, higher vocational education, adult education and secondary education. The recognition of equivalence of a foreign diploma for higher education normally refers to ‘academic recognition’. Equivalence is awarded in the name of the Flemish Minister for Education, Youth, Equal Opportunities and Brussels Affairs by the head of division of the EVC Services Division for Quality Assurance in Education and Training. This procedure will apply when a foreign diploma of higher education would like to be recognized. In case a diploma of adult education would like to be recognized the procedure will be the same as of the higher education and it will be awarded by the same institution. As it has already abovementioned the procedure will differ when the recognition of a diploma of a regulated profession, a foreign teaching diploma, doctor of medicine or a diploma of nursing will be pursue.

The procedure is assessed against a number of criteria such as; the characteristics and structures of the foreign educational system, the level of the institution, the level of the training programme, the essential components of the training programme, the work placements and dissertations, the student workload, the conditions for admission to the training programme and relevant professional experience. In this recognition process, NARIC, normally invoke to at least two Flemish high education institutions to give a reasoned advice about the value of the foreign diploma, unless the training programme is only delivered by one institution. The law stipulates that the expert of the institutions have forty days to give their advice. This procedure awarding the equivalences is based on the following legal framework:

43 The diplomas of higher education, adult education and secondary education. It is also the responsible authority for the professional recognition of teaching diplomas. NARIC also issues certificates to holders of Flemish diplomas abroad.

44 NARIC-Vlaanderen provide to the user in its wep page <www.ond.vlaanderen.be> with ans usefull ’step-by-step guide’ in order to see the exact procedure to the recognition of the different diplomas.

45 See further <www.ond.vlaanderen.be>.

46 This general information have been taken from the NARIC web page <www.ond.vlaanderen.be>.

47 If the advising is mainly positive and the head of division has the same opinion, full recognition is granted by issuing a ministerial decree of equivalence. On this basis, the holder of a foreign diploma has the same rights as the holder of the equivalent Flemish diploma that is mentioned in the decree. If advice is mainly negative and the head of division has the same opinion, you are officially informed about the reasons why the recognition is not granted. See <www.ond.vlaanderen.be>.
- the Flemish Government Decree of 14 October 1992 for equivalence with a Flemish academic training programme and;

- the Flemish Government Decree of 10 June 1997 for equivalence with a Flemish training programme in colleges of higher education.

It is has to be pointed out that the recognition procedure will differ also depending on the aim, i.e., if the diploma holder wants to work in the Flemish Region or if the diploma holder wants to continue its studies in a Flemish institution. In the case that the recognition would be use to get a job, normally no application for equivalence is required. However, pursuant to article 2 and 3 of the Flemish Government Decree of 17 September 2010, a Dutch degree of “bachelor”, “master” or “doctor” is automatically equivalent to the level of a Flemish degree of “bachelor”, “master” or “doctor”, respectively\(^48\).

In Flanders is also possible to get the professional recognition of a foreign diploma. This procedures is meant for nationals of the European Economic Area (EEA) and Switzerland, who are holders of a diploma gain in the EEA or Switzerland which gives access to a regulate profession. If the diploma willing to get the professional recognition has been obtained in a non-EU country, the procedure to follow is the above mentioned one. This professional recognition regulates access to that professions.

The institutions to where to refer this professional recognition, of a diploma obtaining in the EEA and Switzerland or in a non-EU country\(^49\), are the following ones\(^50\):

- For doctors, nurses, pharmacist, dentist, midwifes, paramedical professions and veterinaries the correspondent authority is the SPF Santé Publique, Sécurité de la Chaîne alimentaire et enviroment / FOD Volksgezonheid, Veiligheid van de voedseketen en Leefmilieu.

- For architects, accountants and tax advisors, opticians is the SPF Economie, P.M.E., Classes moyennes et energie / FOD Economie, K.M.O., Middenstand en Energie.

- NARIC-Vlanderen in the Flemish Community is competent for the professional recognition of a foreign teaching diploma\(^51\). In the Federation Wallonie – Brussels the competent is Centre Naric de la CF and the Ministerium der Deutschsprechigen Gemeinschaft.

\(^48\) See <www.ond.vlaanderen.be>.

\(^49\) In the non-EU country, just for the reason that the European Directive cannot be invoke, so that is why it falls back to the procedure for the recognition of equivalence of a foreign diplomas.

\(^50\) The detailed list of institutions and correspondent persons to refer to is available in <www.belspo.be>.

\(^51\) The procedure to apply for this recognition is settle down in the website <www.ond.vlaanderen.be>. See also <www.naric.be>.
- For lawyers and notaries is the SPF Justice / FOD Justitie, the Ordre des Barreaux / Orde van Vlaamse Balies, the institut des juristes d’enterprises / instituut voor Bedrijfsjuristen.

In Wallonia, is the Federation Wallonie-Bruxelles the competent authority to refer to when willing to have and academic recognition of a foreign university degree. The legal framework in where the diplomas recognition lie down in Wallonia is:

- The Royal Decree of 20 July 1971 laying down the conditions and procedure for granting equivalence of degrees and diplomas of foreign studies;
- The Decree of the Government of the French Community of 28 August 1996 determining the conditions and procedure for granting equivalence of foreign degrees or certificates to academic degrees;
- The Decree of the Government of the French Community of 19 March 1997 regulating the operation of the equivalence Commission as provided for in Articles 3 and 4 of the Decree of the Government of the French Community of 28 August 1996 determining the conditions and the procedure for Granting of equivalence of diplomas or certificates of studies in foreign academic degrees;
- the Decree of 7 November 2013 defining the landscape of higher education and academic organization studies.

52 See <equivalences.cfwb.be>.
57 Décret du 7 novembre 2013 définissant le paysage de l’enseignement supérieur et l’organisation académique des études.
The advisory body would analyze each file individually, so the automatic recognition equivalence does not work, even for the European diplomas 58. In order that the equivalence will be recognized is necessary that:

- the institution that issued the foreign diploma recognized by the competent foreign authorities (in general the Ministry of Education) of the issuing country;

- notes that the diploma of higher education in the country of issuance;

- the legal length of courses attended is at least the same as the legal duration of studies to obtain the corresponding diploma in the Wallonia-Brussels;

- for most fields of study, to realize a work of end of studies which can be found corresponding to that required of students in the Wallonia-Brussels59.

As regards the equivalence applications with a university degree when the advisory body delivers a negative opinion concerning academic recognition, it examines the possibility of granting a level equivalent to the generic academic degree of master (2nd cycle) and transition of Bachelor (1st cycle).

The recognition or validation of competencies how it works in Belgium? In case that a recognition of competencies would like to be made, here also will be necessary to distinguish where the professional would like to establish and had its skills or competences recognized. As the procedure and the institutions responsible for will be different depending on the Community. The validation of competences is for people over 18 years, residing in Belgium and having work experience but no diploma or certificate corresponding thereto. So note, that the resident requirement is on the base of the procedure.

In Flanders, the institution responsible for is the EVC 60 (Erkennen van verworven competenties / recognition of acquired competences authority). EVC procedures provides an alternative route to

58 the so-called Lisbon Convention of 1997 defines the general principles regarding the recognition of foreign diplomas of higher education in the European region as defined by UNESCO (that is to say, larger than the European Union). It does imply any automatic recognition of diplomas in the European region. Moreover, the Bologna Process is an intergovernmental cooperation process initiated in 1999 on a voluntary basis, which initially aimed to harmonize the structural aspects of the higher education systems in Europe (that is to say, larger than the European Union), and it in 2010 to establish the European Higher Education Area. Thus, the Bologna Process does not imply automatic recognition of diplomas in the European region. Finally, higher education, included in the recognition of foreign diplomas, remains an exclusive competence of Member States of the European Union.

59 From the time when all required documents have been provided for the constitution of the file, the service legally has 4 months to solicit the opinion of the advisory body and 40 days to submit to the interested (e) the decision that has been taken on the basis of this opinion.
obtain a certificate of recognition, outside the traditional educational and training circuit. The competencies, that it will recognized, are an integrated set of knowledge, skills and attitudes that controls and someone needs to perform to task or assignment. In the other hand, the acquired competences supposes a learning process. The way someone taught or the learning process itself of secondary importance. People can competencies both at work and at home, acquired in an education setting or during leisure activities. EVC gives someone the opportunity to know his can and attitudes recognized, regardless of the context in which he acquired the knowledge, skills and attitudes. The competences of the person to be assessed on the basis of a standard. By this procedure a person can make his or her recognize competencies. The procedure consists of three steps: identify, assess and recognize. Going through an EVC procedure can lead to a formal recognition, with evidence of competence, regardless of how they were acquired.

In Wallonia is the Validation des compétences (validation of competences) the responsible of this fact. The procedure the same as the in the Flemish region, just the authority who will grant the validation will differ. The procedure is based on 4 steps to get a titled of jurisdiction, official proof of skills; first advice will be granted by a counselor or on the website. The second step is contact a skill validation center and register. The third step is to have a validation test and the fourth and last step is to receive a title of competence, when pass the test that poof the mastery in a professional sector by an official document.

In Brussels, to obtain a validation of skill of competences both of the above mentioned institutions can be contacted.

In the following lines, we will review some relevant cases law in the recognition of qualifications:

1. The resolution given by the Council of the State to the claim of the architects in Belgium is as follows:

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60 See <www.evcvlaanderen.be>.

61 It is possible to pass a practical test for obtaining a certificate of competences – “Evaringsbewijs” – for specific professions in the Flemish Community. The web site in where more information can be obtained is <www.ervaringsbewijs.be>. In this web site, also a list of profession that already have this professional recognition test is available.


63 To have further information about this topic consult the CEDEFOP and European Commission Education and Culture DG. (2009). European Guidelines for validating non-formal and informal learning in <www.cedefop.europa.eu>.

64 See <www.validationdescompetences.be>.

65 The summary of the present resolution has been taken from <www.jura.be>
“By loading the King to enact the conditions under which the Provincial Councils of the Order of Architects provide all or part of the course, the law of 22 December 2009 intended to limit the discretion previously exercised by these councils. By setting these conditions, the king necessarily conducts an assessment of what benefits equivalent to the internship. It follows neither the text nor the preparatory work that the King should leave this point an entire discretionary discretion to the provincial councils. Rather, it is to be noted that the legislator replaced the words may waive the verb provide. In deciding that the exemption of the training is given to nationals of Member States of the European Community or a State party to the Agreement on the European Economic Area who are in possession of a diploma, certificate or other as it aims, King binds to that extent the jurisdiction of the provincial councils but does not violate, for that reason alone, Article 52, paragraph 1, of the Law of 26 June 1963 establishing a College of Architects.

The reference in the contested Royal Decree of 23 March 2011 relating to the delivery of architectural training to securities included in Annexes No. 1, b, and 2 a, the law of 20 February 1939 on the Protection of title and the architectural profession does not guarantee the existence of a minimum professional experience. Indeed, these annexes list of qualifications without imposing they are accompanied by a certificate stating the effective exercise of architectural activities. Although it is possible to consider that the titles listed in Annex 2, has as it aims Denmark, Germany, Greece, Spain, France, Ireland, Italy, the Netherlands, Austria, Portugal, the UK, Finland and Sweden were granted several years before the entry into force of the impugned order, no certainty exists as to the experience the holders of professional diplomas. The mere holding of a title does not necessarily and automatically imply the exercise of the profession to which the title gives access. It does not follow from the order under appeal that the holders of the securities it is not benefit from the internship exemption only if they are “fully qualified professionals.” In deciding that the course must be provided under section 50 of the Act of 26 June 1963 establishing a College of Architects persons who are in possession of a title listed in the Annexes 1, b, and 2 a, above The decree attacked violates Article 52, paragraph 1, of the Law, which allows not only to grant this exemption nationals concerned having made abroad, are deemed equivalent benefits in the course, that simple holding the title is not enough to establish.

The following question is put to the Court of Justice of the European Union: As they oblige the Member States to recognize the formal qualifications they seek, as regards access to the professional activities and exercise the same effect on its territory as evidence of formal qualifications issued from Articles 21 and 49 of Directive 2005/36 / EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications have to be interpreted as prohibiting a State to require that to be included in a table of the Order of Architects, the holder of an architect's training heading in accordance with Article 46 of that Directive or that of a as referred to in Article 49.1 also satisfies the conditions of professional internship or experience equivalent to those required of holders of diplomas awarded within its territory after obtaining thereof?”.
2. The Comm. of Brugge (Ostende Section) in the resolution given the 10 June 2010 indicates that:

“The fact that the real estate profession is not protected in the Netherlands does not allow a Belgian agent who is not authorized to practice that profession in Belgium to exercise all the same that profession without authorization in Belgium from the Netherlands. The service provider (agent) should fall under the disciplinary provisions of the welcoming Member State who maintain a direct link with the professional qualifications.

The guarantee offered by Directive 2005/36 / EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications to people who have obtained their professional qualifications in a Member State to have access to the same profession in another member state and be able to exercise the same rights as nationals of that country, does not remove the obligation of the migrant service provider to take into account any non-discriminatory conditions in that Member State on the exercise of this profession, provided they are justified and reasonable from an objective point of view”.

3. The Council of the State in its resolution No. 219.366 of 15 May 2012 indicates that:

“It follows both from the case law of the Court of Justice that Article 152 § 5 of the EC Treaty and the twenty-sixth recital to Directive 2005/36 of 7 September 2005 on the recognition of professional qualifications as the right Union does not affect the competence of Member States to organize their social security systems and to adopt, in particular, provisions intended to organize health services such as pharmacies. However, in exercising that power Member States must comply with Community law, including the provisions of the ECHR, such provisions with the prohibition on Member States from introducing or maintaining unjustified restrictions on the exercise of these freedoms in the healthcare field. In assessing the fulfillment of this obligation, must be taken into account that the health and life of humans rank foremost among the assets and interests protected by the Treaty and it is for Member States to decide the level they intend to ensure the protection of public health and how that level is to be achieved; that level may vary from one Member State to another, it must be recognized to them a margin of appreciation”.

4. The Court of Cassation in the case RG D. 99.0018.F, of 5 September 2002 states that:

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66 The summary of the present resolution has been taken from <www.jura.be>

67 The summary of the present resolution has been taken from <www.jura.be>

68 The summary of the present resolution has been taken from <www.jura.be>
“Where a Community national applies to the Council of the Order of Architects for authorization to practice the profession, the Bar Council must take into consideration all the diplomas, certificates and other qualifications, and the relevant experience of the person concerned by making a comparison between, on the one hand, the skills attested by these qualifications and experience and, on the other hand, the knowledge and qualifications required by national law, even when a Directive on the mutual recognition of diplomas has been adopted for the profession concerned, but the application of this Directive does not lead to the automatic recognition of the applicant or securities (art. 52, 57 and 177 EC Treaty)”.

5. The Council of the State in its resolution No. 132.003 of 3 June 2004 indicates that:

“The regulatory powers of the practice of medicine, the art of nursing and allied health professions is not transferred to the communities and remains reserved for the federal government. Thus, the federal government may in particular establish rules for access to a profession in the medical sector and impose general rules or aptitude evidence in relation to the exercise of that profession. The jurisdiction of the federal government to regulate the practice of art. Nursing involves skill make the recognition of a specific professional title for nurses to obtain a certain degree and the execution of some training. In this case, the minimum training content is defined without establishing this content exhaustively”.

ESTABLISHMENT IN BELGIUM (TEMPORARY – PERMANENT)

TRANSPOSITION OF THE SERVICE DIRECTIVE.

As it is known Belgium is a Federal State, and as a Federal entity, with some particularities, in the transposition of the Services Directive into the Belgian legal system has required several steps to be taken at all levels of Government –power. The impact that the Services Directive had into the Belgian legal system it was not so profound or deep as it should be expected due to the simplification of the administrative procedures have already been undertaken for a number of years prior to the

69 The summary of the present resolution has been taken from <www.jura.be>

70 An extensive information regarding the division of competences between federal entities in Belgium can be found on the Belgium report, in deliverable 5.1. on the categorization of economic rights. It is good, anyway, to remind that in Belgium there is a Federal Government, a Community Government (Flemish-speaking Community, French-speaking Community and German-speaking Community) and a regional Government (the Flemish Region, the Walloon Region and the Brussels-Capital Region), and as well as at the local authorities.

adoption of the Directive. With this aim, in 1998 the Agency for Administrative Simplification (hereinafter referred to as ASA) was set up to make proposals to reduce administrative complexity and related costs for the companies. So as it is expected the ASA has played a significant role in the transposition of the Chapter II of the Directive named ‘Administrative Simplification’. As it is highlighted by A. GEULETTE, the task of coordinating the transposition of the Directive has been entrusted to the Federal Public Service Economy, SMEs, and independent professions and energy. Apart from the legislative and governmental bodies at the federal, regional, and community levels, the Directive include the Commissions for the Protection of Privacy, the Central Council for the Economy, the National Labour Council, The National Bank of Belgium, and the Federal Planning Bureau.

So in the regard of the gold of the present report, namely, to provide an overview about the access and establishment of economic actors -EU and non-EU- to the European and Internal Belgium market


73 ASA was created by the Law of 10 February 1998 for the promotion of the entrepreneurship (Loi-programme pour la promotion de l’entreprise indépendante /Programmawet tot bevordering van het zelfstandig ondernemerschap), as a branch of the Chancellery of the Prime Minister. This law has been implemented by the Royal Decree of 21 October 1998 regarding the implementation of the Chapter I of Title II of the programm law of 10 Februray 1998 for the promotion of indepent entrepreneurs (Arrêté royal portant exécution du Chapitre Ier du Titre II de la loi-programme du 10 février 1998 pour la promotion de l’entreprise indépendante / Koninklijk besluit tot uitvoering van Hoofdstuk I van Titel II van de programmawet van 10 februari 1998 tot bevordering van het zelfstandig ondernemerschap ) Initially, ASA was tasked to make proposals to reduce administrative complexity on the establishment of enterprises, but in 2003 the objectives of ASA has been extended to the following tasks, envolving now the citizens and not only the enterprises: make proposals for simplification; stimulate and coordinate initiatives, carry out studies; develop and implement a methodology for measuring costs for businesses and SMEs; organize cooperation between different federal administrations; develop an administrative impact assessment in collaboration with the departments of the Ministry of the Middle Classes; organize consultation on administrative simplification with all levels of government, representative partners among employed and SMEs, as well as with European institutions and other international institutions.

Furthermore, ASA is responsible also: legal support and coordination of several e-government projects (the technical aspects are the competence of FEDICT); management Contact Point Kafka; in consultation with the authorities during the preparation of simplification initiatives; the reporting of the results. See further <www.simplification.fgov.be>.


linked with the recognition of their professional qualifications and their purpose of establishment in Belgium, the main legal instruments aim to transpose the Directive are:

- The order of the Flemish government of 19 July 2007 implementing the Decree of 2 March 2007 establishing the status of travel agencies.

- The Walloon decree of 3 April 2009 relating to the registration or the authorization of employment agencies.

- The Decree of the German-speaking Community of 11 May 2009 relating to the authorization of temporary work agencies and to the surveillance of private employment agencies.

- The order of the Flemish government of 15 May 2009 implementing the decree of 10 July 2008 relating to tourist accommodation.

- The order of Flemish government of 5 June 2009 organizing employment and professional training.

- The federal Law of 7 December 2009 amending the law of 16 January 2003 setting up a centralize company register.

The list of legal framework has been shortened and adjusted with the general legislation to the scope of the present report. For example the environmental laws, and specific laws for specific kind of services have not been taken into account in the present report, and this because the broadness of the topic. The list have been taken from the list made by op. cit. A. GEULETTE, Implementation of the Service Directive in Belgium in: STELKENS, U, WEIB,W and MIRSCHBERGER, M (Eds), The implementation of the EU Services Directive. Transposition, Problems and Strategies, pp. 90-99.

Besluit van de Vlaamse Regering tot uitvoering van het decreet van 2 maart 2007 houdende het statuut van de reisbureaus. Published in the Moniteur Belge / Belgische Staatsblad the 4 of September 2007. The full text can is available in <www. ejustice.just.fgov.be>.

Décret relatif à l’enregistrement ou à l’agrément des agencies de placement. Published in the Moniteur Belge / Belgische Staatsblad the 5 of May 2009. The full text can is available in <www. ejustice.just.fgov.be>.

Dekret über die Zulassung der Leiharbeitsvermittler und die Überwachung der privaten Arbeitsvermittler. Published in the Moniteur Belge / Belgische Staatsblad the 13 of July 2009. The full text can is available in <www. ejustice.just.fgov.be>.

Besluit van de Vlaamse Regering tot uitvoering van het decreet van 10 july 2008 betreffende het toeristische logies. Published in the Moniteur Belge / Belgische Staatsblad the 12 of October 2009. The full text can is available in <www. ejustice.just.fgov.be>.

Besluit van de Vlaamse Regering houdende de organiserieng van de arbeidsbemiddeling en de beroepsopleiding. Published in the Moniteur Belge / Belgische Staatsblad the 23 of September 2009. The full text can is available in <www. ejustice.just.fgov.be>.

Loi modifiant la loi du 16 janvier 2003 portant création d’une Banque-Carrefour des Entreprises, modernisation du registre de commerce, création de guichets-entreprises agréés et portant diverses dispositions, en ce qui concerne les tâches du guichet unique / Wet tot wijziging van de wet van 16 januari 2003 tot oprichting van een Kruispuntbank van Ondernemingen, tot modernisering van het handelsregister, tot oprichting van erkende
The Walloon Decree of 10 December 2009 aiming to transpose the Services Directive.\textsuperscript{83}

The Walloon Decree of 10 December 2009 aiming to transpose the directive in matters falling within the scope of Article 138 of the Constitution.\textsuperscript{84}

The Walloon Decree of 10 December 2009 modifying certain pieces of legislation with a view to transpose the Directive in matters falling within the scope of 138 of the Constitution.\textsuperscript{85}

The Federal Law of 22 December 2009 adapting specific legislation to the Directive.\textsuperscript{86}

The Royal Decree of 26 February 2010 amending the royal decree of 17 February 2005 regulating the registration of persons who are engaged in the non-judicial recovery of debts and the guarantees such persons must provide.\textsuperscript{87}

The Federal Law of 26 March 2010 on services.\textsuperscript{88} This law has been repealed by the Act of 17 July 2013 relating to the insertion of Book III ‘Freedom of establishment, provision of services and general

ontemningsloketten en houdende diverse bepalingen, wat de taken van het één-loket betreft. Published in the Moniteur Belge / Belgische Staatsblaad the 24 of December 2009. The full text can is available in <www.ejustice.just.fgov.be>.


\textsuperscript{86} Loi adaptant curtaines legislations pa la Directive 2006/123/CE du Parlement européen et du Conseil relative aux services dans le marché intérieur / Wet tot aanpassing van sommige wetgevingen aan de Richtlinjn 2006/123/EG van het Europees Parlemente en de Raad betreffende diensten op de interne markt. Published in the Moniteur Belge / Belgische Staatsblaad the 22 of December 2009. The full text can is available in <www.ejustice.just.fgov.be>.

\textsuperscript{87} Arrêté Royal modificant l’arrêté royal du 17 février 2005 réglementant l’inscription des personners qui exercent une activité de recouvremente amiable de dettes et les guaranties don’t ces personnes doivent disposer / Koninklijk besluit tot wijziging van het koninklijk besluit van 17 februari 2005 tot regeling van de inschrijving van de personen die een activiteit van minnelijke invordering van schulden uitoefenen en van de waarborgen waarover deze personen moeten beschikken. Published in the Moniteur Belge / Belgische Staatsblaad the 12 of March 2010. The full text can is available in <www.ejustice.just.fgov.be>.

\textsuperscript{88} Loi sur les services / Dienstenwet. Published in the Moniteur Belge / Belgische Staatsblaad the 30 of April 2010. The full text can is available in <www.ejustice.just.fgov.be>.


- The Ministerial order of 22 April 2010 concerning the professions of butcher.

- The order of the Government of the Brussels-Capital Region of 8 July 2010 modifying the order of the government of the Brussels-Capital Region of 29 March 2007 relating to taxi and limousine services.

- The Royal Decree of 18 of August 2010 amending the internship and ethics regulations established by the National Council of the Order of Architects.

- The Royal Decree of 26 August 2010 modifying the royal decree of 30 April 2004 containing measures relating to the surveillance of the diamond sector.
The Royal Decree of 17 November 2010 modifying the royal decree of 23 May 2000 containing specific provisions concerning the acquisition, the warehousing, the prescription, the provision and the administering of medicines for animals by veterinarians and concerning the possession, and administering of medicines for animals by persons responsible for animals.95

The Royal Decree of 23 November 2010 on mills and flour trade.96

The Royal Decree of 29 November 2010 on transposing Article 42 of the Directive.97

The scope of application of all the above mentioned (and the not mentioned but the rest of legal instruments that help in implementing the Services Directive) “seems to apply not only to the provisions of transnational services, but also to the provision of purely domestic services.”98

As it can be notice by the lector, the implementation of the Services Directive in Belgium was effectuated, first of all in an horizontal way, i.e., horizontal legal instruments were adopted. This contributes to a partly implement the Services Directive by introducing a number of autonomous provisions, i.e., provisions not modifying existing laws. In a second step, a vertical legal instruments were adopted that aimed to amend or repeal specific pieces of legislation, to ensure compliance with the Directive. The third step in the implementation procedure was to adopt additional pieces of legislation to implement certain provisions of the Directive. Also a huge number of additional orders (that have not been detailed in the present report) were adopted at the executive level. The last step of this implementation procedure, is that I have told at the first point, in Belgium a number of law and 95 Arrêté royla modifiant l’arrêté royal du 23 mai 2000 portant des dispositions particulières concernant l’acquisition, la détention d’un dépôt, la prescription, la fourniture et l’administration de médicaments destinés aux animaux par le médecin vétérinaire et concernant la détention et l’administration de médicaments destinés aux animaux par le responsable des animaux / Koninklijk besluit tot wijziging van de koninklijk besluit van 23 mei 2000 houdende bijzondere bepalingen inzake het verwerven, het in depot houden, het voorschrijven, het verschaffen en het toedienen van geneesmiddelen bestemd voor dieren door de dierenarts en inzake het bezit en het toedienen van geneesmiddelen bestemd voor dieren door de verantwoordelijke voor de dieren. Published in the Moniteur Belge / Belgische Staatsblad the 25 of November 2010. The full text can is available in <www.ejustice.just.fgov.be>.

96 Arrêté Royal relatif aux meuneries et au commerce de la farine / Koninklijk besluit betreffende de maalderijen en de handel in meel. Published in the Moniteur Belge / Belgische Staatsblad the 30 of November 2010. The full text can is available in <www.ejustice.just.fgov.be>.

97 Arrêté Royal transposant l’article 42 de la Directive 2006/123/CE du Parlement Européen et du Conseil relative aux services dans le marché intérieur / Koninklijk besluit tot omzetting van artikel 42 van de Richtlijn 2006/123/EG van het Europees Parlement en de Raad betreffende diensten op de interne markt. Published in the Moniteur Belge / Belgische Staatsblad the 7 of December 2010. The full text can is available in <www.ejustice.just.fgov.be>.

decrees—that were compliant with the Services Directive—already existed before the publication of the Services Directives, so this made the implementation in that field unnecessary.\(^99\)

Once, an idea have been made about the huge transposition and implementation work that Belgium experienced in that process, is time to see the important aspects that the Services Directives brought into the national Belgian law, in order to facilitate the entrance and the establishment of the actors to the internal and the European market.

In order to facilitate the establishment, the Services Directive in its article 6 creates a “point of single contact". Into the Belgian Legislation the Point of Single Contact was created by the Law of 7 December 2009, amending the Law of 16 of January 2003 setting up a centralized company register\(^100\). The points of single contact were assigned with the task of being the company dockets.\(^101\)

In the Belgian case, the company dockets have more competences than the merely given by the Services Directive to the points of single contact. “In accordance with article 6 of the Directive, company dockets are responsible for enabling service providers to complete all procedures and formalities needed to undertake service activities. In view of the division of powers between the various levels of government, regions and communities will also be involved in the functioning of company dockets."\(^102\)

Another measure taken by the Services Directive to make easier the establishment of economic actors across the European market was to enhance the right to information, contained in the article 7. This article has been partly transposed into article 5 of the Law of 7 December 2009. “Pursuant to this provision, company dockets must ensure that they make the following information easily accessible to providers and recipients: requirements applicable to providers, in particular those


\(^100\) Loi portant c‘reation d’une Banque-Carrefour des Entreprises, modernisation du registre de commerce, création de guichets-entreprises agréés et portant diverses dispositions / Wet tot oprichting van een Kruispuntbank van Ondernemingen, tot modernisering van het handelsregister, tot oprichting van erkende ondernemingsloketten en houdende diverse bepalingen. Published in the Moniteur Belge / Belgische Staatsblaad the 5 of February 2009. The full text can is available in <www.ejustice.just.fgov.be>.

\(^101\) Ondernemingsloketten / guichets d’entreprises.

requirements concerning the procedures and formalities to be completed to access and exercise services activities; the contact details of the competent authorities enabling the latter to be contacted directly, including the details of those authorities responsible for matters concerning the exercise of service activities; the means of, and conditions for, accessing public registers and databases on providers and services; the means of redress that are generally available in the event of a dispute between the competent authorities, from which providers or recipients may obtain practical assistance”\(^{103}\). It is to say that since the provisions of the Directive required the implementation of a number of organizational measures, the Belgian Federal Government, entrusted ASA with the task if designing a content management system\(^{104}\) that would be accessible through a common portal to all levels of government\(^{105}\).

A further step, but not a new one, in this procedure of facilitate the establishment of services providers within the Belgian and European internal market is the procedures by electronic means. The article 8 of the Services Directive was transposed into the article 5 of the Law of 7 December 2009. This articles state that “company dockets must be easily accessible at a distance by electronic means in order to carry out all procedures and formalities related to access to a service activity”\(^{106}\). In this regard, it is has to be pointed out that a number of legal provisions previously existed in order to encourage administrative authorities to enable electronic communications with citizens and companies\(^{107}\).


\(^{104}\) The so-called “product catalogue” or “guide procedure”. This is searchable guide on the basis of a number of different criteria, including the location of services providers and activities. “The guide to procedures contains detailed information for each procedure or requirement, including the title of the procedure or requirement, the procedure for filing a requires, the competent administrative authority, the sanctions and rights of redress, the evidence to be submitted, and the existence of a public register where the authorization is listed other than the centralized company register”. Op. cit. GEULETTE, “Implementation of the Service Directive in Belgium” in : STELKENS, U, WEIB,W and MIRSCHBERGER, M (Eds), The implementation of the EU Services Directive. Transposition, Problems and Strategies, pp. 104. The catalogue can be consulted in <www.simplification.be>. In the regional level see in Wallonia <www.cesrw.be> and in Flanders <www.vvsg.be>.


\(^{106}\) The exception to this rule is the local controls of premises where the service is provided as well as the equipment used by the provider of services concerned. Op. cit. GEULETTE, “Implementation of the Service Directive in Belgium” in : STELKENS, U, WEIB,W and MIRSCHBERGER, M (Eds), The implementation of the EU Services Directive. Transposition, Problems and Strategies, pp. 104-105.

In continuation of the implementation process, it has to be taken into account the authorization schemes. Article 9 of the Directive was transposed in a federal level into article 4 of the Belgian Law of Services of 26 March 2010. This article provides that “when an authorization is required for access to service activities and their exercise, its necessity must be justify by an overriding reason relating to the public interest, and the objective pursued cannot be attained by means of a less restrictive measure. Similar provisions have been enacted at the level of the regions and Communities. The decree transposing of the Directive and the parliamentary records of the law do not indicate that there has been a significant debate regarding the definition of authorization schemes. As it is indicate A. GEULETTE, “a number of national legal provisions have been amended or repealed due to their non-compliance with the article 9 of the Directive. In this regard, Belgium had reported authorization schemes to the Commission in several services sectors, some of which have been repealed while others have been maintained. Authorization schemes were, inter alia, repealed in the mill sector as well as in the sectors of matrimonial intermediary activities and time-sharing activities. Authorization schemes were, inter alia, maintained in the retail sector, in the tourism sector, in

108 Loi sur les services / Dienstenwet. Published in the Moniteur Belge / Belgische Staatsblad the 30 of April 2010. The full text can is available in <www.ejustice.just.fgov.be>.

109 This authorization regime may not be discriminatory. So once the service provider have the qualifications and the prerequisites need by Belgium law to establish in the Belgian territory,


113 The exercise of the activity as travel agent, for the operations of tourist accommodation and camping ground. The relevant law in that field are: The Flemish Decree of 19 July 2007 implementing the Decree of 2 March 2007 establishing the status of travel agencies and in Wallonia the Walloon Decree of 27 of March 2010 fixing the status of travel agencies; the Flemish Decree of 15 may 2009 implementing the Decree of 10 July 2008 relating to
the care sector\textsuperscript{114}, in the sector of heritage protection\textsuperscript{115}, in the sector of employment services\textsuperscript{116}, and for the provision of limousine services\textsuperscript{117m}.

The implementation procedure of the Services Directive in Belgium follows with the \textit{conditions for granting authorization} to establish in the Belgian market. This area was covered by the article 10 of the Services Directive and was transposed into Belgian legal system at federal level into various provisions contained in the above mentioned \textsuperscript{118}Law of Services. This article 10 of the Services Directive was also implemented in a regional and community level\textsuperscript{119}. The provisions contained in this different Decrees transposing the Service Directives in all the power levels “state that the conditions for granting authorization for a new establishment may not duplicate requirements and controls that are equivalent or essentially comparable as regards their purpose to which the provider is already subject in Belgium or in another Member State of the European Union. In this regard, the federal coordinator and the provider must assist the competent authority by providing any necessary information regarding those requirements\textsuperscript{120}m. For that matter, the article 5 of the Flemish Decree provides, as it is pointed out by A.GEULETTE, “that where the competent authority verifies if the applicant satisfies the conditions for granting authorization, for a new establishment, it must “take


\textsuperscript{115} See the German-Speaking Community Decree of 24 of June 2010.

\textsuperscript{116} The present sector has been covered by community legislatura procedure, i.e., it have been the different communities of Belgium the ones which has legislate on that field.


\textsuperscript{118} See articles 5, 7, 9 and 11 of the Belgian Services Law.

\textsuperscript{119} See mainly the Horizontal Walloons Decrees, the French-speaking Community Decree, the Brussels French-Speaking Community Commission Decree and the German-Speaking community Decree.

account” of equivalent conditions that have already been fulfilled in Belgium or in another Member State.121

Article 9 of the Belgian Law on Services –actual article III.2. of the Act of 17 July 2013 relating to the insertion of Book III ‘Freedom of establishment, provision of services and general obligation of companies’ in the Code of economic Law and integration of the definitions in the Book III and enforcement provision of the Book III, in Books I and XV of the Economic Code Law – stated the principle that “an authorization enables the provider to have access to and exercise an activity throughout the entire Belgian territory, with the exception of cases where an authorization for each individual establishment or a limitation of the authorization to a certain part of the territory is justified by an overriding reason relating to the public interest, as well as cases for which the legislator at the federal level is not competent.122 In this regard, the legislator at regional and community level has stated that “an authorization enables the provider to have access to and exercise and activity through the entire territory of the Walloon Region123, the entire territory of the French-speaking region124, the entire territory of the Brussels-Capital Region125 and the entire territory of the Flemish Region.”126 Nevertheless, accordingly with the article 11 of the German-speaking Community Decree, the authorization granted under this provisions enables “the provider to have access to and exercise an activity throughout the entire Belgian territory, provided that cooperation agreement with the competent authorities concerned has been concluded and that an overriding reason relating to the public interest does not require a limitation of the authorization to a well-defined part of the national territory.127


123 See article 9 of the horizontal Walloon Decree.

124 See article 9 of the French-Speaking Community Decree.

125 See article 9 of the Brussels French-Speaking Community commission Decree.

126 See article 6 of the Flemish Community Decree.


Another point to take into account when willing to establish in the Belgian market is the duration of the authorization regulated in the article 11 of the Services Directive. At federal level this article was transposed into article 12 of the Belgian law on services, actual article III.10. of the Act of 17 July 2013 relating to the insertion of Book III ‘Freedom of establishment, provision of services and general obligation of companies’ in the Code of economic Law and integration of the definitions in the Book III and enforcement provision of the Book III, in Books I and XV of the Economic Code Law. This article stated that the authorization granted to a provider has an unlimited duration with the exception that if the “authorization is being automatically renewed, where it is subject only to the continued fulfillment of requirements and the number of available authorizations is limited by an overriding reason relating to the public interest or where a limited authorization period can be justified by an overriding reasons related to a public interest”. Similar provisions are contained in the regional and community legislative level.

The authorization procedure is also very important when establishing in Belgium, permanently or temporary. This procedure was settled in the article 13 of the Services Directive. Before to start to explain how Belgium has transposed this into the internal legislation, it is necessary to have in mind the principle that “in case the authority does not respond to the filed application within the prescribed time, the authorization is “deemed to have been granted to the provider”. Article 13 of the Services Directive, was transposed in a federal level into various provisions on the Belgian Law of Services – actual Act of 17 July 2013 relating to the insertion of Book III ‘Freedom of establishment, provision of services and general obligation of companies’ in the Code of economic Law and integration of the definitions in the Book III and enforcement provision of the Book III, in Books I and XV of the Economic Code Law. Normally, “general rule, the duration of the administrative procedure is determined by particular laws or Decrees”. [...]


130 See the article 12 of the Horizontal Walloon Decree; article 12 of the French-Speaking community Decree; article 12 of the Brussels French-speaking Community Commission Decree; article 9 of the Flemish Decree and; article 14 of the German-Speaking Community Decree.


provisions, where no specific provision is contained in the applicable regulation as regards the duration of an authorization procedure, it must be issued at the latest 30 working days from the date of the acknowledgement of receipt or, where the file is incomplete, from the date on which the application provided the required additional documents 134.

In the following lines, the freedom to provide services in Belgium, and how it was transposed into the Belgian Legislations will be analyzed. The freedom was contained in the article 16 and subsequent articles of the Services Directive. At federal level this provision was transposed into the article 15 of the Belgian law on Services – actual article III.13 of the actual Act of 17 July 2013 relating to the insertion of Book III ‘Freedom of establishment, provision of services and general obligation of companies’ in the Code of economic Law and integration of the definitions in the Book III and enforcement provision of the Book III, in Books I and XV of the Economic Code Law. At regional and Community level article 16 was transposed into the article 15 of the horizontal Walloon Decrees; article 15 of the French-Speaking Community Decree; article 15 of the Brussels French-Speaking Community Commission Decree and; article 17 of the German-Speaking Community Decree with the exception of the Flemish Decree 135 that it does not contain a similar provision 136. The Federal and Regional Governments also adapted some sector-specific legislation to transpose this provision of the Services Directive. The Belgian legislators were not obliged to mention the reasons of their restrictions to the freedom to provide services in their laws. Therefore, the reasons for some restrictive provisions cannot always be identified 137, 138.


134 This time period is 60 days in Flanders as it is stated in the article 8 of the Flemish Decree.

135 The Flemish Community opted for a sector-specific implementation of that freedom.


137a Since Since the entry into force of the Services Directive, there has been one judgment of the Belgian Constitutional Court concerning the annulment of the Decree of the French-speaking region of 30 April 2009. The Decree restricted the freedom of services as regards the accommodation of elderly persons based on reasons of public health. In its judgment, the Belgian Constitutional Court concluded that the accommodation of elderly persons falls outside the scope of the Services Directive according to its Article 2(2)(f). The Belgian Constitutional Court concluded that the requests for authorisation provided for in the Decree are justified by reasons of general interest which are the security and health of elderly persons under Articles 49 and 56 TFEU”. The summary has been taken from the ‘Services Directive: Assessment of Implementation Measures in Member States. National Report for Belgium. Part One: Analysis of the implementation of the freedom to provide services clause’, Millieu Ltd, 2011, p. 18. The full text is available in <www.ec.europa.eu>.
In other to see how is the effective transposition of the Services Directive to allow to establish in Belgium, some activity sectors will be analyzed. The federal Programme Law I of 27 December 2006 entails a horizontal obligation for independent (self-employed) persons providing cross-border services in Belgium to file a prior notification with the Federal Service for Social Security (the “LIMOSA” system) for statistical purposes. The prior notification for independents had to contain in particular information such as; identification data of the self-employed, the national identification number in the country of origin, the VAT number in the country of origin, identification of the agent making the prior notification on behalf of the self-employed person, within others.

Nevertheless, this requirement of prior notification system for Belgium authorities, for employees, trainees and self-employed persons posted to Belgium from any country in the world, was considered a violation of the freedom to provided services by the European Court of Justice. In a judgement of 19 December 2012 in the case C 577/10, European Commission v. Belgium, the Court of Justice ruled that the requirement for independent service providers who are not established in Belgium to submit a prior notification before carrying out their activities in Belgium is contrary to the free movement of services, and thus in regard of the provision contained in the article 56 of the TFEU. “While the Court recognised that Belgium could invoke overriding requirements in the country’s general interest and thus justify a restriction to the freedom to provide services, the legislation went too far for self-employed workers. The competent Belgian ministers did not delay the response following the judgement of the Court of Justice of 19 December 2012 and adjusted the Limosa legislation, taking

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139 Loi-programme (I) / Programmawet (I). Published in the Moniteur Belge / Belgische Staatsblad the 28 of December 2006. The full text can is available in <www.ejustice.just.fgov.be>.

140 Acronym for ‘Landenoverschrijdend Informatiesysteem ten behoeve van MigratieOnderzoek bij de Sociale Administratie’ (cross-border information system for the investigation of migration by the social authorities).

141 “In the event that the self-employed person already has a business number or identification number for social security purposes, this number is sufficient. Also in the case of a self-employed person who is not an undertaking within the meaning of the Law of 16 January 2003, the business number or identification number is sufficient”. See the ‘Services Directive: Assessment of Implementation Measures in Member States. National Report for Belgium. Part Two: Analysis of national requirements in specific service sectors’, Millieu ltd, 2011, p. 7. The full text is available in <www.ec.europa.eu>.


143 The full text of the case can be found in <www.curya.europa.eu>.
into account the scope of the judgement of the ECJ. A first amendment was introduced with a Royal Decree of 19 March 2013, amending the Limosa Decree of 20 March 2007. This adjustment included both foreign and self-employed workers as well as trainees, and a shortened list of mandatory information to be provided. Second, the Act of 11 November 2013 has removed the Limosa declaration for all salaried and self-employed trainees.\(^{144}\)

To sum up, after having an overview on how the establishment of a foreign company can work into the Belgian market, a distinction have to be made at that point. One this is to establish and another thing is to provide services in Belgium. By establishing in the Belgian territory, a company must have a physical location and work directly into the Belgian market. On the contrary, to provide service in Belgium do not require a physical location in Belgium but it is required to fulfill some prerequisites, such as; certificate of business capabilities, to apply for an itinerant activities permit or fairground activities permit, to register with the central register databases\(^{145}\) and an allocation of a business number and a verification of the applicable social status with the social insurance fund other permits linked to the activities exercise. It is to say, that the formalities may will vary depend on the activity sector in which the services will be provided and, sometimes also even some times some regional or communities formalities could be required.

In case that the establishment will be chosen for the service provider, the following distinction has to be done depending if the service provider wants to settled down in Belgium as a subsidiary, as a branch or as business unit. If the option is a subsidiary, to exercise the activities in Belgium will be under Belgian Law, i.e., a company will be created under the Belgian Law. The conditions to be fulfilled are; to have a regular activity in Belgium, an address in the Belgian territory and the creation of the company in accordance with the Belgian Company Code of 7 May 1999\(^{146}\). The formalities required, will be the same whether the company is attached to a foreign business or not, as a company under the Belgian Law is created\(^{147}\).

If the service provider want to establish in Belgium as a branch, an operating address and an responsible person for representing the company in Belgium need to be appointed. This is considered an expansion of the company into a foreign country, not creation of a company under Belgian Law. The main conditions required in Belgium to establish as a branch are: to have a regular activity in Belgium, to have an address, to have a responsible person capable of making commitments in respect

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\(^{144}\) This summarize has been taken from <labourlawnetwork.eu>. Published in the Moniteur Belge / Belgische Staatsblad the 6 of August 1999. The full text can is available in <www.ejustice.just.fgov.be>.

\(^{145}\) Banque carrefour des entreprises.

\(^{146}\) Code des Societes / Wetboek van Vennootschappen.

\(^{147}\) See <www.ucm.eu>.
of third parties on behalf the foreign company. The main formalities to be fulfilled in this case are; specifying the outlines of the activity and the powers granted to the authorized person that represent the company in the country and the decision of the general meeting of the company to open a branch, to publish in the Belgian official journal – Moniteur Belge / Belgische Staatsblad – the minutes recording the decision of the general meeting of the company to open a branch, have a checking access to the profession, to apply for an itinerant activities permit or a fairground activity permit, to register in the central business database and allocate of a business number, to identify with the VAT authorities, to apply for all permits required for certain activities, to affiliate to the social statutes of a self-employed person and affiliate the company and, the affiliation to the payroll administrators and the family allowance fund – for cases where a staff is taken.

In case that the service provider want to establish with a business unit, not company under Belgian law will be create and not company representative will be authorized to exercise the activities in Belgium. In this case, the service provider will open a point of sale, a production workshop or just an office, and the management of it will be made from the head office. The main conditions required are to have a regular activity in Belgium and to create an address. The formalities to establish under a business unit are; to check access to the profession, to apply for an itinerant activity permit or fairground activity permit, to register in the central business database and allocation of business number, to have an identification with the VAT – tax- authorities, to apply for all other permits required for certain activities, to affiliate to the social status of self-employed person and affiliation of the company and, the affiliation of the payroll administrator and the family allowance, if necessary.

It is has to be noted that if the service provider willing to establish in Belgium comes from a non-EU country, it will be necessary to obtain a professional card for foreigners to enable them to carry out independent activities in Belgium. The obtaining of the professional card is regulated for the following legal framework;

148 It is has to be pointed out that this permits requirement will vary depending in the activity sector in which the service provider want to establish. This requirements will vary also, depending of the activity sector if the service provider will establish in one community or in another.

149 See <www.ucm.eu>.

150 See <www.ucm.eu>.

151 Nationals of the European Economic Area (EU, Norway, Iceland and Liechtenstein) and Swiss nationals do not need a business card to perform an independent professional activity in Belgium, as a natural person or agent from a company or an association. Other exemptions are also predicted to see further about it, see <www.werk-economie-emploi.irisnet.be>.
- The Act of 19 of February of 1965 on the exercise by foreigners, independent professional activities.\(^{152}\)

- The Royal Decree of 2 of August 1985 implementing the law of 19 February 1965 on the exercise by foreigners, independent professional activities.\(^{153}\)

- The Royal Decree of 3 February 2003 exempting certain categories of aliens from the requirement to hold professional card for the performance of independent professional activity.\(^{154}\)

To obtain the professional card, some criteria’s need to be fulfilled such as; to have the residence right in the Belgian territory, to compliance with the regulatory obligations and especially those related to the activity, to have an interesting project for the Belgian territory assessed in economic utility terms, i.e., response to economic need, job creation, useful investments, economic benefits for businesses located on the territory, opening export innovative activity, within others.\(^{155}\)

The application in order to obtain the business card has to be processed through the Belgian embassy or consulate of the country of residence of the service provider. Once the card has been obtained its validity is for period of five years. Generally, a first card is granted for a testing period of two years. This card, and the subsequent authorisation to establish in Belgium is issued for one or more specific activities that will be specifically mentioned in the card. Nevertheless, the validity of the card is linked to the residence permit or the right to stay in the Belgian territory.\(^{156}\)

To establish in Belgium, can be considered as an attractive investment location for foreign companies. Not only it central location within Europe can be considered as an advantage, but also its extensive tax treaty network and a number of tax incentives. This attraction to foreign investor, can be, also

\(^{152}\) Loi relative à l’exercice, par les étrangers des activités professionnelles indépendentes / wet van 19 februari 1965 betreffende de uitoefening van de zelfstandige beroepsactiviteiten der vreemdelingen. Published in the Moniteur Belge / Belgische Staatsblad the 26 of February 1965. The full text can is available in <www.ejustice.just.fgov.be>.

\(^{153}\) Arrêté royal portant exécution de la loi du 19 février 1965 relative à l’exercice, par les étrangers, des activités professionnelles indépendantes / Koninklijk besluit houdende uitvoering van de wet van 19 februari 1965 betreffende de uitoefening van de zelfstandige beroepsactiviteiten der vreemdelingen. Published in the Moniteur Belge / Belgische Staatsblad the 24 of September 1985. The full text can is available in <www.ejustice.just.fgov.be>.

\(^{154}\) Arrêté Royal dispensant certaines catégories d’étrangers de l’obligation d’être titulaires d’une carte professionnelle indépendante / Koninklijk besluit tot vrijstelling van bepaalde categorieën van vreemdelingen van de verplichting houder te zijn van een beroepskaart voor de uitoefening van een zelfstandige beroepsactiviteit. Published in the Moniteur Belge / Belgische Staatsblad the 4 of March 2003. The full text can is available in <www.ejustice.just.fgov.be>.

\(^{155}\) See <www.werk-economie-emploi.irisnet.be>.

\(^{156}\) See <www.werk-economie-emploi.irisnet.be>.
considered in the background of the “not extensive” implementation of the Services Directives, as it has already been mentioned the impact of the Service Directive in Belgium was not so important and big as it should be expected, taking into account its aims. Just to sum up, the tax incentives in the Belgian territory are not only restricted to Belgian-resident companies but are also available to non-resident companies with a permanent establishment in Belgium. Some examples of this “tax friendly” policy that Belgium have to foreign companies are: the patent income deduction for the hosting of IP activities or the notional interest deduction regime for the hosting of finance activities in Belgium. Nevertheless, Belgium has, furthermore, a modern system of tax rulings that offers investors up-front certainty on the tax treatment of their anticipated investments in Belgium. This extension and its duration must be duly motivated and must be notified to the applicant before the initial period has expired.

In any case, if the service provider need to have a redress in case of a violation of the principle of freedom to provide services in Belgium the competent courts are the Commercial Courts and the Courts of First Instance.

Although, there are no big substantial legal impediment to the freedom of establishment in Belgium, the fact is that the administrative burden for service providers is still very high. To this event must be added the fact of the language barrier. If in other countries is complicated, in Belgium it is even more complicated, given the language barriers that exist in the different linguistic regions.

THE PROTECTION OF ECONOMIC RIGHTS OF CONSUMERS.

1. THE NATIONAL (IMPLEMENTATION) RULES AND (ENFORCEMENT) DIFFICULTIES SURROUNDING THE APPLICATION AND ENFORCEMENT OF: -THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE 2005/29/EC.


Parliament and of the Council (UCPD, hereinafter); has an ambitious goal of preventing the distortion of consumers contracting choice-making, in particular with regard to contract decisions prior to conclusion of a contract and decisions to exercise existing contractual rights.\(^{159}\)

“The core of the UCPD lies in the prohibition of practices contrary to the requirements of professional diligence which materially distort or are likely to materially distort the economic behaviour of the average consumer with regard to a product or service.\(^{160}\)”

Under the legislation, is necessary to give a concept of unfair commercial practices. In this regards, and using the words of W.H. VAN BOOM, “the concept of unfair practices is further subcategorized into misleading and aggressive practices.\(^{161}\)” So both misleading and aggressive practice will be defined in the following lines, to have a clear overview in where the Belgian implementation of the UCPD has broken down, as it will be explained.

Continuing with the definitions given by W.H. VAN BOOM, misleading practices are divided into two categories;

- “Utterances which contains incorrect information and are therefore untruthful or which in any way deceive or are likely to deceive the average consumer, even if the information is factually correct. Such practices cause distortion of the transactional decision-making process of the average consumer in relation to aspects such as the existence or nature of the product, fitness for purpose, usage, quantity, specification, the price or the manner in which the price is calculated, the need for a service, part, replacement or repair, etc.\(^ {162}\)”

- “The practice of omitting or hiding material information –including the provision of such information in an unclear, unintelligible, ambiguous or untimely manner- that the average consumer needs, according to the context, to take an informed transactional decision and thus causing distortions of the transactional decision-making process of this average consumer.”\(^ {163}\)

Prosecuting with the construction of the concept of unfair practice, is necessary to settled what is considered as an aggressive practice. Aggressive practices are those ones which “engage in actual harassment, coercion, the use of physical force or the use of more subtle techniques involving undue


influence such as exploitation of vulnerability or the use of obstacles discouraging consumers form asserting their rights."  

The analysed directive has been implemented for Belgium by the following laws:

- The law of 6 April 2010 on market practices and consumer protection.

Other relevant implementation legislation of the UCPD is:

- The Law of 13 December 2010 regarding the reform of some economic state owned companies.
- The Royal Decree of 21 June 2006 regarding the changes of the complaint management in the insurance sector.

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165 Loi relative aux pratiques du marché et à la protection du consommateur / Wet betreffende marktpрактики en consumentenbescherming. Published in the Moniteur Belge / Belgische Staatsblad the 12 of May 2010. The full text can is available in <www.ejustice.just.fgov.be>. This law is used to implement provisions relating to both financial services and immovable property. Article 84 onwards includes both financial services and immovable property.


168 The full text is available in <www.justice.just.fgov.be>.

Nevertheless the above mentioned, in Belgium the enforcement bodies apply in solving this kind of cases national legislation which is not based on EU Legislation. “This is because the national provisions go beyond the level of protection provided by the UCPD, are more specific, and easier to obtain a result than under the UPCD alone. These provisions are better known and understood by enforcers, businesses and consumers. The complexity and risks in the financial services industry make this a particular sensitive area for the consumer. Therefore, more protective measures were deemed necessary to ensure a balanced market and consumer confidence in services, the complex characteristics of which may not be fully understood by the consumer”.

The most common invoked national provisions are:

- The articles 7 to 9 of the Law of 12 of June 1991 relating to consumers credit. The importance of invoking this articles resides in the fact that it makes clear what it can be considered as a domicile of the consumer and, in particular in the article 9 the prohibition of send credit information or credit offers to the domicile or residence of the consumer or at his working place is stated. It is also prohibited, under this article to offer the consumer to contract a kind of credit under this law, during an excursion organized or on behalf of a seller or a service provider. There exists exception to this prohibitions, and it when the consumer has expressly, explicit or implicit, his agreement with this kind of behaviour.

- Continuing with the same Law of 1991, its article 31 is also, one of the more invoked. This article mainly states that, is prohibited on the creditor and credit intermediary to impose on the consumer, to subscribe another contract with the creditor, the credit intermediary or with any other third party designated by them, in order to conclude a credit agreement. In the second point of that article, another prohibition arises, it indicates that the creditor or the intermediary cannot stipulate charged to consumer, when concluding a credit agreement.

170 In Belgium the enforcement bodies are; FPS Economy, SMEs, Self-Employed and Energy (more information about that body can be found in <www. http://economie.fgov.be>) and the DG Enforcement and Mediation (more information about that body can be found in <www. http://economie.fgov.be>).

171 There was a discussion around maintaining or introducing stricter national provisions during the implementation of the UPCD in Belgium.


174 Loi relative au crédit à la consommation / Wet op het consumentenkrediet. Published in the Moniteur Belge / Belgische Staatsblaad the 9 of July 1991. The full text can is available in <www.justice.just.fgov.be>.
Article 19 of the Law of 4 August 1992 relating to mortgage credits, is also very invoked by the Belgian enforcement bodies. That article stipulates that the granting of a mortgage cannot be subject, directly or indirectly, to the obligation to take out an insurance policy or capitalization or the constitution of savings.

Another national stipulation very used to protect the consumers rights is the Act of 21 December 2013 on the insertion of Title VI "Market Practices and Consumer Protection" in the code of duty and economic integration of own definitions in Book VI, and provisions for the implementation of the own law in Book VI, in Books I and XV of the Code of Economic Law. The main aim of this Law is to provide an implementation of the Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumers rights –which it will be analysed in the following lines-. This the inclusion of this renewed Book VI, the federal legislature wanted that the consumer’s right of withdrawal forming an important component of all legislation on consumer protection.

Under the above mentioned legislation implementing the UPCD, and in order to protect the consumer rights, public authorities, organization representing consumer interest, competitor, trade associations, and individual consumers can bring an action. Consumers can also try to get protection of their rights from the Ombudsman.

Although Belgium has implemented the UPCD, according to the European Commission Belgium did an incomplete transposition of it, and that is why the Commission started a case against Belgium before
the European Court of Justice. The European Court of Justice in the Case C-421/12 Commission vs. Belgium, indicates some interesting general points about the infringement of actions against Member States. The Court in this case declares that;

“[...]


- by maintaining in force Articles 20, 21 and 29 of the Law of 6 April 2010 on market practices and consumer protection, and

- by maintaining in force Article 4(3) of the Law of 25 June 1993 on the exercise and organisation of travelling trading and fairground activities, as amended by the Law of 4 July 2005 and Article 5(1) of the Royal Decree of 24 September 2006 concerning the exercise and organisation of travelling trading activities,

the Kingdom of Belgium has failed to fulfil its obligations under Articles 2(b) and (d), 3 and 4 of Directive 2005/29. [...]”.

In the present case, Belgium claimed that it had implemented the Directive 2005/29/EC concerning unfair commercial practices in the internal market. At the moment of the present judgment was given, Belgium had excluded the liberal professions, in the scope of application of the The Act of 5 June 2007, amending the Act of 14 July 1991 on trade practices and on information and consumer protection. This fact, that Belgium exclude this liberal profession from the notion of traders, of the Law of 1991 amended by the Law 2007, was found unconstitutional, already, by the Belgian

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180 The full text of the case can be found in <www.eur-lex.europa.eu>.

181 Dentists and physiotherapists.
Constitutional Court\textsuperscript{182}. Even though this fact, the Law was not changed by the moment when the Commission starts the case.

During the litigation, Belgium claimed for the first time that the Commission has failed to consider the law of 2 August 2002 on misleading advertising which partially transposes into national law, certain provisions of UCPD. So from the point of view of the Belgium, the application of the Commission was inadmissible \textsuperscript{183}. In any event, the European Court of Justice, found admissible the action taken from the Commission and concluded that Belgium has infringe in the implementation of the UCPD.

“\textquote{In the present case, moreover, it is undisputed that Belgium has relied on the argument that the Law of 2 August 2002 transposes the Directive 2005/29 for the first time only at the stage of submitting its statement in defence to this Court. In its reply to the reasoned opinion, the Kingdom of Belgium’s entire defence on this point consisted in a mere reference to judgment No 55/2011 on the Constitutional Court, delivered on 6 April 2011, which held the exclusion of the professions from the scope of the Law of 6 April 2010 to be unconstitutional. Belgium further stated that a legislative amendment would be introduced ‘in the coming weeks’ to comply with EU law}\textsuperscript{184}.”

This issue was solved by the pass of the Law of Act of 21 December 2013 on the insertion of Title VI "Market Practices and Consumer Protection" in the code of duty and economic integration of own definitions in Book VI, and provisions for the implementation of the own law in Book VI, in Books I and XV of the Code of Economic Law, but it is a very important case law on the unfair commercial practices topic, and that is why it is necessary to studied.

Then, the main obstacles found for enforcing the unfair commercial practice legislation are:

- the enforcement bodies states that for misleading actions, misleading options, and aggressive practices there can be difficulties of proof and assessment of the practices with regard to the law. For other unfair commercial practices there can be difficulties of interpretation and evidence\textsuperscript{185}.

- Also, the enforcement bodies stated that for all practices proof gathering if often complex \textsuperscript{186}.

\textsuperscript{182} G. VERFAILLIE, ‘Belgium criticized for incomplete implementation of the unfair commercial practices Directive’, the full commentary can be found in <www.peeters-law.be>.

\textsuperscript{183} Case C-421/12 Commission v Belgium: infringement proceedings and the role of the Member State’, <www.eulitigationblog.com>.


In Belgium, business organisations and consumer organisations negotiate a code of conduct regarding the advertising and marketing of banking or insurance products and services towards young people; the breach of which would be considered to be an unfair commercial practice.\(^{187}\)

A big amount of the complaints that the enforcement Belgian bodies received from consumers is in the field of financial services. One of the obstacles that the consumers have to get their rights recognizes is that the essential information was not included in the advertising for certain financial products. This meant that the consumers were not able to gain an accurate idea of the exact return of the product, as information was insufficient or non-existent as regards to the offer’s conditions, charges to be paid, and other aspects. In this sense for regulated savings products and specific life insurances, a code of conducts including a minimum number of advertising rules was developed in this sector.\(^{188}\)

Another obstacle, of breach of law in Belgium, is that the risk associated with structured products from Lehman Brothers were not made clear, including misrepresenting them to consumers by not mentioning any risk of Lehman Brothers going bankrupt.\(^{189}\)

The most common unfair commercial practices reported is that the risks associates with the products were not made clear.\(^{190}\)

It is also common that the consumers received unsolicited calls, faxes or e-mail advertising financial products, which also is considered as an unfair commercial practice.\(^{191}\)

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THE CONSUMER RIGHTS DIRECTIVE 2011/83/EU.


- The Act of 7 November 2013 on insertion of Title I “General Definitions” in Book I “definitions” in the Code of Economic Law.
- The Royal Decree of 28 March 2014 on the entry into force of certain books of the Code of Economic Law\(^\text{196}\).

On the contrary that has happened with the Unfair Commercial Practice Directive and the laws on its implementation, with the Consumers Directive and the different acts implementing it, there is no substantial problems or difficulties surrounding it application and enforcement.

However, I would like to outline a case solved by the European Consumer Centre of Belgium\(^\text{197}\).

"Mrs M. ordered a kitchen from Ixina and paid an advance of €1080. Sometime later she wanted to cancel her order and asked whether it would be possible to recover her advance payment.

An employee of Ixina said that it was possible to cancel the order and to transfer the advance to a future purchase. Mrs M. immediately expressed an interest in an American refrigerator at €1299.

To confirm her new order, Mrs V. paid an additional amount of €219. She received a document as proof of her payment and the transfer of the advance to the purchase of the new refrigerator.

Sometime later Ixina cancelled the new agreement and refused to deliver Mrs M.’s new order. Ixina stated that Mrs M. had lost her deposit when she cancelled the order.

Because Mrs M. disagreed with this change of course, she sought legal help.

In law Mrs M. did not have a cancellation period in this case. If you buy something in a shop you are bound by your purchase from the time that you and the dealer agree on the item and the price. You can cancel the purchase, with or without costs, if this is allowed in the seller's general terms and conditions. In this case you have to comply with the terms and conditions.

Ixina’s terms and conditions of sale allow the buyer a cooling-off period of eight days in which an order can be cancelled, but Mrs M. cancelled her purchase outside this time limit. Ixina’s employee was therefore not obliged to accept the free cancellation. On the other hand, Mrs M. would never have cancelled her purchase if she had known that this would result in her losing her deposit.

\(^{195}\) Loi portant insertion du titre Ier « Définitions générales » dans le Livre Ier « Définitions » du Code de droit économique / Wetboek van economisch recht. Published in the Moniteur Belge / Belgische Staatsblad the 29 March 2013. The full text can is available in <www.justice.just.fgov.be>.

\(^{196}\) Arrêté royal relatif à l’entrée en vigueur de certains livres du Code de droit économique / Koninklijk besluit betreffende de inwerkingtreding van bepaalde boeken van het Wetboek van economisch recht. Published in the Moniteur Belge / Belgische Staatsblad the 11 December 2013. The full text can is available in <www.justice.just.fgov.be>.

\(^{197}\) See <www.eccbelgium.be>.
By accepting Mrs M.’s request and giving her a document that confirmed the new arrangements, Ixina and Mrs M. were bound by a new agreement. Ixina therefore had to comply with the agreement. An agreement is an agreement.

Following mediation via ECC Belgium with Ixina, Mrs M. received her refrigerator."

THE ISSUE OF SOLVING CONSUMER DISPUTES VIA INJUNCTIONS AND/OR (COLLECTIVE) JUDICIAL REDRESS (SUCH AS CLASS ACTIONS-INITIATIVE), SINCE THE DIRECTIVES MENTIONED ABOVE AND THE 2013 RECOMMENDATION ON COLLECTIVE REDRESS.

The consumers are protected by a whole of European and Belgian laws. The best known are the: the Warranty Act and the Act on Distance Selling. But even the rights of the consumers as a travellers are protected, as if has been explained in the previous lines.

Normally, and thankfully for the consumers, things go as they should, “you order your services, you pay them and they are delivered to you”. Unfortunately, sometimes things does not go as the consumer would expect. In this situations the best option, and the most desirable one, would be to contact the seller or the services provider, explain the problem and; wait until the seller or the services provider purpose a suitable solution for both. This, undoubtedly, would be the best way to solve the inconvenient situation. Nevertheless, more often that it would be desirable the consumer does not get a suitable solution for his/her problem and a next step has to be undertaken. When something like this happen, the consumers have a wide range of options to enforce their rights against the seller or the services provider within the Belgian legal system 198.

To the consumers then, appears two different ways of solving this kind of disputes:

1. Friendly settlement or Alternative Solution to Disputes.
2. The Judicial Redress.

Prior to start any of this mechanism, the consumer can register a letter of complaint. A letter of complaint is basically a letter in where the consumer write his/her complaint against the seller or the service provider and also indicates or propose a solution to the seller or the service provider 199.

198 ‘Guide to Solving your consumer issue’, European Consumer Centre Belgium. The full text can be find in <www.eccbelgium.be>.

199 The essential details that a letter to complaint must contains are: the name and address of the consumer, the date of the purchase, a clear description of the service or of the product, the exact reason of the complaint, the
Sometime it is not easy for the consumer to know which are their rights and obligations when a complaint about a purchase has to be done. In order to provide with help to the consumers, around Belgium there are few consumers’ organisations and consumers centres in where the consumer can have a first legal advice. One of the most important is the European consumer Centre in Belgium (ECC, hereinafter). This centres and organisations do not limit their action just in giving a mere legal advice, in some occasions they try to find a solution by addressing the seller or the service provider in order to get a solution. For example, the Belgian ECC operates within a European network and in case of complaints about a seller in another Member State it will ask its colleagues in the respective country to write a letter to the seller or the service provider.

In is aim to protect the consumers, the Belgian legislator has established a Committee for Legal Aid, which organizes primary legal aid in Belgium.

expectations of the consumer from the seller or the service provider, the term within the consumer expect a response (normally 2 weeks) and the bank account number (if applicable) for the reimbursement.

Find further information about this center in <www.eccbelgium.be>.


The legal assistance or legal aid can be considered as the allowance to a person to have effective access to the Court when he / she does not have the resources needed to cover the costs of the procedure. It is the Belgian Judicial Code which guarantees this legal assistance providing with two systems in the following articles; 446 bis and 508/1 to 508/23 of the Belgian Judicial Code and article 664 to 699 of the same norm. The Act of 23 rd of November 1998 on legal aid helps implement this right to a legal help. This act replaced the old system providing assistance for free or at reduce rate. There three types of legal aid:

-Legal aid at frontline or primary legal assistance, which is free and it is available to anyone (individuals and bodies corporates) for short consultations, practical information or an initial legal opinion. This kind of assistance is provided by lawyers or other professionals during free consultations. This first ensures the management of legal expenses. To try to obtain this kind of assistance the right holder must go to the assistance commission set up in each court district and comprising representatives of the Bar, public welfare centers and approved legal assistance organizations.

-The second line of legal aid or secondary legal is the legal assistance to an individual in the form of detailed legal opinion or legal assistance. This kind of assistance is available to all individuals but there are exempt from this assistance the bodies’ corporates. It can be provided whether or not in the context of a formal proceeding, an assistance with a court action, including legal representation. It is organized by a legal assistance bureau set up within each local Bar Council.

-The legal aid consists on full or part exemption form stamp duties and registration charges and other costs of proceedings and is available to litigants who do not have enough monetary resources to cover the cost of judicial or extrajudicial proceedings. So then legal aid is available to everyone that can prove that they have inadequate incomes. Thus the beneficiary that can claim for this kind of legal aid are: persons holdings the Belgian nationality, foreign nationals in accordance with international treaties, all nationals of member States of the Council of Europe, foreign nationals lawfully residing in Belgium, and foreign nationals in proceeding provided by the act of access to the territory, residence, establishment and removal of foreigners. The applications for this legal aid can be presented in the office of the Court in which the action is to be brought or the act is to be done. There is a legal aid bureau in every Court of First Instance, Industrial Relations Courts, Commercial Court and Court of Appeal and at the Court of Cassation.
The first method is cheaper than going to Court and it pursue to achieve a friendly solution between the consumers and the seller. This friendly solutions methods of solving disputes between the seller and the consumer are more satisfying and efficient and, normally, are faster than the Tribunals. As a fast overview of them under the Belgian legal system, it is to say that there exists the followings: conciliation, mediation, arbitration, third party binding decisions, transactions, ombudsman and other mechanism of solving conflicts extrajudicial. This methods will not be a part of the present research, as it will be focused on the judicial redress that there exist in order than the consumers can have satisfied their claims.

The present report will focused on the judicial redress that the consumers can have in Belgium to have their rights protected. In this regard, it will focus in the injunctions and the class actions. The Belgian Judicial System and the Procedural Law is still and basically and exclusive competence of the federal authorities. “Civil proceedings do not have a distinction between trial and pre-trial; are mainly in writing, with only a supporting role for oral pleadings; and are defined by the procedural autonomy of the parties.”

In consumer’s disputes, the consumer, can always take his case to the justice of the peace. This justice is competent for small disputes with a maximum value of 1,860 € and its resolution can be appealed in front of the Court of First Instance. The Court of First Instance, the Commercial Courts and The legal assistance can be obtained for all kind of disputes, even the disputes concerning economic rights, and more in concrete the consumer’s rights. More information about the legal aid system can be found in <www.advocaat.be>.


205 This Court is placed at the lowest level of the Justice Court pyramid. There are 187 Justices of the Peace in Belgium – one for each judicial district according to Article 59 of the Belgian Judicial Code. These jurisdictions are hearing civil and commercial cases for small claims with a limited amount of money. The full document about the Belgian Legal system can be found in <www.fra.europa.eu>. You can find more about this Court in <www.juridat.be>.

206 The Courts of First Instance are ordinary courts which function alongside special courts. This implies that they hear all cases apart from those expressly transferred to another court by the law (as it is indicated in article 568 of the Judicial Code). In addition, they also have some special competences in some matters defined by the Judicial Code. They are competent to hear appeals against judgements delivered at first instance by the Justice of the Peace, except for those, which may not be appealed. Op. cit. <www.fra.europa.eu>. You can find more about this Court in <www.juridat.be>.

207 In each district there is one Commercial Court as it is state in article 73 of the Belgian Judicial Code. Its jurisdiction is based on article 573 of the Judicial Code. It is competent for disputes between traders regarding acts that have been qualified as commercial transactions, and which do not resort under any of the other
the Courts of Appeal\textsuperscript{208} can be also competent to solve the consumer's disputes. The competency of each one to know the case will vary or will depend on the subject of the dispute, the competency can be found in the Belgian Civil Judicial Code in the articles 553 to 663.

As it happens in other Member States, in Belgium, there exist different ways of instituting proceedings: the summons, the petition and the voluntary appearance. Normally, in the cases in which a consumer is involved the customary way to institute a proceeding is by summons\textsuperscript{209}. The usual way to resolve these conflicts, once demand is registered by the court, is to settle a date for a hearing of the parts in conflict. After the hearing if none of the parties indicates their opposition a sentence in the case will hand down by the judge\textsuperscript{210}.

There exists also under Belgian judicial system a reconciliation procedure in every Court. This procedure, are free of charge of costs and it is a very simple and fast one. It starts with the submit of the request to the clerk of the court's office. The clerk will summon the parties to appear before the judge. The parties are not obliged to be present during the hearing. During this hearing a binding solution will be found if the parties are agree. If no solution is found or the opposite party does not show up, the consumer can still to Court and start a proceeding\textsuperscript{211}.

It can happen that the dispute reveals an infraction, which requires a criminal prosecutor and a criminal proceeding will be set up. This is the case, for example, when a seller does something which is prohibited by law and which entails a penalty\textsuperscript{212}. In this cases the consumer, victim of a tort, may jurisdictions. It can also deal with appeals in certain cases handed down by a Justice of the Peace as indicates the article 577 of the Judicial Code. Op. cit. \textlt{www.fra.europa.eu}. You can find more about this Court in \textlt{www.juridat.be}.\footnote{208} There are five Courts of Appeal in Belgium as it is settled in article 104 of the Constitution. They have jurisdiction notably to hear appeals relating to decisions delivered at first instance by the Courts of First Instance, the Commercial Courts and the presidents of these courts. Op. cit. \textlt{www.fra.europa.eu}. You can find more about this Court in \textlt{www.juridat.be}.\footnote{209} When serving a summon the consumer will need to pay the fixed cost of the bailiff and additional costs depending on the amount of the petition that can estimate between 28 € to 168 € more or less. Op. cit. 'Guide to Solving your consumer issue', European Consumer Centre Belgium. The full text can be find in \textlt{www.eccbelgium.be}.\footnote{210} Op. Cit. 'Guide to Solving your consumer issue', European Consumer Centre Belgium. The full text can be find in \textlt{www.eccbelgium.be}.\footnote{211} Op. Cit. 'Guide to Solving your consumer issue', European Consumer Centre Belgium. The full text can be find in \textlt{www.eccbelgium.be}.\footnote{212} Op. Cit. Guide to Solving your consumer issue', European Consumer Centre Belgium. The full text can be find in \textlt{www.eccbelgium.be}.
have an interest in obtaining a compensation of the damages suffered. The victim can join the criminal proceeding started by the public prosecutor as a “civil party” or even, the victim, can also start the criminal proceeding by him/herself. In such cases, the claim of the civil party (for damages, restitution, etc) have to be handled according to the rules of the criminal proceeding\(^{213}\).

Notwithstanding the above expressed, and as it has been mentioned the main interesting judicial redress for consumers in Belgium are the injunctions and the class actions, that will be analysed in the following lines.

As it is known an “injunction is an order granted by a court whereby someone is required to perform or to refrain from performing a specific action”\(^{214}\). In relation with the consumers, is the Injunctions Directive 98/27/EC the one which ensures the defence of collective interest of consumers in the internal market. The Directive provides means to the consumers to bring an action for the cessation of infringements of consumer rights. This Directive has been substantially modified several times. In the interest of clarity and rationality, the Directive has been codified by the Directive 2009/22/EC of the European Parliament and the Council of 23 April 2009, on injunctions for the protection of consumers’ interests. Both Directives have been implemented for Belgium. The main legal instruments helping to implement the Directives are:

- The law of 2 August 2002 on misleading and comparative advertising, unfair terms and distance contracts concerning the liberal professions\(^{215}\).


Under the article 2 of the Directive 2009/22/EC, in Belgium are the ‘Association Belge des Consommateurs Tests-Achats / Belgische Verbruikersunie Test-Aankoop\(^{217}\)’ and the ‘Organisation des


\(^{214}\) <www.ec.europa.eu>.

\(^{215}\) Loi du 02/08/2002 relative à la publicité trompeuse et à la publicité comparative, aux clauses abusives et aux contrats à distance en ce qui concerne les professions libérales / Wet betreffende de misleidende en vergelijkende reclame, de onrechtmatige bedingten en de op afstand gesloten overeenkomsten naze de vrije beroepen. Published in the Moniteur Belge / Belgische Staatsblaad the 20 November 2002. The full text can be found in <www.ejustice.just.fgov.be>.

\(^{216}\) Loi, du 26 mai 2002, relative aux actions en cessation intracommunautaires en matière de protection des intérêts des consommateurs / Wet betreffende de intracommunautaire vorderingen tot staking op het gebied van de bescherming van de consumentenbelangen. Published in the Moniteur Belge / Belgische Staatsblaad the 10 July 2002. The full text can be found in <www.ejustice.just.fgov.be>.

\(^{217}\) More information about this entity can be found in <www.test-achats.be> and <www.test-aankoop.be>.
consommaterurs a.s.b.l. / consumentenorganoisatie v.z.w. / verbraucherschutzzentrale v.o.e. are the entities qualified to bring actions for injunctions. The main purposes of the abovementioned entities are:

- To promote, defend and represent consumer interests (initiatives, activities, studies, research, publication on consumer issues, individualises services and support for members, etc).
- To promote and support the recruitment and development of legal persons whose main objective is to promote and defend consumer interests.
- To inform and advise private persons on consumer problems.
- To intervene with the authorities and takes steps to protect consumers.
- They have to right to represent individuals and collective consumers.
- They are empowered to intervene in cross-border consumer issues.
- They can take some preventive measures and help for private persons with excessive debts.

Also The Minister of Economic Affairs, professional and inter-professional organisations and individual consumers can seek injunctions to stop an illegal practice against a trader.

Some examples of Belgian injunctions are:

1. The UK’s Office of Fair Trading (OFT, hereinafter) took an injunctive action in a Belgian Court against the Belgian company Duchesne. The Court ordered the company to stop misleading mailings UK consumers by promising prize in case of a purchase from its catalogue. A brief summarize of the case is provided:

“The Duchesne SA, trading in the UK as TV Direct Distribution and Just 4 You, has been sending unsolicited mail order catalogues to UK residents along with notification of a large prize win, typically £10,000. Many consumers were led to believe that they had to make a purchase from the catalogue in order to secure their alleged win. However, prize winners were pre-selected and the vast majority of recipients were unlikely to receive the cash prize they thought they had won. The OFT claimed that Duchesne SA’s prize notifications are misleading and are used to induce consumers to purchase its products. Approximately a million mailings a month were sent to UK consumers, with Duchesne SA

218 More information about this entity can be found in <www.cec-ecc.be> and <www.evz.be>.
219 Only against unfair commercial practices.
220 The normal timing for this kind of proceedings is around 7-8 months.
221 The Commercial Court of Brussels in the Case OJ L 166/51.
222 ‘Consumers Redress Belgium’,
receiving 4,000 orders a day from its TV Direct Distribution and Just 4 You catalogues. The OFT action came after hundreds of consumers complained that they had been misled into believing they had won a large cash prize. The court injunction will prevent D Duchesne SA from making similar misleading claims in connection with its home shopping catalogue business.”

2. The second example and more recently is the one in which Test-Achats sought an injunction against Ryanair. The Commercial Court of Namur in the judgment of 10 March 2010 ordered Ryanair to modify its general terms and conditions. It also ordered the payment of 1.250 € per day in case of non-compliance. In this judgment, the Court emphasised that the general terms and conditions of the low-cost airline have numerous shortcomings and breach the law of unfair Trade Practices. The Court criticised the lack of structure of Ryanair website, the absence of a full list of all applicable terms and conditions, the mishmash of frequent asked questions and terms and conditions, the abundant use of internal references, within others. The Court, in addition, also found that Ryanair unlawfully denies consumers the right to obtain reimbursement of their ticket in the event of death or serious illness which makes travelling impossible.

Class – Actions or Collective Redress in Belgium.

Class actions in Belgium are relatively new and rarely used. It is the Law of 28 of March 2014 to insert a Title 2 ”From the collective redress action” on Book XVII ”Special Court proceedings” of the Code of economic integration of duty and definitions specific to the seventeenth book in Book 1 of the Code of Economic Law, the one which introduces the possible class actions in within the jurisdictional system in Belgium.


224 The summarized of the present case has been taken from Van Bael & Bellis on Belgian Business Law, Volume 2010, No 3, p. 13. The full text is available in <www.vanbaelbelis.com>.

225 Loi portant insertion d’un titre 2 ”De l’action en réparation collective ” au livre XVII ”Procédures juridictionnelles particulières ” du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique / Wet tot invoeging van titel 2 ”Rechtsvordering tot collectief herstel” in boek XVII ”Bijzondere rechts procedures” van het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek XVII in boek I van het Wetboek van economisch recht. Published in the Moniteur Belge / Belgische Staatsblad the 29 April 2014. The full text can be found in <www.ejustice.just.fgov.be>.
In this sense it is necessary to understand class action as an action of a group for the representative of a class to take an action in pure justice in order to request the repair the losses of that mass. The action is introduced by the representative on behalf of the entire class of people with the same or similar rights, the action results in a judgment which has force of res judicata in respect of all members of the class.\(^\text{226}\)

The Belgian Judicial Code does not allow the mass actions. The Belgian positive procedural law, in nature, is incompatible with a mechanism that would extend the res judicata of a decision to persons who were not parties to the proceedings and/or which would allow an applicant without a mandate to act in the name and on behalf of unrepresented in the proceedings. However, the Belgian positive law has, in various forms, mechanisms directly or indirectly facilitating the repair mass damage the aggregation of individual actions or "class actions," the transfer of compensation to a third party claims to act alone in compensation for the damage mass, or the extension of res judicata or "test action"\(^\text{227}\).

The classic way to cope the collective damages it to combine individual actions: this is of bundled shares, the result benefits only and shall bind only those who introduced the request in court or who intervened voluntarily in the procedure. The victims, on their own initiative or at the suggestion of an association, several victims of a mass loss caused by the same generator event, may first decide to combine their individual actions with a view to reduce the judicial costs and to increase their representation (and thus weight) in the proceedings or in the negotiations\(^\text{228}\).

"Under articles 17 and 18 of the Belgian Judicial Code, a plaintiff (consumer) is only entitled to a trial and a decision on the merits of the demand if it has a sufficient personal interest and capacity"\(^\text{229}\). Normally the question of the personal interest rarely cause problems. However, “for injunctions, there is a problem if the interest is deemed merely for the future, as in an action to prohibit actions that have not yet taken place and cannot be proven to be an imminent danger"\(^\text{230}\). Nevertheless, this is not used very much in Belgium to solve the consumer’s disputes or even in general terms. In any


case, the Belgian Civil Procedural Law is flexible in allowing the exercise in one's own name – as formal party to the proceedings- the rights of others\textsuperscript{231}, if one is authorized to exercise them either by contract or by law\textsuperscript{232}. It is even, "not necessary to assign one’s rights to the formal party to let that party demand their recognition in proceedings; it is sufficient to grant authority"\textsuperscript{233}.

The rule explained above, that was able in Belgium until the law of 28 March 2014, permits class actions only on an opt-in basis (that is to say, on the basis of an authority to act in one’s own name for the represented parties). Thus, an association does not automatically have authority to represent the individual’s rights of its members\textsuperscript{234}.

A very important case, in which this representation mechanism was used in the action or shareholders of LHSP who entrusted the exercise of their claim to Deminor\textsuperscript{235}. “Deminor joined a “private” claim with the criminal proceedings against some of the former directors. The consumer’s organizations Test-Aankoop assisted Deminor in contracting the shareholders, of whom around 13,500 gave mandates to Deminor, many using a standard form the web sites of Test-Aankoop and Deminor. Four thousand people were members of Test-Aankoop, and Test-Aankoop assumed the costs of the proceedings itself. The Deminor clients had to advance a limited sum to cover the costs of the proceedings. The fact that all shareholders had to be approached individually and had to be asked to share in the costs was perceived as an obstacle to collective litigation by Deminor. The trial in these criminal proceedings only started in 2008\textsuperscript{236}, and this has also been mentioned as one of the reasons why only a limited number of shareholders in the end granted Deminor the authority required\textsuperscript{237}.

Apart from the above explained mechanism, the defence of diffuse interest by associations also exists in Belgium. On the basis, of the ordinary procedural rules, an association can only exercise their own subjective rights and the subjective rights of third parties if they have obtained authority to exercise these in their own name as an agent on account of these third parties\textsuperscript{238}.

\textsuperscript{231} In a lot of cases the parties whose rights are exercised by an agent are remaining anonymous or just identified as class.


\textsuperscript{234} It is has to be authorized, but this authorization can be a part of the contract to became a member. Op. Cit. M. E. STORME and E. TERRYN, ‘Belgium’, p. 97.

\textsuperscript{235} Deminor is a firm specialized in the defence of interest of minority shareholders. See more about Deminor in <www.deminor.com>.

\textsuperscript{236} More than five years later than the bankruptcy of LHSP was declared.


The Belgian Court of Cassation, has consistently ruled that a general or collective interest is in itself not a personal interest for an association or other group, the main precedent is the Eikendael Decision, Cass. 19 November 1982²³⁹. The Council of the State, has been more flexible on this point.

The Law of 28 of March 2014, which entered into force the 1st of September 2014, as it is has been pointed out, has introduced into the Belgian judicial system the collective actions. The conditions to initiate a collective proceedings, under that law are the followings. The alleged cause must be a potential violation by the company of a contractual obligation. The action must be lodged by an applicant who meets the conditions to represent a mass or a collective. And, finally, it must be secondary to a common law action. Probably, the first difficulty that the litigants will encountered is to demonstrate that using a collective redress action is more efficient than an ordinary action²⁴⁰.

Who can be entitled to introduce a class action in Belgium? The class representative must be a consumer organization with a legal personality. This is a normal condition and it is known that these associations had the right to take an action on that basis in the field of the injunction. This association should have a corporate purpose directly related to the collective damage suffered by the group and is not pursuing a sustainable manner, an economic purpose. This association should have in the day that it introduces action in collective redress, legal personality for at least three years²⁴¹. It must also show that it is active in this area²⁴².

The group must be composed by consumers, as individuals, are affected by this common cause. It is those who are ordinarily resident in Belgium or, if this is not the case, they should have expressed their willingness to be part of the group within the period prescribed by the decision on admissibility. For Belgian consumers, so this is a system of "opt out" is expected and, for foreign consumers is a system of "opt in". The "opt-out" means that, by the mere fact objectively belong to a category of persons affected, it is supposed to participate in the action and thus to benefit if successful, unless it manifests its decision of not participate. Instead, the "opt in" only allows participation only if one expressly indicated its willingness to do so. However, in the Belgian system, the optional inclusion system can also be considered²⁴³.

²⁴⁰ E. BALATE, ‘L’action en reparation collective en fin adoptee en droit belge’, the full text can be found in <www.justice-en-ligne.be>.
²⁴² This entitlement to act, for new associations, is hardly simple. Indeed, during the first three years of entry into force of the law, it will seem difficult for such an association, to act on the basis of the new law.
The competent Court to know a class action in Belgium is the Commercial Court, which examines, initially, the admissibility of the action. It checks the proof that the representative can act, that the collective harm is sufficiently described. The law is innovative in that it sets up a trading system of collective reparation agreement. If this agreement was not completed, the procedure is ongoing. The judge may conclude a collective obligation of reparation on the part of the party continued. It should describe, sufficiently, the collective harm but also the group and any sub-categories. It must designate the group's representative and all additional advertising measures required\(^{244}\).

Finally, only the terms and amount of compensation are contained in the judgment. The judgement can contain a reparation by equivalent or, it may also decide an individualized amount due to each consumer can occur as part of the procedure\(^{245}\).

2. CASE LAW. National consumer cases based on the national implementation measures of both Directives (differences by the national courts to the ECJ with regard to the both unfair commercial practices as harmonised by the Directive 2005/29/EG and consumer right as harmonised by Directive 2011/83/EU).

In the following lines some relevant recent cases related to unfair commercial practices will be analysed\(^{246}\):

1. In the field of financial services, the President of the Commercial Court of Brussels in the judgment of 5 of March 2008 states that\(^{247}\):

   “In this case the defendant launched a promotional campaign in which an interest rate of 7% on a bank account was offered, this under the condition of simultaneously buying other financial products at least for the same amount of the deposits on the bank account. Advertisements were made via the website of the defendant, through radio commercials and through leaflets. The radio commercial made no reference to the additional obligation of buying the financial products in order to obtain the 7% interest rate, and merely stated that it concerned an “offer under conditions”. The consumer was,

\(^{244}\) Op. Cit. ‘L’action en reparation collective en fin adoptee en droit belge’, the full text can be found in <www.justice-en-ligne.be>.


\(^{246}\) Relevant case law in this field can be also found for Belgium in <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.showCountry&countryID=BE>.

however, invited to consult all applicable conditions on the website of the bank or to contact the bank’s offices. The President ordered the cessation of the offer and of all related advertising”.

2. The Commercial Court of Brussels, in the judgment of 23 April 2008 indicates:

“Through various channels (including newspapers, magazines, websites, posters, barriers in public parking lots, and gadgets such as ice scrapers and calendars), the defendant made publicity for the car insurance services of its foreign affiliate. The plaintiff argued that: (1) the publicity was misleading, because the official insurance registration number of the defendant was not mentioned on every type of publicity; and (2) the defendant misled the consumer with respect to its identity and nature, because the publicity did not explicitly mention that the defendant acts as an insurance intermediary, promoting the insurance services affiliate. The claims were dismissed”.

3. In the same line the Commercial Court of Antwerpen in the resolution of 29 of May 2008 judges at follows:

“The defendants (an insurance company and its affiliate) made publicity for their car insurance service. As part of the publicity, they invited the consumer to visit a website (www.ingauto.be) to try out an ‘insurance tariff simulator’ and obtain an insurance offer. While the website mentioned the possibility of increasing insurance premiums, this information was omitted in the publicity. According to the plaintiff, the omission of this information renders the advertisement to be misleading. The claim was dismissed”.

4. The Commercial Court of Brussels in the Lehman Brothers case in 2009 judges as follows:

“This case concerned investors who, advised by their banks, invested in structured bonds issued by Lehman Brothers. In 2009 Citibank Belgium S.A. and Deutsche Bank S.A. were brought before the Brussels Chamber of Commerce, for more than 700 Belgian investors. Concerning Citibank Belgium S.A., the collective action led to an overall settlement between the bank and the consumers, as a result of which they were able to recover between 65% and 75% of their investment. The civil proceedings for


damages against Deutsche Bank S.A. are currently pending. Parallel to these civil proceedings, the Brussels public prosecutor has launched a criminal procedure”.

5. The Decision of 13 April 2011 of the Commercial Court of Brussels follows as:

“A car manufacturer offered insurance together with the sale of a car. The judge considered that the provision was not limited to dual offers whereby all products offered need to be financial services. It is sufficient that one of the elements in the dual offer contains a financial service. The judge condemned the dual offer of insurance with the purchase of a car”.

The main differences between the national Courts and the European Court of Justice in their judgments is the mainly the one related with the ECJ Total Belgium case. At it is known some Members States have made explicit use of Article 3(9) of the UCPD (in the sense of actually including special rules for financial services and/or immovable property in legislation that implements the UCPD). Belgium is an exceptions to this. Belgium have reacted to the ECJ ruling in Total Belgium by abolishing the contested general prohibition of joined offers; but have maintained this prohibition in the area of financial services where this was permissible.

3. THE PROTECTION OF ECONOMIC CITIZENS’ RIGHTS IN THE DIGITAL ERA.

(Right to be forgotten and economic freedom to conduct a business).

➢ INTRODUCTION.

Nowadays, we live in the age of information and knowledge which results in the fact that more and more data related to people’s personal atmosphere is collected and made available and this in increasing amounts. In this context, it is not surprising that the boundaries between the citizen’s right to privacy and the protection of personal data are diluted because the intimate sphere of the citizens is being increasingly digitized.


251 ECJ joined case C-261/07 and C-299/07 of 29 April 2009, VTB-VAB NV vs. Total Belgium NV and Galatea BVBA vs. Sanoma Magazines Belgium NV.
As it is already demonstrated by authors and Tribunals, the development of information and communication technologies makes personal data of citizens widely available to the public administration, private companies and even to other individual citizens. However, this trend implies a threat as this data might suffer from data manipulation. It is to say that, the control of this big amount of personal data by their owner is becoming very difficult, either by ignorance, by the complexity of the procedures or simply because of economic reasons.

Control difficulties are magnified in those cases where data related to a particular person is transferred, with or without consent, between different database administrators and this especially when it happens at a transnational level (EU or internationally). Even though this fundamental right to data protection is intended to guarantee the data owner full control over the use and purpose of his personal data, and this in order to prevent violations to their dignity, the average citizen will in practice experience a lot of difficulties when executing this recognized power of control.

Therefore, the personal data protection right is essential within an increasingly complex world in which technology puts privacy and freedom of people at risk. In this regard, it is clear that database administrators can manipulate data and harm (either consciously or unconsciously) the data owners. Somehow this data manipulation has to be corrected afterwards.

Since the entry into force of the Treaty of Lisbon, fundamental rights have a level of recognition and protection equivalent to the one that they have within the different Member States. Furthermore, a catalogue of legally binding rights has been established by the European Charter of Fundamental Rights (The Charter, hereinafter) and in addition to this, the European Union has pledged to ratify the European Convention on Human Rights of the Council of Europe.

The Charter recognizes a catalogue of freedoms, principles, political rights, economic rights and civil social rights. This catalogue not only includes classical freedoms and rights but also includes new “fourth generation” rights directly related to scientific advances in recent decades. In this context, the present part of the project will focus in one “recent fourth generation” right, the right to be forgotten. It is a study of a classical right settled already in the article 8 of The Charter, as it will be demonstrate in the following lines, that needs a new interpretation and adaptation. This right has not only be threatened by the latest technological advances, especially in terms of the use of new technology, but is currently also be subjected to a new interpretation or reinterpretation through the emergence of the right “to be forgotten”. The right to be forgotten has recently suffered a new impulse with the Case 131/12 of the European Court of Justice (ECJ, hereinafter) of Google Spain, SL, Google Inc. versus the Spanish Data Protection Agency regarding the case of Mr. Mario González Costeja (reference for a preliminary ruling by the National Court of Spain).
The right to be forgotten, is not a new right, it has been already recognized in the article 12 in close relation with the article 7.f. of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (The Data Protection Directive, hereinafter). It is has to be noted then that the source of protection of the right to be forgotten is in strict relation with the protection of the data protection right.

The Data protection Directive has been implemented in Belgium by the following laws;

- The Belgian Constitution in its article 22 related to the right to private life protection.


- The Data Protection Act has been further implemented by the Royal Decree of 13 February 2001.

- The Law of 13 June 2005 on electronic communications;

- The Law of 18 May 2009 pertaining to various provisions regarding electronic communications;


252 Loi du 8 Décembre 1992 sur la protection de la vie privée par rapport au traitement des données personnelles / Wet tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens. Published in the Moniteur Belge / Belgische Staatsblad the 18 of March 1993. The full text can is available in <www.justice.just.fgov.be>.


256 Loi du 24 août 2005 visant à transposer certaines dispositions de la directive services financiers à distance et de la directive vie privée et communications électroniques transpose l’article 13 de la directive 2002/58 / Wet tot omzetting van verschillende bepalingen van de richtlijn financiële diensten op afstand en de richtlijn privacy
Belgium has not adopted a genuinely sectoral approach for the regulation of the protection of privacy and personal data, but instead adopted specific rules for certain cases. In addition to the Data Protection Law and the Royal Decree of 2001 for the general Directive, a plethora of specific laws and rules was also put in place to contain provisions on the protection of privacy and personal data. The measures enacted to further give shape to e-Privacy Directive, flagged above, testify to that fact. Other examples of these types of complementary executive and administrative acts are the Camera Surveillance Law of 21 March 2007, or the monitoring of employees’ online communications regulated by the Collective Bargaining Agreement No. 81 concerning the monitoring of electronic communications of employees of 26th April 2012.

The right to be forgotten, and thus the reinforcement of the protection of online citizens falls within the scope of application of the abovementioned legislation.

- The Law of 27 of March 2014 containing various provisions regarding electronic communications.

- The Electronic Communications Act of 13 June 2005.

⇒ DEFINITION OF THE SCOPE OF APPLICATION OF THE RIGHT TO BE FORGOTTEN.

Due to we live in a digital age which results in the fact that more and more data related to the people’s personal atmosphere is collected and made available and this in increasing amounts. In this context it is not surprising, that the boundaries between the citizen’s right to privacy and the elektronische communicatie. Published in the Moniteur Belge / Belgisch Staatsblad 31 August 2005. The full text can be consulted from <www.ejustice.just.fgov.be>.


protection of personal data are diluted because the intimate sphere of the citizens is being increasingly digitized. It is in this background where the right to be forgotten arises.

Even though today there is not a right to be forgotten as such, as it has not been yet regulated through a specific law (neither on a national, European or international level – unlike to what happened with the right of personal data protection -), the delimitation of the concept is not peaceful. As a primary approach to that concept, defined by the ECJ judgement, we can understand the right to be forgotten as the possibility that such right gives to the individual to “re-start” without the digitized knowledge of any negative circumstance of his past, lacking in any social relevance, will pursue all his life on an inescapable way. To sum up, it can be understood as another way of personal freedom.\textsuperscript{262}

However, the right to be forgotten has some different points of view. One can say that it should be considered as a new right due to its appearance in the article 17 of the projected Regulation of data protection. Another point of view held by some authors is that we are confronted with an addition of the right of access, rectification, cancellation and opposition that personal data protection right gives to the individuals.

According to the ECJ judgment of the Google case (C-131/12), the right to be forgotten is legitimized when digital content of personal data is indexed in search results, however, this is inconsistent with the applicable data protection law. That “incompatibility” should be considered in a broader sense. Therefore, we must apply the right to be forgotten in cases of irrelevant personal information or irrelevant public interest whose universal diffusion can cause an injury to the individual.

We must be clear that the right to be forgotten on the Internet, is only the internet application of opposition and cancellation rights. The challenge arises primarily, and that’s how I raised the Commission with the proposed regulation, the challenges that the processing of personal data arises in the digital age in which we live, which is not understood communication or, why not say, socialization without social networks, search engines or cloud computing services. The main difficulty that this situation raises is no other than to allow those concerned to maintain effective control over their personal data, to recover or delete them from online service providers.\textsuperscript{263}

In the line to considered the right to be forgotten as an addition to the rights of opposition and cancelation, the right to be forgotten exists in Belgium since 1998, during which the Belgian Privacy

\textsuperscript{262} See the ECJ judgment of Google case C-131/12.

Act\textsuperscript{264} has been adapted to the European Directive on Privacy, which contains this law. This is described more specifically in Article 12 of the Privacy Act. This provision reads:

“ [...] 1º. Everyone has the right to obtain at no charge the correction of any inaccurate personal character is concerned.

(Everyone also has the right to object, for serious and legitimate grounds relating to a particular situation, that data relating to him being processed, unless the lawfulness of the processing is based on the grounds referred to in Article 5, b) and c).

When personal data is collected for direct marketing purposes, the person concerned may object, free of charge and without any justification, to the intended processing of personal data concerning him. Where there is justified opposition, the processing performed by the controller may no longer involve those data.)

Everyone also has the right to obtain free removal or prohibition of use of any personal data relating to him which, given the goal of treatment is incomplete or irrelevant or whose registration, communication or conservation are prohibited or which has been kept beyond the authorized period.

2º. To practice (the rights referred to in §1), the applicant makes a request dated and signed (the controller) or any other person designated by the King.

3º. (In the month following the introduction of a request pursuant to paragraph 2, the controller communicates corrections or deletions of data, made on the basis of § 1, to the data itself, as well as persons to whom the incorrect, incomplete and irrelevant has been sent, provided it is still knowledge of the addressees of the statement and the notification to these recipients do not appear impossible or involves a disproportionate effort.

If the data subject objects, pursuant to § 1, paragraphs 2 and 3, processing or intended processing of personal data concerning him, the controller communicates within the same period the person concerned what action it to the request.) [...]”

Although the expression “right to be forgotten” does not literally appear in the text of this law, the expression is only used to explain intelligibly what is at issue.

In general terms the right to be forgotten means that you can request that your personal data are no longer processed, so for example they are no longer published on a particular website, but it can only be done for serious and legitimate reasons related to the particular situation of the data holder. This

\textsuperscript{264}Loi du 8 décembre 1998 relative à la protection de la vie privée à l’égard des traitements de données à caractère personnel / Wet tot bescherming van de persoonlijke levensfeer ten opzichte van de verwerking van persoonsgegevens, Moniteur Belge / Belgish Staatsblad the 18 March 1993, up to date 28 of March 2014. Full text can be consulted from www.ejustice.just.fgov.be.
implies first of all that it must exist a good reason to request the deletion of personal data. In other words, and using the expression of the Belgium Privacy Commission, the reason that the data holder do not like it too, will not be sufficient motivation for to erase the personal data. The holder must be able to prove that the publication of his data is really harmful for him.

Then there must also be a specific case, “special situation”. The data holder cannot, therefore, by a single request to Google remove at once all that has been published online about him/her or what you have published him/her self\(^{265}\).

Therefore, the right to be forgotten cannot be understood without a prior understanding of the right to personal data protection and the rights of opposition and cancellation. Another point to be addressed in this study, is the issue of intangible property for those interested in the subject carries intrinsic personal data and therefore it is the very basis resulting in that they can exercise their rights of opposition and cancellation and even the right to be forgotten\(^{266}\).

So having in mind that the right to be forgotten is in the center of the present report as an expression of protection of online citizens, at that point is necessary to give an overview to the right or the issue of intangible property of his/her personal data that a citizen has or can have. This because no other reason than the invocation of the definition of the right to be forgotten, that is mainly base on this concept. The property right on personal data\(^{267}\), is an unpaved road in the European Union, even though it is not the first time that arise into the front row. It has not suffer a great development, and in the Belgium legal system neither. But what it is clear that this concept is the base for a right to be forgotten can be developed with the aimed that it was thought. Taking the words of P. M. SCHWARTZ “personal information is an important currency in the new millennium\(^{268}\), i.e., in the digital era that we are living. So once, the personal data has become a commodity it is necessary to indicate, if any limit to the data privacy and ownership can be invoked. Following with the idea of the above mentioned author, he defines the concept of property as “any interest in an object, whether tangible or intangible, that is enforceable against the world. From this perspective, property rights run with the objet, and can be contrasted with contract rights, which bind only parties in privacy\(^{269}\). Following with the conception indicated for P.M. SCHWARTZ, information privacy right has to be understood as

\(^{265}\) See <www.privacycommission.be>


“the result of legal restriction and other conditions, such as social norms, that govern the use, transfer and processing of personal data generate in daily life.” This idea of the propertisation of the personal rights by creating the right to be forgotten, has some fans and detractors. For example the European Data Supervisor (EDP, hereinafter) give some reasons of detract the idea of the privatization of that right, the main one has an economic base, it indicates that the exercise of the rights of individuals goes against the “natural economic” trend. The EDPS states that: “The right to be forgotten could contribute to shift the balance in favor of the data subject since it would ensure that the information automatically disappears after a certain period of time, even if the data subject does not take action or is not even aware the data was ever stored.” On the contrary the Commission proposal for a new Data Protection Regulation of 25 January 2012 introduced this long complex right to be forgotten and to ensure in the new article 17. In essence this article does not create a new right to be forgotten, it just give a new prospective of the existing right to erasure.

“According to this article, a person could obtain “the rectification, erasure or blocking of data” form the controller if the processing does not comply with the provisions of this Directive, “in particular because of the incomplete or inaccurate nature of the data”.

As it has been already mentioned, the definition of right to be forgotten can be found or it has been ruled for the first time in Article 17.1 of the projected Regulation. Through this right is granted to the person concerned the right to ask to the responsible of the data base or of the processor to delete his/her personal data and refrain from giving more coverage when the data are no longer needed in relation to the purposes, expiry of the period authorized and conservation the person withdraws consent or oppose the treatment. In this way, the Commission has try to ensure to internet users that


271 M. VERMEULEN, S. GUTWIRTH, ‘Empowering social network site users through creating. New rights: analyzing the right to be forgotten and the right to data portability in the EU’, EMSOC User empowerment in a social media culture.

272 Opinion of the data protection supervisor on the 2010 Communication from the commission to the European Parliament, the Council, the Economic and social Committee and the Committee of the Regions – “A comprehensive approach on personal data protection in the European Union’ (2011/C 181 /01).


they can require suppliers to completely delete their personal data when dis-enrolled from a service or when no longer needed for the purpose for which it was collected.

The responsibility of the responsible for the treatment of the personal data is also extended, in the article 17.2 of the projected Regulation, is stated that “the party shall have been released personal data, it is required to take reasonable measures with regard to data whose publication is responsible in order to inform third parties that are processing the data that an interested party request to delete them and any link to such personal data, or any copy or replica thereof. In addition, when the controller has authorized a third party to publish personal data, the controller will be held responsible for that publication.”

The limitations that this right to be forgotten can have, have been emphasized form the Commission, that indicates that “the right to be forgotten was not an absolute right, and would not apply to activities subject to exemptions and derogations provided under the provisions for processing for private purposes and under processing for journalistic and literacy purposes; it would therefore be ensured that the right to be forgotten does not affect freedom of expression and is used by individuals to attempt to alter or disappear from the public record. The media’s role in keeping such public record will therefore not be affected.”

In this sense the exact scope of exceptions to the right to be forgotten and erasure, despite what article 17.3. of the projected regulation stated, there is a number of exceptions that limits the implementation of the right to be forgotten including that “the controller does not have to carry to erasure “for compliance with a legal obligation to retrain the personal data by Union or Member State Law to which the controller is subject”, many insurers and financial services providers were still worried that the current draft does not address, or even acknowledges, all potential conflicting legal obligations that might result from the creation of a right to be forgotten”.

What is clear is the fact that there exists a tension between the right to be forgotten and the freedom of expression which boils down to the relationship between the data subject and a party,

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278 The Commission’s approach aims a solving this substantial problem with a procedural notification duty of the original controller to such third parties.
such as publishers, content providers, search engines or even private parties who might not even fall within the ambit of data protection law\textsuperscript{279}.

The main problem that the right to be forgotten presents in implementing is that the right to be forgotten can only be effective and enforceable when it can be implemented on a practical level. And this because, as the European Economic and Social Committee indicates “it will be difficult to achieve it, given the viral nature of data on the Internet Technologies which delete but do not forget\textsuperscript{280}”.

Finally, and previously to check the existence of such a right in Belgium it is important to note that, the right to be forgotten applies at first blush only to people and not for companies. And this because a person who has suffered a criminal conviction, committed financial fraud or malpractice may be denied the removal of this information on behalf of the prevalence of the right of information. But this is not entirely true, as thus a company can also committed crimes and for the same reasons as person the right to be forgotten can be denied. So in theoretical terms, the right to be forgotten can also be applicable to companies.

And now, it can be considered that in Belgium exits such right to be forgotten?. As it has already been mentioned, in Belgium does not exits a right to be forgotten by itself. Nevertheless and due to the implementation of the Data Protection Directive into the Belgian legislation, this right can be extracted from the Belgian Data Protection Act. In any case, it would be possible in Belgium to request the removal from a search engines in the following cases; in case of homonymies, in case of public persons wishing to hide their political position or activity, in vintage career in the porn industry, in misinformation, in dissemination of personal information, in an old newspaper article within others\textsuperscript{281}. The content will thus have more probabilities to be removed when it is considered obsolete, misleading, old, etc. However, it will be more difficult to remove a search result provided that this information about the data holder has a public interest. Anyway, the online users willing to use their right to be forgotten must explain the reasons for their request\textsuperscript{282}.

\textsuperscript{279} Op. cit. M. VERMEULEN, S. GUTWIRTH, ‘ Empowering social network site users through creating. New rights: analyzing the right to be forgotten and the right to data portability in the EU’, EMSOC User empowerment in a social media culture.


\textsuperscript{281} The list have been taken from ‘E-reputation: google et le droit à l’oubli en Belgique’, <www.mission-systole.be/blog/> .

CASE LAW AFTER GOOGLE CASE.

The competent regulatory authority in Belgium is the Privacy Commission.\(^{283}\) This Commission supervises compliance with the Belgian Data Protection Law, issues guidance on its application, keeps a public register of notifications, and offers advice on various matters related to the protection of personal data. This Commission enforces and applies the national regulation, but upon receiving a complaint, the first immediate thing it will attempt is to reach an agreement between the parties. If not solution can be reached, the Commission can issue an opinion on the case at hand.\(^{284}\) At the same time, an investigation can be initiated in order to verify whether processing of personal data proceeded in accordance with the Data Protection Law. The Privacy Commission can also inform the public prosecutor of suspected violations, and submit to the Brussels Court of First Instance any disputes relating to the application of the Law. The sanctions and the remedies that can be taken by this Commission are listed in the articles 37-39 of the Data Protection Law.\(^{285}\)

Recently, the Privacy Commission has made a recommendation\(^{286}\) in order to justify that Belgian Data Protection Law applies in Belgium when Facebook process data about Belgium citizens. The Privacy Commission justify in its recommendation why Facebook is subject to Belgian Law. The Privacy Commission’s argument can be summarized as follows\(^{287}\):

“[…]"

- **Facebook, Inc. and not Facebook Ireland is the data controller**

On the basis of a detailed factual analysis, the Privacy Commission firstly concludes that Facebook Ireland cannot qualify as a data controller because it “does not appear to be able to take independent decisions when it comes to determining the purpose and the resources relating to the processing of the personal data of Belgian citizens”.

\(^{283}\) Commissie voor de bescherming van de persoonlijke levenssfeer / Commission de la protection de la vie privée, <www.privacycommission.be>.

\(^{284}\) As settled in Article 31(3) of the Data Protection Law.


\(^{286}\) Recommendation No. 04/2015 of 13 May 2015, ‘Own-initiative recommendation relating to 1) Facebook, 2) internet and/or Facebook users as well as 3) user and providers of Facebook services, particularly plug-ins (CO-AR-2015-003). The full text is available in <www.privacycommission.be>.

\(^{287}\) The summarized has been taken from T. VAN CANNEYT, ‘The Belgian Facebook recommendation : How the nomination of a single EU Data Controller is under fire’, Field Fisher Watheruse LLP, 2015. The full text is available in <www.privacylawblog.fieldfisher.com>.
In this regard, the Privacy Commission attaches a lot of importance to the fact that the new privacy policy, which kicked off the investigation in the first place, has been rolled out globally, without a specific version issued by Facebook Ireland that was adapted for the EU market. Another element that was relied upon is the fact that the privacy policy did not refer to the term “personal data” but rather to the more generic/US-inspired terms “data” and “personal information” – though quite why these terms should be relevant to an assessment of an entity’s controllership (or lack of it) is far from clear.

For those reasons, the Privacy Commission takes the view that Facebook, Inc., with its registered office in the US, has to be considered the sole data controller.

- Facebook Belgium qualifies as an establishment in the sense of article 4.1.a of Directive 95/46/EC

Having that it considers Facebook, Inc. to qualify as data controller, the Privacy Commission then goes on to examine the role of Facebook Belgium.

Facebook Belgium is a subsidiary of Facebook, Inc. whose corporate purpose is reportedly limited to public policy and legislative and regulatory outreach activities and is not involved in any commercial activity as such.

However, applying the principles of the ECJ’s Costeja “Right to be Forgotten” judgment (C-131/12), the Privacy Commission concluded that Facebook Belgium is an establishment of Facebook, Inc. because it considered these activities to be “inextricably linked” to Facebook, Inc.’s activities – the first reported instance of the Right to be Forgotten judgment being applied by a local regulator to submit another major US-led multinational to a Member State’s local data protection laws

- Alternatively, Facebook Inc. uses equipment on the Belgian territory

The recommendation then goes on by stating that even if Facebook Belgium (or any other Facebook affiliate in the EU for that matter) does not qualify as an establishment in the context of which Facebook, Inc. processes personal data, then Facebook, Inc. is still subject to the Belgian data protection laws by virtue of the Equipment Test due to its use of cookies and other tracking technologies served on Belgian residents’ devices. [...]”

The Belgian Courts are nevertheless also tasked to apply and interpret the abovementioned national laws implementing the EU legislation related to the protection of personal data, notwithstanding that they will often take their cue from precedents and guidelines established by the Privacy Commission, where available. After Google case C-131/12 in Belgium has not been a significant judgement in this
sense. Most of the complaints that Google or other processor receive from the data holders are solved in an amicable way.

- **HAMPRED THE ECONOMIC FREEDOM TO CONDUCT A BUSINESS IN BELGIUM?**
  - WHAT IMPLIES THAT FREEDOM?
  - AFFECTION BY THE RIGHT TO BE FORGOTTEN.
  - BASES DE DATOS / COMPRA VENTA / COMO AFECTA A LOS TITULARES DE ESOS DATOS / SE PUEDE HABLAR DE PROPIEDAD QUE PROTEJA ESOS DATOS.

The analysis of the reflection of the right to be forgotten in the freedom to conduct a business in Belgium, cannot be considered without the prospect of the propertisation of personal data. The proposal of propertisation of personal data, is not a new European idea and comes from US in 1970s. In that sense, propertisation was considered as a possible and better way to achieve the aims of privacy and data protection. “Companies has view this information – the personal information of online users - as a corporate asset and have invested in software that facilitates the collection of consumers information. Once personal data has become a commodity, the question arise regarding the necessity, if any, of legal limits on data trade”.

“In order to enhance data subjects control over their personal data, the Commission announced in 2010 that it aimed to complement the rights of data subjects by ensuring the data portability, which the Commission defines as; providing the explicit right for an individual to withdraw his / her own data from an application or service so that the withdrawn data can be transferred into another application or service, as far as technically feasible, without hindrance from the data controllers.

So this right of portability will assists the individuals in ensuring that social networking sites and other relevant controllers given them access to their personal information, and as such could be seen as strengthening of the existing right to access.

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In this context, the sector that would suffered more from all this changes is the sector of marketing direct in Belgium and also all the business that used this kind of marketing to get to new consumers. The EU legislation defines the marketing direct as: “all activities and ancillary services to allow them to offer products and services or transmitting commercial messages to all other segments of the population by means of mail, telephone or other direct means for the purpose of information or to request a response form the person concerned292. The Belgian Data Protection Act, in strict sense does not give a definition about the notion of marketing direct. The most common situation is one in which someone receives an advertising message to this name, not only by post but also through others channels as mails, sms, etc. But this not the only possibility, there are other such as: direct marketing action performed by a company to another (in which there is, a transference of personal data) or brokerage address (exchange, sale or rental of file), personalized advertising within the meaning of the Electronic Commerce Act or the Trade Practices Act, etc. The messages non-customized do not fall within the scope of Privacy Act since they do not involve the processing of personal data.

In this context and if the implementation of the right to be forgotten and the right to data portability have a good end, since the data holder would have a real control on their own data, to trade with them will became more difficult, and as such, to establish and conduct a business in the Belgian market much more difficult. This difficulties arise from the impossibility to get to new customers.

292 See <www.privacycommission.be>.
ANNEXES

NATIONAL LAWS

FEDERAL LEVEL

LAWS


- Loi du 8 décembre 1998 relative à la protection de la vie privée à l’égard des traitements de données à caractère personnel / Wet tot bescherming van de persoonlijke levensfeer ten opzichte van de verwerking van persoonsgegevens. Moniteur Belge / Belgisch Staatsblad the 18 March 1993, up to date 28 of March 2014.


- Loi du 2 août 2002 relative à la publicité trompeuse et à la publicité comparative, aux clauses abusives et aux contrats à distance en ce qui concerne les professions libérales / Wet betreffende de misleidende en vergelijkende reclame, de onrechtmatige bedingen en de op afstand gesloten overeenkomsten n生产厂家 de vrije beroepen. Moniteur Belge / Belgisch Staatsblad the 20 November 2002.


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- Arrêté royal modifiant l’arrêté royal n° 78 du 10 Novembre 1967 concernant l’exercice des professions de la santé / Koninklijk besluit tot wijziging van het koninklijk besluit nr. 78 van 10 November 1967 betreffende de uitoefening van de gezondheidszorgberoepen.


- Arrêté royal du 10 février 2008 relatif aux conditions en matière de formation et d'expérience professionnelle et à la reconnaissance des qualifications professionnelles CE pour l'exercice de la profession de détective privé, ainsi que l'agrément des formations / Koninklijk besluit betreffende de vereisten met betrekking tot de opleiding en de erkenning van de EG-beroepskwalificaties voor het uitoefenen van het beroep van privé-detective en de erkenning van de opleidingen. Moniteur Belge / Belgisch Staatsblad the 3 of March 2008.

- Arrêté royal du 10 février 2008 relatif à la reconnaissance des qualifications professionnelles CE pour l'exercice d'activités visées par la loi du 10 avril 1990 réglementant la sécurité privée et particulière / Koninklijk Besluit van 10 februari 2008 betreffende de erkenning van beroepskwalificaties EG voor de door de wet van 10 april 1990 regeling van de private en persoonlijke veiligheid activiteiten.


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- Arrêté royal du 26 août 2010 modifiant l'arrêté royal du 30 avril 2004 portant des mesures relatives à la surveillance du secteur du diamant / Koninklijk besluit tot wijziging van het


MINISTERIAL ORDERS


WALLONIA


- Arrêté du Gouvernement de la Communauté française du 19 mars 1997 réglant le fonctionnement de la Commission d'équivalence telle que prévue aux articles 3 et 4 de l'arrêté du gouvernement


- Décret du 7 novembre 2013 définissant le paysage de l'enseignement supérieur et l'organisation académique des études.

- Arrêté du 13 juin 2008 du Gouvernement de la Communauté française déterminant les modèles desdiplômes et de leur supplément délivrés par les Instituts supérieurs d'Architecture et le jury d'enseignement supérieur de la Communauté française délivrant le même diplôme / Besluit van de Regering van de Franse Gemeenschap tot bepaling van de modellen voor de diploma’s en hun toevoegsel uitgereikt door de Hogere Architectuurinstituten en de examencommissie voor Hoger onderwijs van de Franse Gemeenschap die hetzelfde diploma uiteerkt . Moniteur Belge / Belgisch Staatsblad the 12 of August 2008.


- Décret du 18 juillet 2008 du Gouvernement de la Communauté française fixant des conditions d'obtention des diplômes de bachelier sage-femme et de bachelier en soins infirmiers, renforçant la mobilité étudiante et portant diverses mesures en matière d'enseignement supérieur. Published in the Moniteur Belge / Belgische Staatsblad the 10 of September 2008.

- Décret de 23 janvier 2009 portant des dispositions relatives à la reconnaissance des qualifications professionnelles pour l'exercice de fonctions dans les établissements d'enseignement préscolaire, primaire, secondaire ordinaire et spécialisé, artistique, de promotion sociale et supérieur non universitaire, secondaire artistique à horaire réduit de la Communauté française et les internats dépendant de ces établissements, et dans les centres psycho-médico-sociaux, relatives au congé pour activités sportives et diverses mesures urgentes en matière d'enseignement. Moniteur Belge / Belgisch Staatsblad the 10 of March 2009.


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- Commercial Court of Brussels, judgment of 23 April 2008 (no number assigned).
- Commercial Court of Antwerpen, judgment of 29 of May 2008 (no number assigned).
- Commercial Court of Brussels, Lehman Brothers judgement 2009 (no number assigned).
- Commercial Court of Brussels, judgement of 13 April 2011 (no number assigned).
EUROPEAN COURT OF JUSTICE

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DELIVERABLE 5.2

DENMARK REPORT
DENMARK

CONTRIBUTOR: UCPH
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QUESTION 1: ACCESS OF ECONOMIC ACTORS TO THE EUROPEAN/INTERNAL MARKET

INTRODUCTION

The present report seeks to answer the questions put forward in the questionnaire on implementation (re. Deliverable WP5.2) and to present the framework of transposition of Directive 2005/36/EC on the recognition of professional qualifications in Denmark. It will introduce the formal and practical implementation of the system for recognition of foreign professional qualifications (Sections A and B). Moreover, the report will identify how the national framework affects the free movement of establishment and provision of services of different categories of citizens/professionals (Section C).

The presence of qualifications criteria in order to access a regulated profession in a national system can impede access to the European/Internal Market for Union citizens as well as third country nationals (hereinafter: TCNs). Although such obstacles may be justified for legitimate purposes (e.g. consumer protection), the rules may as a point of departure not lay down directly or indirectly discriminatory criteria. Thus, there is a need to recognise professional qualifications acquired in another Member State in order to lift the barriers that hinder the movement across borders of economic actors. As expressively mentioned in the questionnaire, the authorisation requirements for EU citizens wanting to establish themselves in another Member State in order to lift the barriers that hinder the movement across borders of economic actors. As expressively mentioned in the questionnaire, the authorisation requirements for EU citizens wanting to establish themselves in another Member State that are dealt with in the Services Directive are not at focus in the present report.

A. IMPLEMENTATION OF RECOGNITION OF PROFESSIONAL QUALIFICATIONS MEASURES IN DENMARK

According to the 2010 Commission’s Scoreboard on the Professional Qualifications Directive Denmark has completed transposition of the directive, communicating 129 measures adopted in order to comply with the requirements. Moreover, the rules on temporary provision of services were also duly implemented, as well as the system for automatic recognition of qualifications for all the seven ‘sectoral professions’ where training conditions are harmonised, and for professions in the craft, industry and commerce sector.

The legal basis for recognition of professional qualifications in Denmark comprises of:

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1 The report has primarily been elaborated by Silvia Adamo, but supervised and/or commented upon throughout the process by Ulla Neergaard. Professor Peter Blume’s review of section 3 is gratefully acknowledged.


4 Scoreboard, part I and II.

5 Scoreboard, part III and IV.
- the Act and Executive Orders on the Assessment of Foreign Qualifications and the Qualifications Board;\(^6\)
- the Act and relative Executive Order on the Access to the Exercise of Certain Professions in Denmark, which together implement the Professional Qualifications Directive;\(^7\)
- a number of specific orders applicable to various regulated professions, as for example the maritime occupations.\(^8\)

The Regulated Professions Database of the European Commission indicates that there are 161 regulated professions in Denmark that are covered by Directive 2005/36/EC.\(^9\)

On the basis of the annual reports on the monitoring of the application of EU law published by the Commission\(^10\) it is possible to conclude that Denmark is not in the problem zone as regards incorrect implementation. To the best of our knowledge there has so far not been initiated any infringement proceedings against Denmark for incorrect application of the directive at the European Court of Justice, nor has it been possible to identify national case law on the matter.

### B. PRACTICAL IMPLEMENTATION

The authority in charge of coordinating the assessment of foreigners’ qualifications when they are seeking to work in a regulated profession in Denmark is the Danish Agency for Higher Education (Styrelsen for Videregående Uddannelser), under the Ministry of Higher Education and Science.\(^11\) The Agency is the national contact point as regards the regulated professions in Denmark, and it also runs a website that informs on the rules enforced.\(^12\) The Agency is also the designated coordinating unity in the current process of implementation of the 2013-version of the Professional Qualifications directive, together with the relevant ministries, within the deadline set of 18 January 2016.

\(^6\) Consolidated Act on the Assessment of Foreign Qualifications etc. LBK no. 579 of 01/06/2014 (Bekendtgørelse af lov om vurdering af udenlandske uddannelseskvalifikationer m.v.), Executive Order no. 602 of 25/06/2003 on the Assessment of Foreign Educational Qualifications etc. (Bekendtgørelse om vurdering af udenlandske uddannelseskvalifikationer m.v.) and Executive Order the Qualifications Board BEK no. 447 of 10.05.2007 (Bekendtgørelse om Kvalifikationsnævnet).

\(^7\) Consolidated Act on the Right to Exercise Certain Professions in Denmark, LBK no. 189 of 12/02/2010 (Bekendtgørelse af lov om adgang til udøvelse af visse erhverv i Danmark) and Executive Order on the Recognition of Professional Qualifications, BEK no. 575 of 01/06/2011 (Bekendtgørelse om anerkendelse af erhvervsmæssige kvalifikationer m.v.). Earlier regulation was established by Lovbekendtgørelse nr. 334 af 20.03.2007 om adgang til udvølelse af visse erhverv i Danmark; Lov nr. 476 af 09.06.2004 om adgang til uduøvelse af visse erhverv i Danmark, and Lov nr. 291 af 08.05.1991 om adgang til uduøvelse af visse erhverv i Danmark for statsborgere i De Europæiske Fællesskaber og de nordiske lande.

\(^8\) See e.g. the order concerning the application of the Act to Certain Maritime Professions no. 818 of 22 July 2004 (Bekendtgørelse om anvendelse af lov om adgang til uduøvelse af visse erhverv i Danmark på erhverv under Økonomi- og Erhvervsministeriets (Søfartsstyrelsens) ressort).


\(^12\) See <ufm.dk/le> (in Danish).
The Agency works in close cooperation with 21 competent authorities, which are in charge of admitting Danish nationals as well as foreigners to the regulated professions. In order to enhance the coherence in the area of regulated professions, since 2010 the Agency has been in charge of receiving all applications for recognition of foreign qualifications in Denmark. These applications are then forwarded to the competent authority for carrying out the procedure leading to authorisation.

The Agency is also in charge of the assessment of foreign qualifications gained via educational courses (such as diplomas etc.). The Agency promotes the evaluation by spreading information in job centres, language centres, municipality based integration centres, and so on, in order to support the use of foreign qualifications in Denmark. Regrettably, even among large companies in Denmark, many are not aware of the Agency’s work as regards the recognition of foreign professional qualifications.13

The assessment that the Agency or another competent authority provides is an official statement that indicates e.g. how a foreign qualification matches a corresponding Danish education/profession, thus giving the foreigner access to the labour market.14 The decision on foreign professional qualifications can result in a positive decision; a conditional decision; or a negative decision. In case of a positive decision, the foreigner can undertake work in Denmark on an equal footing with Danish citizens. However the authorisation can contain time limitations, and indicate when the authorisation has to be renewed.

In case of a conditional decision, the access to the labour market is conditional upon the meeting of certain qualification requirements, as e.g. an aptitude test or a trial period (option to be chosen by the applicant). This is though only valid for cases decided according to EU-rules; in the cases decided by Danish rules on the access to a regulated profession by TCNs, a conditional decision can entail a requirement to complete supplementary education.

In case of a negative decision, the foreigner cannot take up work in Denmark according to his/her foreign qualifications. Both the conditional and negative decisions have to give a reason for the decision and indicate the ways of appeal. The case handling time is set not to exceed three months from the time of application.

In May 2015 the Agency has reported to the Parliament on the previous year’s work on the matter of recognition of foreign educational qualifications, devoting the analysis also to those educations that give access to regulated professions in Denmark.15 In the area of regulated professions, the Agency has reported an increase in applications in the recent years. In 2014, 1,676 cases were decided, meaning an 18% increase from the previous year; the Danish Health and Medicines Authority (Sundhedsstyrelsen), the Danish Working Environment Authority (Arbejdstilsynet), and the Danish Agency for Higher Education handled together 94% of the cases. 16

The following figure illustrates the latest years’ development in the decisions of the relevant authorities.

Figure 1: Decisions on authorisation etc., according to the type of decision

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According to the Danish Agency for Higher Education, the applications decided on the basis of the EU rules had a bigger percentage of positive outcomes than the ones where the applicant was a TCN or had an educational background from a third country (see more on the legal basis for the assessment in the following section). In the case of decisions based on EU rules for recognition of professional qualifications, 93% were positive, 5% conditional, and 2% negative. As regards all other decisions, 14% were positive, while 74% were conditional, and 12% were negative.¹⁷

We were not able to identify case law that specifically deals with the matter of recognition of foreign professional qualifications.

C. CATEGORIES OF PROFESSIONAL QUALIFICATIONS

According to the questionnaire the following categories of qualifications are to be considered (p. 4): a) qualifications obtained by EU citizens in another Member State (EU qualifications); b) qualifications obtained by EU citizens outside the European Union (non-EU qualifications); c) qualifications obtained by EU citizens prior to their country joining the European Union (pre-accession qualifications); d) qualifications obtained by nationals of EU associated third countries, when the relevant association agreement includes chapters on establishment and/or services. However, in the Danish context it is not possible to identify all of the above categories. In practice, it is possible to identify three different categories of qualifications, as different rules apply in Denmark for Union Citizens, Nordic citizens and TCNs.

Moreover, in line with the provisions of Directive 2005/36/EC, there is a difference between freedom of establishment and provision of services on a temporary or occasional basis in Denmark. For temporary or occasional provision of services in Denmark the procedure is fairly straightforward and only requires a declaration from the worker to the relevant authority that the applicant meets the criteria listed for the exercise of the regulated profession. An exception to this rules is if the applicant is a TCN. In case of TCNs, or professional qualifications gained in a country outside the EU, the possibility to present a declaration so as to exercise a regulated profession on a temporary basis is admitted only in those cases where the national legislation for the regulated profession at stake allows it.

For establishment and access to regulated professions in Denmark, the rules are different in case the applicant is a Union citizen, or a citizen of Iceland, Norway, Liechtenstein, or Switzerland (and qualified to access a regulated profession in another Member State), or if the applicant is a TCN. In case of a Union Citizen, the qualifications directive will apply.

Nordic citizens (citizens of Finland, Norway, Iceland, and Sweden) are reserved a preferential treatment. Due to the agreements among the Nordic countries, it is possible to grant automatic recognition of professional qualifications for the exercise of some medical and teaching professions in Denmark.

However, EU-rules according to the professional qualifications directive do not apply for TCNs. The Danish opt-out on Justice and Home Affairs (cooperation on matters of visa, asylum, immigration and other measures for the free movement of people) entails that the professional qualifications directive does not apply to persons having a nationality outside the EU, EEA and Switzerland. An exception to this is applied to persons that have been granted a residence permit in Denmark according to the Residence Directive 2004/38/EC, which has been transposed into Danish law. For the recognition of qualifications from a third country, the worker or his employer has then to seek recognition within areas or trades which require training in Denmark. This procedure is lengthier and does not foresee automatic recognition of qualifications; it can both involve costs and further education or training requirements in order to access a regulated profession.

Finally, some categories of professionals are regulated by international conventions (mainly within the maritime industry) that take precedence over the professional qualification directive as well.

QUESTION 2: THE PROTECTION OF ECONOMIC RIGHTS OF CONSUMERS


19 Styrelsen for Videregående Uddannelser (2015b), ibid. p. 27.

20 The Danish Working Environment Authority (2010), Want to work in Denmark?, p. 7.

21 Styrelsen for Videregående Uddannelser (2015b), ibid. p. 27.
A. REGULATORY FRAMEWORK

The Unfair Commercial Directive 2005/29/EC (hereinafter: UCP) is implemented in Denmark in the Consolidated Marketing Practices Act\(^\text{22}\), whereas the Consumer Rights Directive 2011/83/EC (hereinafter: CRD) is implemented in the Act on Consumer Contracts.\(^\text{23}\) While other acts also concur to the protection of consumers in Denmark (e.g. the Danish Contract Act [Aftaleloven]; the rules on consumer purchases in the Danish Sale of Goods Act [Købeloven]; the Payment Services and Electronic Money Act [Bekendtgørelse af lov om betalingstjenester og elektroniske penge]; and The Act on Alternative Dispute Resolution in relation to Consumer Complaints [Lov om alternativ tvistløsning i forbindelse med forbrugerklager (forbrugerklageloven)], inter alia), we will focus the following report on the Consolidated Marketing Practices Act and the Act on Consumer Contracts as they are the main legal sources of reference for the implementation in Danish law of the UCP and CRD.

The modern Danish law on marketing practices was introduced in 1974\(^\text{24}\), and was mainly based on a national tradition that led back to competition law. The provisions in the first act on marketing practices had to a certain point the same content as the rules on competition, but the angle of the approach was different: the 1974-act marked the departure from the conception of economic activity as a private matter, introducing the interests of consumers as a matter of public concern and the figure of the Consumer Ombudsmand as the guardian of the enforcement of the law protecting those interests.\(^\text{25}\) The 1974-act was subsequently changed along the years (in 1994, 2002 and 2005) until the UCP came into force and Act no. 1547/2006 amended the Marketing Practices Act to implement the directive in Danish law.\(^\text{26}\)

Since the UCP was introduced, the national law has been interpreted in conformity with EU law.\(^\text{27}\) In particular, via implementation of the Directive in Danish law, a new general clause was included in the first section of the act (section 1 (2)) while a new section (section 3) reformulated the rules on misleading and unfair marketing.\(^\text{28}\) An executive order on misleading marketing\(^\text{29}\) and a series of other ministerial orders related to the Marketing Practices Act are also enforced.\(^\text{30}\) At the time of the implementation of the directive, the Consumer Ombudsmand issued guidelines that dealt with the most relevant changes in section 1 (clause on good marketing practices) and 3

\(^{22}\) Lovbekendtgørelse nr. 1216 af 25.09.2013 om markedsføring.


\(^{24}\) Lov nr. 297/1974 om markedsføring.


\(^{26}\) Lov om ændring af lov om markedsføring (Gennemførelse af direktivet om urimelig handelspraksis, kontrolundersøgelser m.v.) nr. 1547 af 20.12.2006.


\(^{30}\) See list in the annex on national provisions.
(misleading and unfair marketing) and the insertion of a new section 12a (invitation to purchase) in the Marketing Practices Act as a consequence of the implementation of the UCP. 31

The Marketing Practices Act is not just a consumer protection act or an act that only regulates the relationship between economic activities; the Act aims at protecting both the interests of the consumers, business owners and more common social considerations (almene samfundshensyn). 32 These considerations were already included in the 1974-Act, but were made explicit in section 1 (generalklausulen) of the 2005-Act.

Since the implementation of the UCP, the Marketing Practices Act has been changed several times. 33 The possibility to present a class action was introduced in 2007, opening for the possibility of having the Consumer Ombudsmand as group representative in a class action on marketing practices. 34 This model offers the possibility to effectively handle litigation of cases that have a large number of similar claims. 35

As regards the CRD, the Act on Consumer Contracts implementing the directive in Danish law was based on a report (betænkning) written by a committee in the Ministry of Justice. 36 The committee had the task to consider how the directive could be transposed in Danish law. The act proposed followed the guidelines of the committee; the bill was passed in the Danish Parliament in December 2013 and the act has been enforced as of 13 June 2014. Some of the provisions in the directive were implemented in the the Danish Contract Act and other acts. 37 The previous Act on Consumer Practices had implemented Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 85/577/EEC to protect consumer in respect of contracts negotiated away from business premises (both directives were replaced by the CRD). The Danish rules on distance contracts were already offering a high degree of protection to consumers, and the CRD in many ways strengthens consumer protection even more. 38

**B. AUTHORITIES INVOLVED IN CONSUMER PROTECTION** 39

The primary administrative institution that ensures the application of the UCP is the Danish Consumer Ombudsman (Forbrugerombudsmand), which carries out supervisory tasks 41 and also ensures that the legislation on the Danish

33 For an overview, see Heide-Jørgensen, C. (2012), ibid., pp. 35-36.
34 Lov om ændring af retsplejeloven og forskellige andre love (Gruppesøgsmål m.v.) nr. 181 af 28/02/2007.
37 Lov om ændring af købeloven og forskellige andre love (Ændringer som følge af forslag til ny forbrugeraftalelov m.v.) nr 1460 af 17.12.2013.
39 The following section is partly based on the national report written for WP 5.1.
40 See <http://www.consumerombudsman.dk/>.
Marketing Practices develops with a view on protecting the consumers' rights. The Danish Consumer Ombudsman is the appointed central enforcement authority and national liaison office under the EU regulation on consumer protection cooperation (CPC). Moreover, the Danish Consumer Ombudsman delivers guidelines \(^42\) and statements on different consumer related topics, such as e.g. ethics and marketing, internet and e-commerce, children/young people and marketing practice, and also on its own jurisdiction. These statements provide interpretation of consumer law as well. \(^43\)

The Danish Competition and Consumer Authority (Konkurrence- og Forbrugerstyrelsen) covers an array of areas relating to the well-functioning of the Danish markets. The Authority works as a secretariat for the Competition Council (Konkurrencerådet), the Council for Public-Private Cooperation (Rådet for Offentlig-Privat Samarbejde), the Energy Supply Complaint Board (Ankenævnet på Energiområdet), the Consumers’ Ombudsman (Forbrugerombudsmand), and the Consumer Complaints Board (Forbrugerklagenævnet).

The Consumer Complaints Board is an impartial complaint board that helps consumers that are unsatisfied with a service or a good purchased in Denmark. If the Consumer Complaint Board finds in favour of the consumer, and the business owner does not comply with the board’s decision within 30 days, the consumer can take the case to court. The Danish Competition and Consumer Authority may assist the consumer in bearing the costs of a possible lawsuit. Decisions by the Consumer Complaints Board of general public importance are available online. \(^44\)

The Danish Competition and Consumer Authority also provides advice about common consumer related questions. Moreover, among its duties is also: to produce market analyses based on both competition and consumer aspects; to advice relevant public authorities through the formulation of guidance notes on legal and practical matters; and to contribute to the development of new politics and regulation, putting forward recommendations and communicate to the consumers and the companies.

The Danish Competition and Consumer Authority operates the website Forbrug.dk, the Public Consumer Portal, which lists advice about relevant topics and products in order to make consumers better equipped to make the right choices based on individual preferences and needs. The portal offers a hotline for advice about consumers rights (although only in Danish) both before and after making a purchase (e.g. about electronic commerce or banking); it also offers guidance as to how to submit complaints to the Consumer Complaints Board and other relevant complaints bodies. The Danish Competition and Consumer Authority also funds the European Consumer Centre Denmark (Forbruger Europa) that gives advice to consumers and also assists in presenting a complaint about purchases in another EU country, Norway or Iceland. \(^45\)

Finally, we can also mention the private consumer council Forbrugerrådet Tænk which is an independent member organization working to promote sustainable and socially responsible consumer spending and well-functioning

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\(^41\) Section 22 (1) of the Consolidated Marketing Practices Act.

\(^42\) Section 24 of the Consolidated Marketing Practices Act.


\(^44\) See <http://www.forbrug.dk/Klagemuligheder/Forbrugerklagenaevnet/Klag-til-Forbrugerklagenaevnet/Afg%C3%B8relser>.

\(^45\) See <http://www.forbrugereuropa.dk/>.
The organization handles inquiries about consumer policies and also offers counselling on consumer issues and complaints (by phone and e-mail, in Danish only).  

C. ISSUES OF ENFORCEMENT

The contemporary systems for enforcement of rules on marketing practices and consumer protection are developing in close connection, and are based on a peculiar combination of public administration and private enforcement via court action. For contravention of the Marketing Practices Act, Section 27 establishes the possibility to directly go to court for any private actor with a legitimate interest (retlig interesse) in the case. This can therefore happen without prior evaluation of the Consumer Ombudsmand. Interest organisations and consumer protection organisations can also take legal action. The Consumer Ombudsmant as well can file a suit in court.

For other details on the mechanisms in place for administrative enforcement, enforcement through court action, and types of sanctions, we can refer to the information provided by the enforcement fiche on Denmark published on European Commission’s website on the Unfair Commercial Practices Directive (the text is to be found in the Annexes); a circular from Rigsadvokaten has also been issued.

As regards collective redress, no collective actions has been brought to the courts under section 28 of the Marketing Practices Act, which opens for the possibility of the representation by the Consumer Ombudsmand of a collective claim.

QUESTION 3: THE PROTECTION OF ECONOMIC CITIZENS’ RIGHTS IN THE DIGITAL ERA

INTRODUCTION

The present analysis is concentrated on the implementation at the national level of the protection of ‘online citizens’ – including companies in their economic freedom to conduct a business – with a particular attention given to citizens’ rights “to be forgotten” after the European Court of Justice’s ruling in Case C-131/12 of 13 May 2014. Consumer rules on online shopping are thus not at focus in this report. The selected topics in the following were chosen in order to give a general overview of the implementation of EU data protection rules in Danish legislation (section A), as well as recent legal developments both in theory as in practice (section B). Final remarks will be devoted to the right to be forgotten as it has been analysed in Danish legal scholarly work (section C).

46 <www.taenk.dk>.
49 Section 27, 1 (2) of the Consolidated Marketing Practices Act.
53 Judgment of the Court (Grand Chamber) of 13 May 2014. Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González. ECLI:EU:C:2014:317.
A. EU DATA PROTECTION LEGISLATION AND DANISH NATIONAL LEGISLATION

The EU regulation on data protection is undergoing a restructuring\(^{54}\) and has been mentioned as a key instrument for ‘[r]einforcing trust and security in digital services and in the handling of personal data’ in the recently unveiled communication on the strategy for a single digital market in Europe.\(^{55}\) Denmark is characterised by a high degree of digitalisation, where both citizens and public authorities use digital media, where digitalisation is seen as a part of a modern and efficient public sector, and where a high level of trust exists between citizens and the State.\(^{56}\) Therefore, a big amount of data is gathered and exchanged, but at the same time the vulnerability of the system of data protection is increasingly exposed. Moreover, the area of data protection covers many different sectors and the exchange of data can happen at national but also international level, without much debate about the consequences for the protection of individual citizens’ rights.\(^{57}\)

As regards the implications of EU Data protection legislation for economic citizens’ rights in the Danish legal system\(^{58}\), one can start by ascertaining that Directive 95/46\(^{59}\) has been transposed with considerable delay into Danish law by means of Act on Processing of Personal Data no. 429 of 31.05.2000 (Lov om behandling af personoplysninger – Persondataloven). At the time of the negotiations of the Directive in the EU, Denmark was not particularly enthusiastic about its adoption, and this may have caused the directive to have “an undeserved bad reputation”.\(^{60}\) In contrast, nowadays the directive is evaluated to have introduced in Denmark an improved system over the previous one (which was regulated by the Registry Acts – Registerlovene\(^{61}\)), and to have promoted new and better rights for citizens.\(^{62}\) The Danish Act on Processing of Personal Data ensures that EU standards of protection are enforced at the national level, and the Act regulates both the handling of data by private actors and public authorities. The Act has the aim of strengthening the citizens’ legal certainty (retssikkerhed) by creating transparency about the handling of data; by setting up procedures and conditions for the treating of data depending on their degree of sensitivity; and by giving citizens the right to object to certain types of treatment of data.\(^{63}\) The Act is supplemented by the Executive Order on Security Measures for the Protection of Personal Data.\(^{64}\)


\(^{57}\) Danish Institute for Human Rights (2015), ibid.

\(^{58}\) The following is partly based on the national report written for Deliverable 7.2.

\(^{59}\) Directive 95/46 on the protection of individuals with regard to processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L281/31.


\(^{61}\) The now repealed Lov om offentlige myndigheders registre and Lov om private registre.

\(^{62}\) Blume, P. (2013a), ibid.

\(^{63}\) Danish Institute for Human Rights (2015), ibid.

\(^{64}\) Executive Order on Security Measures for the Protection of Personal Data handled by Public Administration (Bekendtgørelse om sikkerhedsforanstaltninger til beskyttelse af personoplysninger, som behandles for den offentlige forvaltning), BEK no. 528 of 15/06/2000.
At the time of the implementation it was discussed whether the directive was expected to bring about harmonisation of data protection rules or if it was just a minimum standard directive. The answer to that seemed to be both. The directive has had a great impact on the Danish rules, which have been formulated in close correspondence with the Directive’s text. Unfortunately, the choice of not adopting a more free linguistic style in the redaction of the Danish rules has created a legal text that by some is considered to be a bit inaccessible and difficult to understand.\textsuperscript{65}

The Danish Data Protection Agency has the duty and authority to monitor the enforcement of the Act on Processing of Personal Data.\textsuperscript{66} The agency provides guidance and advice to authorities, companies, and individual citizens. The agency also controls the more sensitive processing of personal data by companies and authorities via notifications and authorisations. Moreover, the Agency handles complaints from citizens; it can take up cases out of its own initiative; it conducts visits and inspections; and can issue criticism, bans, or enforcement notices for violations of the Act on Processing of Personal Data. On its website, the Agency publishes its decisions from the year 2000 onwards.\textsuperscript{67} The decisions of the Agency are binding and final, and cannot be brought to another administrative authority. However, a decision can be brought to the Parliamentary Ombudsman or the Courts.

An infringement of the Act on Processing of Personal Data can entail compensation for damages or sanctions in the form of fines or even prison sentences.\textsuperscript{68} The Danish Data Protection Agency does not have the authority to sanction infringements, but it can report infringements to the Police. Not respecting the decision of the Agency does also entail a sanction.\textsuperscript{69} However, although being important “symbolic signs” from the legislator’s side, neither sanctions nor compensation play a relevant part in practice, and the level of sanctions is also considered low in comparison to other countries.\textsuperscript{70} Offenders do not incur high value fines in Denmark,\textsuperscript{71} and this has led to the question of whether the protection of personal data is taken seriously in the Danish legal system.\textsuperscript{72}

Worth of mention is also the transposition in Denmark of the now annulled Data Retention Directive 2006/24,\textsuperscript{73} which was partly implemented by Executive Order on Providers of Electronic Communications' Networks and Electronic Communications' Services Recording and Storing of Data on Telecommunications (\textit{Bekendtgørelse om udbydere af elektroniske kommunikationsnets og elektroniske kommunikationstjenesters registrering og opbevaring af oplysninger om teletrafik (logningsbekendtgørelsen)}, BEK no. 988 of 28/09/2006, and partly via provisions in the Administration of

\textsuperscript{65} Blume, P. (2013a), p. 100.

\textsuperscript{66} \texttt{http://www.datatilsynet.dk/english/>}.

\textsuperscript{67} \texttt{http://www.datatilsynet.dk/afgoerelser/>}.

\textsuperscript{68} Compensation has to be decided by the Courts. See f.ex. U.2007.1967V.


\textsuperscript{71} In case U.2004.2204\texttt{Ø}, a 5.000 Dkk. (ca. 670 €) fine was given for collecting data without a legitimate purpose (violation of Art. 5(2) and 6 (1) of the Act on Processing of Personal Data).

\textsuperscript{72} Blume, P. (2013a), p. 185-186.

\textsuperscript{73} Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive) [2006] OJ L105/54. [annulled]
Justice Act (retsplejeloven). Guidelines to the executive order were also introduced.74 The telecommunications providers were strongly against the new rules, which entailed an increased administrative burden and financial costs related to the storing of data.75

The rules on storing/retention of data came into force on 15 September 2007. As formulated by one of the leading legal scholars on the topic in Denmark, Professor Peter Blume, this is a particularly historical date because Danish legislation considerably modified the practices of the monitoring of communication made via telephone and internet: the monitoring of data has from that day become a common, every day phenomenon, although citizens may not always be aware of it.76 Denmark was then a sort of pioneer, while other countries contested the Directive for undermining citizens’ rights.77 It is in fact dubious whether the reduction in the right to privacy of citizens has been counterbalanced by an increased security and protection against criminal/terrorist activity. It is not clear whether the intervention on privacy that the duty to store data represents is effective and proportional, since it potentially affects all citizens. Moreover, the rules enforced have excluded a series of services and providers, so it is uncertain whether monitoring all citizens entails an effective surveillance of potential suspects, since they could choose to use those providers exempted from the duty of storing data.78

Executive order no. 988/2006 establishes that data shall be stored for one year but there are many exceptions to this rule, which raise the questions as to whether the system is effective and if it actually attains its objectives.79 In any case, the monitoring of citizens in Denmark is now intensive and has increased tremendously (e.g. 100.000 registrations per citizen in 2010), while the police only rarely uses any of the gathered information (in the same year the police requested access to internet information 170 times and mobile telephone information 3.801 times).80 In 2012 these numbers raised to 144.000 registrations per citizen, corresponding to ca. 900 million registrations per year.81 The Danish Security and Intelligence Service (Politiets Efterretningstjeneste, or PET) has informed that they only use the information on a very limited scale, while the communication providers have reported annual costs of storing of data as high as 50 million DKK a year.82

After the European Court of Justice in its judgement of 8 April 201483 declared invalid the Data Retention Directive, the Ministry of Justice evaluated whether the Danish rules had to be revised consequently.84 The Ministry found that

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75 Danish Institute for Human Rigths (2015), ibid.


78 Danish Institute for Human Rigths (2015), ibid.


80 Data reported in Blume (2013a), p. 453.

81 It was estimated that 90% of these registrations were registration of internet sessions, a type of registration that is no longer requested by law since 2014, see in the next section.

82 Danish Institute for Human Rigths (2015), ibid.

83 Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd (C-293/12) v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung (C-594/12) and Others. ECLI:EU:C:2014:238.
there was not an overall ground for assuming that the Danish rules on data retention also should be in breach of the Charter’s provisions on the right to respect for private life and communications and the right to the protection of their personal data (Article 7 and Article 8). This result was based on an analysis’ findings that the Danish legislation laid down clear and precise rules.

According to the Ministry, the rules in the Act on Processing of Personal Data contain a list of substantial guarantees on the effective protection of the storing of data against the risk of abuse and unlawful access to and the use of these data, i.e. material and procedural conditions for the access to the stored data. Moreover, the rules in the Administration of Justice Act on intervention on the secrecy of communication have to be respected when accessing stored data and the time limit for the storing of data is set to 1 year, after which the data have to be deleted or anonymised. However, the Ministry found that in particular the rules on storing of internet sessions (storing of information on internet based communication) were not appropriate to reach their goal of use of information as a part of criminal investigations. The rules in the executive order on storing of internet sessions data were then repealed. The parliament has postponed debating an overall reform of the rules on the storing of data to an unknown date in 2015.

B. RECENT DEVELOPMENTS

As far as developments in the area are concerned, recent comments have focused on data protection on social media platforms, and questioned how effective the protection of the right to privacy is in face of the requirement of user consent for personal data in social networks. There have been a number of cases in the years 2013-2014 where sensitive personal data have been leaked, also from public authorities’ databases, and that has raised the issue of IT-security, which cannot be treated separately from the issue of protection of personal data. Many companies are still not complying with the regulations in force, and the Data Protection Agency has also highlighted that public authorities have troubles complying as well.

Another development of concern in the area is a legal amendment giving access to banks and other financial institutions to personal citizens’ information contained in the ‘Income registry’ (indkomstregister), which registers personal data on income, employment and pension. The access can be required in the case a bank needs the

84 Justitsministeriet Lovafdeling, Notat om betydningen af EU-Domstolens dom af 8. april 2014 i de forenede sager C-293/12 og C-594/12 (om logningsdirektivet) for de danske logningsregler. 2. Juni 2014.
85 Justitsministeriet Lovafdeling, ibid., pp. 24-27.
86 Justitsministeriet Lovafdeling, ibid., p. 22.
87 Bekendtgørelse om ændring af bekendtgørelse om udbydere af elektroniske kommunikationsnets og elektroniske kommunikationstjenesters registrering og opbevaring af oplysninger om teletrafik (logningsbekendtgørelsen), BEK no. 660 of 19/06/2014.
information for advising a client on its product; the possibility to access the information in case of granting of credit was already in place since 2012 (Art. 7a) and thus it has now been expanded. The access to information has of course to respect the rules laid down in the Danish Act on Processing of Personal Data. Nonetheless, this latest amendment is a further step away from the original purpose of having a digital income register. The preparatory works for the Act on the Income Registry stated instead that the aim was an easing of the administrative burden of public authorities in the case-handling of education grants and other social benefits. The departures from the original aim can eventually lead to using the income registry as a tool to monitoring citizens; unfortunately, the risk of abuse of the information remains quite concrete, as it was witnessed in recent cases where either private or public institutions were unable to guarantee the correct handling of sensitive data.

The regulation of data protection has been object of recent legal scrutiny, due to the fast development of technology and the increased widespread use of digital data in public and private institutions. In 2009, a committee was appointed in order to investigate the overlap between the rules in the Act on Public Administration (Forvaltningsloven) and the Act on Processing of Personal Data as regards the exchange of personal data between authorities. The committee recommended among other things that the Act on Processing of Personal Data should regulate the access to exchange personal data between authorities, either manually or electronically.

Moreover, in the wake of the 2014 media-based scandal, the Parliament established a working group that had the task of looking into the need to increase the protection of sensitive personal data. The new EU directive proposal and the right to be forgotten were explicitly mentioned as topics to be covered in the report commissioned to the working group. The working group under the parliament’s legal affairs committee (Retsudvalg) has recently submitted its report. Starting by stating that data security and the protection of the citizens’ sensitive personal data are “a growing worry”, the working group reiterates that public authorities as well as private companies in many occasions infringe the rules on data protection. This calls for a strengthening of the role and possibility of effective control by the Danish Data Protection Agency, and perhaps in the future to reinforce its independency by placing it under the Parliament (it is now under the Ministry of Justice).

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92 Preparatory works to Bill L 403/2006.


94 Ministry of Justice, Justistministeriet (2009), Betænkning om udveksling af oplysninger inden for den offentlige forvaltning. Betænkning nr. 1500.

95 A number of famous people’s credit card were monitored by an employee of the Danish/Norwegian electronic payment services company NETS, and a Danish celebrity magazine (Se & Hør) had paid to get the information in order to report on the movements of these known people.


99 “En voksende bekymring” (my translation), Beretning no. 4, ibid., p. 4.
The sanctions that the Agency can inflict are not evaluated as sufficient, and the working group also proposes that, differently from now, the sanctions may be the same for public authorities and private companies. Finally, the working group recommends that the principle of ‘privacy by design’ should be drawn in future public IT-systems, that the public registries which use sensitive personal mapped are mapped, and that a report evaluates if and what limits of user consent can be implemented in the future. Unfortunately, the working group did not have the resources to deal with the question of the right to be forgotten, but included reflections on the proposed EU new regulation on personal data in its analysis. The overall principles stated by the working group all lead towards an increased control of the use of sensitive personal data, and better information to citizens about it, in an effort to increase the rule of law in the area.100

It will now be up to the new government (new elections have been called at the time of writing), if they so wish, to follow upon the recommendations of the working group.

Finally, the Danish Supreme Audit Institution (Rigsrevisionen) has also given a report on the state’s handling of sensitive personal and companies’ data.101 The Rigsrevisionen has examined eight Danish State Institutions and stated that the protection of sensitive data is unsatisfactory and not living up to the standards set by the law. Regrettably, even those institutions that are used to handle a great number of sensitive data, such as Statistics Denmark, The National Police (Rigspolitiet) and the Danish Customs and Tax Administration (SKAT) have shown security gaps in certain areas. The analysis and critique were directed among other things at the institutions’ lack of update of internal guidelines; lack of control with user access; and lack of monitoring of the internal security measures’ observance.102

C. THE RIGHT TO BE FORGOTTEN

As regards the issue of the right to be forgotten, a starting point can be the acknowledgment that, in the field of protection of personal data one can find a struggle between the right of individuals to maintain their integrity and the companies’ economic purposes, where recent considerations on integrity are gaining footing at the legal level.103 In this optic, the right to be forgotten which is included in the Commission’s regulation proposal Article 17 is an expansion of the controller’s duty to erase the personal data which are out of date and consequently no longer fulfil the aim they were gathered for – conversely this is a right that expands the possibility for an increased protection of the citizens’ integrity.

Although in 2012, when first proposed, the right to be forgotten seemed to be the biggest innovation in the new legal set-up, the formulation later adopted may have reduced its future impact. For example, the right to be forgotten is not unconditional (many exemptions apply) and has not been formulated as a principle, but instead as a right which presumes that the subject affected has to make a motion to get her right respected; notoriously few make use of this form of right that requires action from the subject involved, while characteristically internet keeps and remembers everything.104 Moreover, after the Google-ruling by the European Court of Justice in 2012, it will be possible for a citizen to ask for the removal of a link that is no longer relevant; however, the information (data) will, provided that is

100 Beretning no. 4, ibid., p. 2.


102 Rigsrevisionen, ibid.

103 Blume, P. (forthcoming 2016), Persondataretten mellem integritet og økonomi, Retfærd, no. 1/152.

lawfully made public, not be deleted and in principle, it can still be found. As Blume poignantly puts it, “the right to be forgotten is therefore today rather a right to be remembered with inconvenience”.  

In the Danish legislation there is no explicit right to be forgotten, but the basic idea beyond such a right is recognized: personal data in Denmark cannot be stored for an indefinite time. As a matter of fact, according to Article 5, section 5 in the Danish Act on the Processing of Personal Data, the data collected cannot be stored in a way that makes it possible to identify a person for a longer timespan than it is necessary to serve the purpose for which they were collected. However, this is a duty for the controller, and not necessarily a right for the citizen. Moreover, the Danish Data Protection Agency cannot monitor observance of the time-limit for storing of data, and this seems to be a problem especially for public authorities, since the possibility for archiving in Article 14 of the Danish Act does not provide a fixed deadline.

There is also nowadays in Danish law no duty for the controller to communicate with third parties who have accessed the data, in order to ensure that the removal or erasure of the personal data. In this respect the proposed Article 17 (2) in the new regulation may imply new administrative burdens and financial costs for the controller, also for the public administration. However this duty to inform third parties is not precisely defined and may be unrealistic, as it presupposed that the data subject actively applies for erasure of own personal data to the controller. A more efficient way to implement the right to be forgotten could be to expand the information provided to the data subject, so that the data controller could ask for the preference of the data subject as regards the eventual deleting of her personal data already at the time of the collection of data. In this way it would be more likely that people would become more conscious of the fact that the data they provide about themselves are actually remaining ‘somewhere’, ‘out there’, for an unclearly defined period of time.

It is a remarkable step forward for the evolution of personal data protection that the right to be forgotten is now on the EU political agenda. However, the many exceptions in the proposed regulation seem to erode the individual’s right to be forgotten, and the technological difficulties related to the effective realisation of this right may eventually not provide the individual’s integrity those safeguards promoted at the outset. In conclusion, we did not find it possible to foresee the national consequences of the right to be forgotten.

105 Blume, P. (forthcoming 2016), ibid., my translation. In the original: “Retten til at blive glemt er derfor i dag snarere en ret til at blive husket med besvær”.


107 The rule in Article 5, section 5 reflect the rule in Article 6(1e) in the Data Protection Directive. See Blume, P. (2013b), ibid.


111 In the Danish Act, Articles 28 and 29 in Title III (The data subject’s rights), Chapter 8, establish what information are to be given to the data subject.

ANNEXES

RELEVANT NATIONAL PROVISIONS

- Consolidated Act on the Assessment of Foreign Qualifications etc. LBK no. 579 of 01/06/2014 (Bekendtgørelse af lov om vurdering af udenlandske uddannelseskvalifikationer m.v.)
- Executive Order no 602 of 25/06/2003 on the Assessment of Foreign Educational Qualifications etc. (Bekendtgørelse om vurdering af udenlandske uddannelseskvalifikationer m.v.)
- Executive Order the Qualifications Board BEK no. 447 of 10.05.2007 (Bekendtgørelse om Kvalifikationsnævnet)
- Consolidated Act on the Right to Exercise Certain Professions in Denmark, LBK no. 189 of 12/02/2010 (Bekendtgørelse af lov om adgang til udførelse af visse erhverv i Danmark)
- Executive Order on the Recognition of Professional Qualifications, BEK no. 575 of 01/06/2011 (Bekendtgørelse om anerkendelse af erhvervsmæssige kvalifikationer m.v.)
- Order concerning the application of the Act to certain maritime professions no. 818 of 22 July 2004 (Bekendtgørelse om anvendelse af lov om adgang til udførelse af visse erhverv i Danmark på erhverv under Økonomi- og Erhvervministeriets (Søfartsstyrelsens) ressort)
- Consolidated Marketing Practices Act no. 1216 of 25.09.2013 (Lovbekendtgørelse om markedsføring)
- Act on Certain Consumer Contracts no. 1457 Of 17.12.2013 (Lov om forbrugeraftaler)
- Bekendtgørelse nr. 1203 af 28. september 2010 om information til forbrugerne om priser på låne- og kredittilbud og valutakurser
- Bekendtgørelse nr. 1249 af 25. november 2014 om regler for Forbrugerombudsmandens virksomhed
- Act on Processing of Personal Data no 429 of 31.05.2000 (Lov om behandling af personoplysninger – Persondataloven)
- Executive Order on Providers of Electronic Communications’ Networks and Electronic Communications’ Services Recording and Storing of Data on Telecommunications (Bekendtgørelse om udbydere af elektroniske kommunikationsnets og elektroniske kommunikationstjenesters registrering og opbevaring af oplysninger om teletrafik (logningsbekendtgørelsen), BEK no. 988 of 28/09/2006
- Executive Order on Security Measures for the Protection of Personal Data handled by Public Administration (Bekendtgørelse om sikkerhedsforanstaltninger til beskyttelse af personoplysninger, som behandles for den offentlige forvaltning) BEK no. 528 of 15/06/2000
- Guidelines no. 74/2006, Vejledning til bekendtgørelse om udbydere af elektroniske kommunikationsnets og elektroniske kommunikationstjenesters registrering og opbevaring af oplysninger om teletrafik (logningsbekendtgørelsen)
- Guidelines no 74/2006, Vejledning til bekendtgørelse om udbydere af elektroniske kommunikationsnets og elektroniske kommunikationstjenesters registrering og opbevaring af oplysninger om teletrafik (logningsbekendtgørelsen)

CASE LAW

- U.2004.2204Ø
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Ministry of Justice, Justitsministeriet (2009), Betænkning om udveksling af oplysninger inden for den offentlige forvaltning. Betænkning nr. 1500


The primary administrative mechanism in regards to enforcing the UCP Directive implemented primarily in the Danish Marketing Practices Consolidation Act is the Consumer Ombudsman cf. Section 22 of the act. This section states that it is the responsibility of The Consumer Ombudsman to monitor compliance with this Act and the executive orders issued pursuant to this Act, especially in the interests of consumers. This is meant to be a priority rule, not a jurisdiction rule, which means the authority of The Consumer Ombudsman is not limited to subjects regarding consumers. Furthermore The Consumer Ombudsman may carry out inspections for the purpose of processing complaints forwarded from enforcement authorities in other EU countries pursuant to Regulation (EC) No 2006/2004 on consumer protection cooperation, and which concern infringements of directives for which the Consumer Ombudsman has been appointed the competent authority cf. Section 22a. The Consumer Ombudsman shall seek by negotiation to influence traders to act in accordance with the principles of good marketing practice and to observe this Act in other respects cf. Section 23(1). In addition he produces guidelines for marketing in specified areas that must be considered essential, especially in the interests of the consumer and he has the authority to, on request, give a statement regarding his view of the lawfulness of contemplated marketing arrangements, unless an opinion would be subject to unusual doubt or other special circumstances exist. An advance indication does not amount to an actual opinion of the lawfulness of the arrangement concerned.

Although The Consumer Ombudsman primarily handles problems regarding consumers, complaints can be filed by anyone for instance consumers, competitors or other traders even anonymously. In addition the Consumer Ombudsman is intituled to process issues regarding The Marketing Act on his own initiative c.f. the Marketing Act Section 22.

There are no legal requirements you need to meet in order to file a complaint, however the Consumer Ombudsman has issued a guide on his website (www.forbrugerombudsmanden.dk) listing which information is recommended.
to state in the complaint to insure he has all needed information in order to assess the complaint. (For instance information about the trader the complaint concerns, why the trader is thought to violate the Marketing Act, documentation etc.) On the website of The Consumer Ombudsman is a printed form for filing complaints but using it is optional.

The Consumer Ombudsman does not have obligation to investigate the complaint. All complaints filed with the ombudsman will be assessed, but it is his choice weather a complaint should be investigated further or not. The assessment is generally based on the following circumstances: - is the problem base for many complaints? - is the issue a general problem seen in several trades? - how severe is the problem in regard to each person?

There are no specific requirements regarding the provision of evidence to The Consumer Ombudsman. The Consumer Ombudsman however has authority to require the disclosure of all details considered necessary for his activities, including decision as to whether a matter falls within the purview of the Act cf. Section 22(2.)

II. ENFORCEMENT THROUGH COURT ACTION

Which court actions are available to enforce the UCP Directive?

Under Section 20 of The Marketing Act actions in conflict with the Act may be prohibited by judgements. As a consequence the regular court action of filing a civil suit is also available to enforce the implemented directive. Concurrently with this or subsequently there is the possibility of imposing injuctions cf. below.

Under Section 27 anyone with a legal interest therein may start the court actions in accordance with Section 20. Under Section 27 The Consumer Ombudsman has the authority to start court actions on his own initiative as well. The term legal interest is not conclusively defined in Danish law but in general the plaintiff needs to have an individual interest in the case and he or she need to be individually affected by the outcome.

Can court actions be initiated by competitors?

Court actions can be initiated by competitors as long as they have the sufficient legal interest.

Because of the often urgent nature of these types of lawsuits it is possible to obtain an injunction to restrain the breach. A case regarding an injunction of this matter is handled through the regular procedure in the Danish Administration of Justice Act chapter 57. In short the bailiff's court process the case and is able to issue an injunction to stop the action violating the Marketing Act. Furthermore the bailiff's court has authority to order certain actions from the violator in order to insure compliance with the injunction. In order to obtain an injunction the plaintiff must prove or render probable: - that the actions wanted prohibited is in conflict with rights of the plaintiff - that the defendant is going to carry out the actions wanted prohibited - that the overall goal of the injunction would be wasted if the plaintiff is referred to the ordinary courts.
In general the provision of evidence in regards to the ordinary court actions are no different than other civil or penal cases. One should however pay attention to the provisions in the Danish Marketing Act Sections 3(3) and 22(2) regarding the traders duty to submit documentation and information regarding their behavior on the market. Section 3(3) furthermore states that the trader must be able to prove factual information. The burden of proof regaring facutal information thereby is the traders.

III. SANCTIONS

Under Section 20 of The Marketing Act actions in conflict with this Act may be prohibited by judgments. Concurrently with this or subsequently, such injunctions may be imposed by judgments as may be considered necessary to ensure: Compliance with the prohibition, including through provision that agreements entered into in conflict with a prohibition are invalid and restitution of the state of affairs existing before the unlawful action, including destruction or recall of products and issue of information or correction of statements. Actions in conflict with The Marketing Act incur liability to pay damages under the general rules of Danish law. Any person who infringes or unwarrantably takes advantage of another’s rights in conflict with this Act shall pay reasonable damages for this. If infringement or exploitation of rights in conflict with The Danish Marketing Act has taken place neither intentionally nor through negligence, the offender shall pay damages to the extent deemed reasonable.

The possible criminal actions are regulated in Section 30 of the marketing Act. Under this section several actions are sanctioned with either fines or imprisonment. Non-observance of a prohibition or injunction imposed by the court or an injunction imposed by the Consumer Ombudsman under Section 23(2) or under Section 27(2) shall be liable (however, non-observance of an order to repay a payment received does not carry a penalty) of a fine or imprisonment of up to four moths. A party who omits to mention information required under section 22(2), or under section 22a(3) second sentence, or under circumstances covered by The Danish Marketing Act gives the Consumer Ombudsman incorrect or misleading information, is liable to a fine unless a more severe penalty is prescribed under other legislation. Infringement of the provisions of section 3(1-2), sections 4-6, section 8(2), sections 9-11, section 12a(1-2), section 13(1-4), section 14, section 15(3) and section 16(1-4) and deliberate infringement of section 18 is liable to a fine unless a more severe penalty is prescribed under other legislation. Infringements of section 3(2) that consist of damaging references to another trader or matters that apply in particular to the party in question and infringement of section 5 are subject to private prosecution. Infringement of section 19 is liable to a fine or imprisonment of up to eighteen months, unless a more severe penalty is prescribed under section 299 a of the Danish Penal Code. Prosecution will take place only at the request of the injured party cf. subparagraph 4. Further more the Danish Penal Code supplies the Marketing Act with sanctions for actions that might also
What are the possible administrative sanctions for the infringement of the UCP provisions?

In general, The Consumer Ombudsman shall seek by negotiation to influence traders to act in accordance with the principles of good marketing practice and to observe The Danish Marketing Act in other respects cf. Section 23(1). The negotiation however is more than friendly conversation, and if a trader disregards an undertaking given to the Consumer Ombudsman after negotiation under subsection (1), the Consumer Ombudsman may impose such injunctions on the trader as may be considered necessary to ensure compliance with the undertaking cf. subsection (2). These injunctions are criminally sanctioned cf. Section 30(1). Furthermore, The Consumer Ombudsman may impose a provisional prohibition where there is an obvious danger that the purpose of a prohibition as referred to in section 20(1) will be lost if the court’s decision must be awaited cf. Section 29. A case to affirm the prohibition shall be brought not later than the next working day. The rules in sections 642 No. 2, 643, 645(1-3) and 651 of the Administration of Justice Act apply correspondingly, and the rules in sections 636, 638 and 648(2) apply subject to the necessary exemptions.

What are the contractual consequences of an administrative order or a judgement relating to an unfair commercial practice on an individual transaction?

Misleading and aggressive commercial practices can be terminated by initiating a cease and desist procedure. In practice, this procedure will be initiated by a competitor or The Consumer Ombudsman, who are not a party to the individual transaction with the consumer. The individual transaction will therefore not be affected by a cease and desist decision, since a judicial decision only produces effects between the parties to the procedure, in casu the vendor and his competitor or The Consumer Ombudsman. Nevertheless, a procedure can also be initiated by the consumer who contemplates that the contract is void because he has concluded the contract with a mistaken consent. He will thus allege that this mistaken consent originates from inter alia error, fraud or violence. If a competent court concludes that the vendor has conducted an aggressive or misleading commercial practices, the consumer will be able to prove the origin of his mistaken consent and thus his contract will be declared void.

How can consumers get redress/compensation (e.g. through collective actions)?

In general, the consumers can get compensation by filing a civil lawsuit themselves. Under Section 20(2) of The Marketing Act actions in conflict with this Act incur liability to pay damages under the general rules of Danish law. And under 20(3) any person who infringes or unwarrantably takes advantage of another’s rights in conflict with this Act shall pay reasonable damages for this. If a majority of consumers have a uniform claim for damages as a result of infringement of the provisions of the Marketing Act, the Consumer Ombudsman may treat this as a single claim cf. Section 23. The Consumer Ombudsman may be appointed as group representative in a collective action, cf. Part 23a of the Administration of Justice Act cf. Section 23(2).

The Consumer Ombudsman usually publics his decisions in a press release on his website. The Danish court system has a principle of free access to public records which entails that the public has access to court decisions in general unless tangible circumstances should speak against it. In that case, the court can decide to exempt a case from publicity. It is not custom in Danish legal practice that the courts themselves publish their decisions.
DELIVERABLE 5.2

COUNTRY REPORT
GREECE

CONTRIBUTOR: DUTH
I. General Introduction

European Citizenship is intended to confer to EU citizens rights; not only rights of a civic and political nature, but also rights of an economic nature. In fact, the first rights ever recognised to citizens of the Member States, well before the term ‘EU Citizenship’ has been coined, have been economic rights. Several of these rights, although developed independently from the ‘citizenship pathway’ are now intrinsically linked to it and, even, constitute its essence for citizens’ everyday life (since it is not every-day that a citizen changes name\(^1\) or risks having a family member expelled).\(^2\) Such rights, to the extent that are connected to the pursuance of economic activity, may concern citizens both individually and as members of EU companies and corporations.

In what follows, three such series of rights are examined: a) the recognition of professional qualifications, b) consumer rights and c) rights in the digital era. Although these rights have been established by the EU in the above chronological order, it does not necessarily follow that the older rights are better respected in the national legal orders. This is certainly true for Greece, where the recognition of professional qualifications has been fiercely opposed by well-established local corporatist and rent-seeking interests and is still ailing. Although data protection is, generally, well-established a principle in Greece, more modern digital-era rights have still to make their way into legislation and/or national case law. Consumer rights are, overall, better respected, subject to several administrative/technical limitations connected to the ongoing financial crisis.

II. Access of Economic Actors to the European/Internal Market

A. Introduction

The recognition of foreign qualifications in Greece is a long story full of controversies and polemics both at the political and at the legal level. At the same time it offers a textbook illustration of the lengths to which a Member State may be ready to go, under the pressure of strongly represented national interest groups, in order to avoid opening the domestic labour market to professionals “from abroad”.

The tension in this area stems from the combination of one factual and one legal consideration. On the factual side, Greece has for many years been the biggest exporter of higher education

\(^1\) As in Ilonka Sayn-Wittgenstein, Case C-208/2009, EU:C:2010:806.

students in the world, in relation to its population; this has changed during these last years because of the financial crisis which, however, has put up pressure for franchised foreign studies in Greece. On the legal side, the 1975/1986/2001/2008 Constitution in its Article 16 (5) foresees that “Education at university level shall be provided exclusively by institutions which are fully self-governed public law legal persons”. This limitation to private initiative has been introduced for the first time in the 1952 Constitution, after the end of the civil war, in order to keep at bay (ex)communists from claiming University posts (thus ‘infecting’ the youth). Ironically, it has become one of the flagship claims of all left-wing and communist parties, in a way that in two successive constitutional amendments (in 2001 and 2008) the proposal to amend this provision has been dropped.

Article 16 C has offered Constitutional grounding to trade-unions in the education sector (prominently POSDEP) to resist for many years the recognition of any qualification delivered in Greece by/with the help of private entities. It has also offered a plausible alibi to Professional Chambers in the various professions (prominently the Technical Chamber of Greece and the Bar Associations), for their respective reasons, to try to block professionals from other countries. These are mainly Greek nationals who have studied abroad (or in “Colleges” in Greece under franchise/validation agreements with EU Universities) and to a much lesser extent genuinely non-Greek professionals. Indeed, there are relatively few EU citizens working in Greece and of these even fewer work as free-standing professionals (not in EU companies) and need to acquire fully-fledged access to the labour market. This remark makes plain that, at least in Greece, any discrimination against EU degrees is more against the degree itself (and the foreign delivering institution) rather than against non-Greek EU nationals; hence the issue of citizenship is not that much at stake. In what follows, however, any holder of a degree from an EU institution will be indiscriminately called ‘the EU degree holder’.

There are two pathways in Greece for recognising qualifications acquired abroad, mirroring the ambivalence of Greece towards this issue: one for academic recognition of degrees, diplomas etc essentially under Greek law and one for the mutual recognition of professional qualifications

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under the relevant EU Directives (currently: Directive 2005/36). Most EU graduates are likely to opt for the procedure foreseen by the EU Directive, since this procedure is more flexible as to the qualifications to which it applies and more efficient in terms of deadlines and transparency; they can, if they wish, opt for academic recognition, but this is quite exceptional. 8 Professionals having acquired their qualifications in a third country outside the EU, on the other hand, may not invoke EU secondary legislation. They are, thus, only subject to academic recognition by DOATAP.

These two procedures of recognition – academic vs professional - are completely separate as to their logic, legislative origin, procedural requirements, body carrying them out and material outcome; the latter has been introduced in order to make it up for the deficiencies, under EU law, of the former. In order to understand the dynamics and antagonism between the two procedures, one need to start from the start, i.e. from academic recognition which, nowadays, is mostly used by holders of non-EU degrees.

**B. Qualifications obtained by EU citizens outside the European Union (non-EU qualifications)**

Responsibility for the academic recognition bears with the Interdisciplinary Organisation for the Recognition of Academic Titles and Information, known under its Greek acronym, DOATAP (Diepistimonikos Organismos Anagnorisis Titlon Akadimaikon kai Plhroforishs). This Organisation was set up by law 3328/2005 9 to succeed a) to DIKATSA, set up by law 741/1977, 10 responsible for the recognition of University degrees and b) to ITE, set up by law 1404/83, 11 responsible for the recognition of technical and vocational degrees. It has also been named as the Greek NARIC (National Academic Recognition Information Centre). It is a body under public law but has its own legal personality.

DOATAP evaluates any degree submitted to it at three stages. First, it examines whether the institution which delivered the degree is ‘of the same keen’ (omotages) with Greek Universities. Second, it ascertains whether the degree at stake is ‘of the same level’ (isotimia) with the equivalent degrees delivered by Greek Universities. While for postgraduate degrees the examination stops there, for undergraduate degrees there is a third step whereby DOATAP examines the actual content of the courses taught and judges the extent to which the degree

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8 Academic recognition is indispensable, however, if one is to enrol for a higher, follow-up, degree in Greece or to apply for becoming a University Professor.

9 FEK A 80.

10 FEK A 314.

11 FEK A 173.
‘corresponds’ (antistoichia) to degrees delivered by Greek Universities; if correspondence is not perfect (which it rarely is), and depending on the field of study, DOATAP may require the applicant to sit one or several exams at the ‘corresponding’ University Department in Greece.

Each one of these steps contains ‘traps’ for the EU degree holder.

1. In order for a foreign institution to qualify under the first test as ‘omotages’ it has to fulfil the following conditions (Article 3 (η) of law 3328/05): a) cover all the important study fields in the relevant discipline, b) award undergraduate, postgraduate and doctoral degrees (with exceptions for technological institutions), c) is staffed majoritarily by PhD holders d) degrees awarded open up professional rights in their countries of issuance and e) studies should be of post-secondary degree and have a minimum duration of three years for undergraduate and one year for graduate degrees. Hence, under this test, are excluded degree awarding bodies which

   a. Offer only undergraduate or only graduate degrees, or do not offer PhDs (e.g. the College of Europe);

   b. Are specialized in a way that they do not fully cover the relevant discipline or offer top-up (not basic) qualifications which do not necessarily lead to any specific professional right;

   c. Are more focused on applied/clinical rather than theoretical/research issues and do not employ PhD holders;

   d. Are more oriented towards vocational training and/or professional specialisations rather than research.

In reality, many of the degree awarding institutions which are not organised in the form of traditional Universities but are run by professional organisations and/or accredited by professional bodies (such as e.g. all the bodies accredited by the Scottish Qualification Authority (SQA)\textsuperscript{12} will fail this test.

Most importantly, however, under this test all ‘Colleges’ operating in Greece under franchise and/or validation agreements with EU Universities are disqualified. Although under EU law the degrees thus awarded are assimilated to those awarded by the parent Universities, DOATAP has refused to recognise them, as such recognition would undermine Article 16(5) C according to which University education in Greece is only provided by public bodies. Such refusal, bluntly violating EU law, has been validated by a judgment of the full chamber of the Conseil d’Etat (CE

\textsuperscript{12} See www.sqa.org.uk/
This judgment, although delivered on a tight majority (13 votes for/11 against) and violently criticised by legal doctrine, still holds good.

2. The test of the degree being ‘of the same level’ (isotimia) also raises issues, especially in relation to three-year degrees. For isotimia to be established DOATAP looks at a) the duration, b) the educational process and c) the assessment, promotion and graduation methods. Given that University degrees in Greece typically have a four-year and, occasionally, also five-year duration (for the basic polytechnic degrees), any basic degree based on the 3+1+1 model of the Bologna process won’t be recognised as such. This is so, irrespective of the professional rights that such degree grants to its holder in the MS where it has been obtained (the home MS). Such three-year degree may be recognised only if the applicant also holds a Master’s degree, but then the two will be considered jointly and will lead to the recognition of an undergraduate degree. Clearly, also this aspect of the recognition procedure falls foul of the EU requirements under both secondary and primary legislation.

3. The test whether the foreign degree ‘corresponds’ to the equivalent Greek one(s) is one which allows for quite some discretion to be exercised by DOATAP since it allows DOATAP a) to choose among the similar (but not identical) national degrees the one with which it is going to compare the degree submitted for recognition and b) look into the respective study programmes of the compared degrees and identify differences which will have to be made up for by exams in the missing subjects. Exams are organised jointly by DOATAP and the Greek Universities in Greek only. Hence the requirement that knowledge of the national language may only be imposed as a condition for taking up work in a MS, where such language is crucial for carrying out the tasks related to the job, is clearly not respected.

C. Qualifications obtained by EU citizens in another Member State (EU qualifications)

1. Legislative developments

In view of all the above, and given that efforts to review the tasks and functioning of DOATAP have been resisted by University Professors (acting both with their Trade-Union and individually, typically as members of majority parties), a second pathway has been created, this time under the direct control of the Ministry of Education, for the application of the various General Systems of mutual recognition of professional qualifications (Directives 89/48 and ensuing...
legislation). The body responsible for such recognition, has changed composition and names a
couple of times since its creation in 2000 and is currently known as SAEP (Symvoulio Anagnorisis
Epaggelmatikon Prosonton).\(^{17}\) Although this body has been created on purpose for the
implementation of Directive 89/48 and its progeny, its effectiveness has not been without
problems.

First, as already mentioned, SAEP (under a different name) was created as part of the domestic
legislation implementing Directive 89/48 (p.d. 165/2000),\(^{18}\) only in 2000.\(^{19}\) That is, nine years
after the formal deadline for the implementation of Directive 89/48, and after Greece had been
condemned once – and the procedure for the imposition of fines had been commenced – for
failure to transpose the Directive.\(^{20}\) Similarly, Directive 2005/36 has only been transposed with
great delay, by p.d. 38/2010, after Greece has been condemned by the Court.\(^{21}\)

Second, in its initial form, p.d. 165/2000 (which transposed Directive 89/48 into Greek law)
allowed SAEP to verify the omotages (same in keen) of the delivering institution, thus excluding
all Colleges alumni from any recognition. A condemnation by the CJEU has, again, been
necessary for this to change.\(^{22}\) Although the relevant provision of p.d. 165/2000 has been
modified accordingly, it has taken yet another condemnation paired with a preliminary ruling by
the CJEU to ‘convince’ SAEP to recognise degrees delivered by Colleges.\(^{23}\)

Third, and most importantly, SAEP has, for a long time, made a very narrow interpretation of
the terms of Directive 89/48 and its progeny and has consistently rejected any claim for the
recognition of degrees leading to non-regulated professions. Thus, all the case law of the Court
concerning the obligation of mutual recognition of diplomas by virtue of primary EU law (and

\(^{17}\) The current composition of the SAEP is foreseen in Art 56 of the Presidential Decree 38/2010, as amended
by Law 4205/2013, Chapter II Art 2.

\(^{18}\) FEK A 149.

\(^{19}\) It is worth noting that Directive 89/48, adopted under the Greek Presidency of the Council, was signed by the
then Minister of Development, Ms Papandreou; when this happened the Technical Chamber of Greece
(TEE) made public that it would block the application of this Directive by any means. Thus, it has succeeded
in delaying the transposition of the Directive by ten years and, even today, it denies enroling holders of
recognition by virtue of the General System, unless they have obtained a judicial decision to that effect.

\(^{20}\) Commission v Greece (general system), C-365/93, EU:C:1995:76


\(^{22}\) Commission v Greece (Recognition of diplomas-Colegia), C-274/05, EU:C:2008:585

\(^{23}\) Commission v Greece (Opticians), C-84/07, EU:C:2008:679, Chatzithanasis v Ypourgos Ygeias kai Koinonikis
Alliengys, C-151/07, EU:C:2008:680, Kastrinaki v Panepistimiako Geniko Nosokomeio Thessalonikis, C-
180/08, EU:C:2008:627.
independently from Directive 89/48) remained without any application in Greece. a) DoATAP considered that such case law only concerned professional recognition, while b) SAEP held that non-regulated professions were beyond its field of competence. The Commission initiated proceedings against Greece up to a reasoned opinion (7598/2012). Under the pressure and the supervision of the Troika of lenders, the Greek government in one (of the numerous) omnibus laws pushing through structural reform in order to comply with the Memorandum of Understanding, mooted a solution. Law 4093/12 in its Article 12 establishes a second, parallel, procedure for the recognition of professional equivalence, for all cases which do not fall under any act of secondary EU law. Hence, in 2013, when SAEP has been restructured (also) to cope with its new functions, a body responsible for applying EU law was at last available; this is 22 years after the date when Directive 89/48 and the relevant CJEU case law were supposed to apply! What is more, the new procedure which does not stem directly from Directive 2005/36 is less favourable in terms of deadlines, compensatory measures imposed etc. than the one foreseen under the Directive. Hence, a discrimination, in procedural terms, is established between EU degree holders coming under the scope of secondary legislation (claiming access to a regulated profession) and those who can only claim the application of primary law (for non-regulated professions).

For these cases where the SAEP has, despite all the above hurdles, assumed responsibility, its performance has been far from satisfactory. Turning a blind eye to the pressure of the Troika which required SAEP to regularly provide numerical data of the cases processed, SAEP has been proverbially slow to deal with cases pending before it. Very rarely did it manage to deliver a decision within the four, then three, months allocated to it by the law. Since the silence of SAEP means tacit rejection, applicants are forced within strict limitation periods of 30 and 60 days to introduce administrative and annulment proceedings, respectively, only to receive a SAEP decision few months later. Delays are due to the successive reshufflings of the composition of the SAEP, the changes in the Ministry’s organigram and the SAEP being moved offices, the fact that SAEP members representing professional bodies either do not attend its meetings and the body lacks the necessary quorum or demand the adjournment of deliberations, the fact that experts nominated to look into the individual cases do not deliver in time, or to the fact that SAEP is not convened regularly enough.


25 Which specifically mentions Reasoned Opinion 7598/2012 as the reason for the adoption of the relevant legislative provision.
A further way in which the SAEP has been making recognition more difficult is by refusing to take into account any professional experience gained by applicants in Greece prior to their recognition application. According to SAEP even if the applicant has completed exactly the same functions as s/he will be completing when fully qualified, the fact that such experience was gained prior to formal recognition somehow obliterates it. This point has also been resolved by the CJEU by way of a preliminary ruling.  

The issue of professional experience has also been raised in CJEU case Toki, where the Court upheld SAEP’s refusal to take into consideration professional experience as a University researcher/lecturer while assessing the application for the title of environmental engineer.  

Applicants who are lucky enough to get a positive decision from SAEP have still several hurdles to get over. If SAEP’s decision imposes compensation measures and the applicant opts for an apprenticeship period, s/he is typically faced with the refusal, explicit or tacit, of the competent professional body to designate the apprenticeship frameworks. Similarly, other professional bodies have systematically refused to organise aptitude tests for holders of SAEP’s decisions.

In the few cases where SAEP grants full recognition with no compensatory measures, then again, several professional bodies plainly refuse to enrol the professionals concerned.

2. Case law

In view of all the above difficulties faced by holders of EU qualifications to obtain recognition in Greece, it comes as no surprise that a rich body of case law, on top of that already mentioned, has been developed, both before the Greek courts and the CJEU.

The first wave of case law has been triggered by the very important delays (of ten years) with which Greece transposed Directives 89/48 and 92/51. Hence, the question of the direct effect of

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26 Vandorou C-422/09, Giankaulis, C-425/09, and Askoxilakis C-426/09 v Ipourgos Ethnikis Pedias kai Thriskevmaton, EU:C:2010:732, see also CE 1878/2012.


28 See e.g. Stathopoulos v Panellinios Sylllogos Fysikotherapefton, pending before the AthAdmCAppeal, reg. no. AK216/2-2-2015.

29 See e.g. the minutes of the Technical Chamber of Greece under no ΑΔΑ ΒΛ Ψ842-ΗΓ0, Decision Α9/Σ3/2013.

30 See e.g. the case of Ms Spiliotopoulou whose application for enrolment with the Chambers of Economists (Oikonomiko Epimelitirio Elladas) is pending since 2011 and has not advanced despite her serving a writ and threatening criminal action against its president.

31 See above under C.(1).
Directives 89/48 and 92/51 has been brought by the Conseil d’Etat to the CJEU, in cases Peros32 and Aslanidou,33 respectively. Mr Peros held a title from a German Fachoschule and was seeking to enrol as an engineer with the Techniko Epimelitirio Elladas (TEE, the Technical Chamber of Greece);34 Ms Aslanidou held a title of occupational therapist from a German ‘College’ and was seeking to obtain an authorisation to practice by the relevant Ministry. Both referrals were made prior to the publication of CJEU judgment in Beuttenmüller which ruled for the first time on this point,35 and confirmed it and enriched its reasoning. Following this series of judgments, the CJEU has been resolving similar issues by way of simple orders.36

Following the recognition of direct effect of the relevant Directive provisions, a second wave of cases reached the Conseil d’Etat, and after a transfer of competences, the Administrative Courts of Appeal. In these Greek nationals tend to annul SAEP’s negative decisions, typically reached in violation of Directives 89/48 and 92/51 and/or 2005/36. SAEP’s refusal to take into consideration professional experience acquired in Greece has already been discussed above.37

SAEP’s refusal to recognize degrees delivered by Colleges under franchise and/or validation agreements has repeatedly been condemned by the CE, even after the CJEU decisions on that matter.38

Holders of SAEP’s recognition have not always had an easy life. Hence, employees of the state-controlled public utility for energy distribution (DEH, nowadays DEDDHE) were faced with the entity’s internal regulation which (still today) only foresees academic recognition, by DOATAP, as a valid condition for hiring/upgrading holders of foreign degrees. Hence they had to go all the way up to the Court of Cassation, in a legal battle which went on from 2003 to 2011, in order to obtain hierarchical and salary adjustment corresponding to their degrees.39

In the same vein, the Technical Chamber of Greece (TEE), to which affiliation is mandatory for anybody wishing to exercise any technical profession in Greece, has systematically opposed

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32 Peros v TEE, C-141/04, EU:C:2005:472; for the final judgment in this case see CE 1684/2009.
33 Maria Aslanidou v Ypourgos Ygias & Pronoias, C-142/04, EU:C:2005:473.
34 Which was – and still is - one of the main actors blocking the transposition and proper implementation of relevant EU secondary legislation.
35 Case Beuttenmüller v Land Baden-Württemberg, C-102/02, EU:C:2004:264, para55.
36 See Joined Cases Kastrinaki v Panepistimiako Geniko Nosokomeio Thessalonikis, C-180/08 and 186/08, EU:C:2008:627.
37 See n 26, 27 and the corresponding text.
38 See eg CE 853/2010 (mechanical engineer); CE 4161/2011 (optician).
holders of SAEP’s recognition. Not only has it constantly refused to enroll them as members,\(^{40}\) but occasionally it has even introduced annulment proceedings against individual recognition decisions.\(^{41}\)

A further issue which has been resolved by the CE relates to trainee lawyers to move from another MS to Greece. Following the CJEU’s ruling in Morgenbesser\(^ {42}\) the CE held that trainees may not be assimilated to lawyers and do not come under the category of ‘regulated profession’; to the extent, however, that they offer remunerated services they come under primary law on free movement (as workers) and their applications may not be dismissed. Hence, in the absence of any formal (academic or professional) recognition, the Bar association is, nevertheless, under an obligation to examine their qualifications.\(^ {43}\) This is so even if the applicant has not followed legal studies but has become trainee lawyer following a conversion course.\(^ {44}\) What is more, if a Bar association has accepted to enrol a trainee, it may not question the grounds for such enrolment at the time when such trainee wants to sit the qualification examination.\(^ {45}\)

Last but not least, damages for breach of EU rules on the recognition of qualifications have not been forthcoming. Either the causality of damage has been difficult to prove,\(^ {46}\) or the delay for the award of damages has been extremely long, or both.\(^ {47}\)

D. Qualifications obtained by EU citizens prior to their country joining the European Union (pre-accession qualifications)

Since Greece is Member of the EU since 1981 and the first General System was only adopted in 1989, there are no pre-accession cases of people claiming the application of the General System. People who have obtained their qualifications prior to the Greek accession are currently

\(^{40}\) See eg CE 249/2009, 4881/2012 and 4882/2012; Athens Administrative Court of Appeal 1454/2013; TEE’s practice still today is that it refuses to enrol holders of SAEP’s recognition; against such refusal they have to bring annulment proceedings and TEE will only accept to conform to the judicial decision, delivered 3-10 years later and following considerable expense.

\(^{41}\) CE 2636/2011; CE 3741/2009

\(^{42}\) Morgenbesser v Consiglio dell’Ordine degli avvocati di Genova, C-313/01, EU:C:2003:612.


\(^{45}\) CE 3900/2012 and 2154/2014.

\(^{46}\) See e.g. CE 339/2012.

\(^{47}\) See e.g. Athens Administrative Court of Appeals 3296/2013, on a claim initiated in 1999 (!) awarding the amount of 3,000 euros (!).
on their way to retirement, hence the recognition of their qualifications is not too much of an issue.

E. Qualifications obtained by nationals of EU associated third countries, when the relevant association agreement includes chapters on establishment and/or services

No relevant case law has been identified.
III. Consumer protection

A. National Legislation

Consumer protection, alongside labour law, are the two fields where legal intervention in contractual relations is necessary in order to secure the interests of the weaker party. Additionally, they both correspond to duties of the Social State.

Consumer protection is considered to have constitutional bases in Article 2 (1) (State obligation to respect and protect human dignity), Article 4 (1) (equality before the law), Article 5 (1) (right to personal development and participation in social, economic and political life of the country) and Article 106 (1, 2) (ensuring economic growth and private economic initiative) of the Constitution. 48

Besides, Article 1 of Law 2251/1994 reiterates the State’s constitutional obligation to ensure the special expression of consumer rights, i.e. the consumers’ right to health protection and security, the protection of their financial interests from the exploitation on the part of economically stronger parties, the right to be heard, the right to be informed, as well as the provision of consumers unions.49

Until 1994 consumers were solely protected by the general provisions on contractual obligations foreseen in the Civil Code. The relevant Civil Code provisions are: Articles 178-179 on public morals and abuse of power; Articles 371-373 on vague provision; Article 281, on abuse of rights; Article 288 on good faith and fair practice; Article 332 para. 2 on clauses excluding liability.

These clauses, however, did allow for the occasional abuse to occur and, as consumerism and consumer culture spread in Greece, the need to strengthen consumers’ position was widely felt. Hence, the Greek legislator in view of the draft Directive 93/13 and other Directives on consumer protection,50 adopted in 1991 a general law on the protection of the consumer. In the Introductory Report of Law 1961/1991, 51 it is recognized that “the consumer is at a disadvantaged position, due to the modern economic reality, and mainly due to the structure and functioning of the market. Indeed, an immediate need emerged to establish further measures to limit the legal and economic power of the supplier, so as to avoid the entrapment and exploitation of the consumers

48 Liakopoulos Athanasios, Ι prostasia sou katanałoti kai to Syntagma, NoB (1984) 945-955
51 FEK A 132.
In the meantime, Directive 93/13/EEC on unfair contract terms in consumer contracts\footnote{1993 OJ L 95/29.} was adopted as a pivotal instrument of consumer protection: it introduced a European notion of “good faith”, extensive rules on the definition and interpretation of unfair contract terms and foresaw that Member States should ensure that effective means exist under national law to enforce these rights; further, it recognized the right of collective actions for the protection of consumers. Directive 93/13/EEC was transposed into Greek legal order by law 2251/1994.\footnote{FEK A 191.} This law completely substituted Law 1961/1991, and is until today in force, as amended by Law 3587/2007 and complemented by various other presidential decrees and ministerial decisions.\footnote{E.g. Presidential Decrees 131/2003 (FEK A 116), 293/2001 (FEK A 205), 339/1996 (FEK A 225), Ministerial Decisions 56885/2014 (FEK B 3107), Z1-891/2013 (FEK B 2144).} The above mentioned law is basically structured in two main parts: the first one on the substantive and the second on the procedural legal aspect. The law defines the notions of consumer and supplier in accordance with the Directive (Article 1 para. 4). The Law also includes detailed provisions on Unfair General Terms & Conditions regarding trading transactions (Article 2). Further, it establishes the right of consumers to withdraw within a short period, as well as the obligatory use of written form for contracts concluded away from business premises (Article 3).\footnote{This regulation mostly complies with Directive 85/577/EEC.} Articles 4 and 4a regulate the rights of the consumer as far as distance marketing of goods, services and financial services are concerned, Article 5 the sale of consumer goods and guarantees required by the supplier, Article 6 the responsibility of the supplier for defective products, Articles 7 and 7a the assurance of the health, security and mental health of the consumers, Article 8 the responsibility of the provider of services, Article 9 regulates advertising, while Articles 9a-9i\footnote{Article 9a-9i were added after the amendment of 2251/1994 by Law 3587/2007, in compliance with the Directive 2005/29/EC on Unfair Commercial Practices (UCP).} refer in detail to unfair commercial practices, by dividing them into either misleading –when the supplier omits substantive information– or aggressive –which include harassment, compulsion or even physical force. It also establishes Amicable Settlement Committees in each prefecture, recommended by the competent Prefect towards out-of-court dispute settlement between suppliers and consumers or consumer associations (Article11). On this last topic, following Commission’s Recommendation 98/257/EC on the principles applicable to the bodies responsible for the extrajudicial settlement of consumer disputes\footnote{[1998] OJ L 115/31.} and Recommendation 2001/310/EC on the criteria to be applied in the process of
amicable settlement, Law 3297/2004 introduced the Independent Authority “Consumer Ombudsman”.

The legal framework on consumer protection officially introduced by law 2251/1994, was updated and amended by Law 3587/2007, in accordance with Directive 2005/29/EC. In fact, all the provisions of Article 9a-9i of Law 2251/1994 as it stands, constitute the transposition of the latter Directive. The most important innovations brought by Law 3587/2007 are a) the upgraded role of the National Consumer Council, b) the recommendation of Child Protection Committees, which aim to protect minors from risks caused by products on their mental, spiritual or moral development, c) the competence of the Minister of Development to turn into legislative acts (ministerial decisions) consumer issues of general interest irrevocably decided in courts, d) as well as the ability of consumer associations to exercise collective actions and to demand damages for loss suffered by consumers. Additionally, the notion of product and that of supplier is further expanded, while the meaning and scope of unfair commercial practices, as well as misleading acts and omissions is being fully determined in accordance with relevant case law (Arts 9a-9i). In order for its enforcement to be assured, the law also sets out the penalties to be applied in each case, alongside stricter fines for infringements.

1. Governance of consumer protection

   a. General secretariat for the consumer

The General Secretariat for Consumer Protection and Market Supervision (GSCPMS) has been active in overlooking consumer matters for many years. In its current form it has been established by p.d. 116/2014 and comprises the following Directorates: The Directorate of Consumer Affairs and Information, The Directorate of Consumer Protection and The Directorate of Institutional Affairs and Monitoring Market Products and Services. It used to be attached to the Ministry of Employment and Social Affairs, then the Ministry of Development and Competitiveness and it has recently been

59 FEK A 259.
60 For which see below, under A(c).
61 FEK A 152.
63 For which see below, n 128 and the corresponding text.
64 FEK A 185.
transferred to the newly founded Ministry of Development, Competitiveness, Infrastructures, Transports and Networks.

The GSCPMS’ main task is to ensure the health and safety of consumers, mostly by investigating complaints, petitions and grievances, stemming from the violation of the consumer protection legislation (particularly law 2251/1994 and corresponding European legislation). In this direction, it receives complaints and reports from consumers. Not all complaints lead to the opening of a case, since the GSCPMS enjoys some discretion based on a number of criteria, including the gravity of the alleged misconduct, the need to protect public interest, the possible impact on the consumer behavior, as well as the results expected by the intervention of the General Secretariat in each individual case. The GSCPMS also fulfills two other functions, i.e. it sends out inspectors, on a daily basis, at different kinds of shops and markets which may affect public health and also controls transfer pricing between affiliated companies.

Unlike the Consumer Ombudsman, the GSCPMS is not an extrajudicial settlement body of consumer disputes with suppliers. Nor does the GSCPMS accept complaints from citizens in relation to failed/problematic transactions with Services of the Greek public or semi-public sector, for which the consumer should address to the Greek Ombudsman. On the contrary, the GSCPMS’ competence is confined to administrative sanctions against suppliers for breaches of the specific legislation it oversees. Additionally, the Secretariat does not issue opinions or answers to legal questions and is not responsible for granting compensation for either material or moral damage suffered by any individual complainant, nor can it compel, judicially or extra-judicially, suppliers to return overpayments to any particular consumer. In all the above cases, which may also violate –apart from specific laws on consumer rights- other provisions of the legislation in force, jurisdiction belongs to the civil courts.

Complaints are submitted to the GSCPMS either electronically (at [http://www.1520.gov.gr/ypovoli-kataggelias](http://www.1520.gov.gr/ypovoli-kataggelias)) or by phone at a dedicated hotline (1520, which however is only operational during public sector opening hours). Submission by fax, post or in person is also possible.

The GSCPMS publishes a yearly report. The most up-to-date statistics relate to the year 2013. Indicatively, during this year, it received a total of 17,142 calls (in sharp fall from 2012’s 24,615 calls) and an unspecified number of complaints; from those calls it dealt with 13,173 (in net increase from 2012’s 11,662). The industry areas most represented were banking and insurance services, telecommunication services and defective products. During this year the GSCPMS has imposed 82 fines summing up to 1,307,500 euros (as opposed to 47 fines for 1,317,500 imposed in 2012).
The GSPMS is also the national contact point for the Rapid Alert System for Non-Food Consumer Goods (RAPEX), established by the General Product Safety Directive. Under this capacity it publishes a weekly report on defective and/or dangerous goods commercialized in Greece.

b. National Council on Consumers and Markets

Article 12 of Law 2251/1994 introduced the National Consumer Council, as a consultative and advisory body of the Minister of Development. The National Consumer Council expresses the views of the consumers on matters of consumer protection, submits proposals so as to promote their interests and safeguard their rights, and issues opinions on consumer issues and in particular on draft legal documents and provisions relating to consumers. The National Consumer Council consists of 19 members, representing government, consumers, trade unions, commerce and industry, serving a mandate of three years. They serve to record consumer problems and to inform consumers on market developments and the opportunities thus offered for consumers. What is more, the National Consumer Council offers the forum where a number of Consumer Associations around the country come and work together. The National Consumer Council contributed decisively in formulating the content of Law 3587/2007 which amended and updated Law 2251/1994. Law 3587/2007 upgraded the National Consumer Council in terms of its organization and competences, and renamed it to National Council on Consumers and Markets. Under its new name, the Council constitutes a consultative and advisory body of the Minister of Development, which expresses the views of market operators and consumers on the competitive functioning of the market, as well as consumer protection issues. That shall be achieved by submitting proposals on the promotion of their legitimate interests, safeguarding their rights, and issuing opinions on matters relating to the market and consumers, particularly on draft laws and provisions relating to consumers.

c. Consumer Ombudsman

The Consumer Ombudsman is an Independent Authority established by law 3297/2004 and supervised by the Ministry of Development. It functions as an extrajudicial body, towards consensual resolution of consumer disputes, but also as an advisory institution on the side of the state to treat problems within its competence. Under the supervision of the Authority also lie the Amicable Settlement Committees located in the Prefectural Authorities of the country. However, according

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66 FEK A 152.
67 See the recitals of L 3587/2007, p.1.
68 FEK A 259.
to Article 94 (2) of law 3852/2010,\textsuperscript{70} the terms of the establishment of Amicable Settlement Committees, alongside the compliance of records of their files and consumer registers have now been transferred to the Municipalities of the country, so that the Institution continues its work within the new organizational scheme of the local government (\textit{Kallikratis Programme}). Following the above change, the Consumer Ombudsman remains as quasi Appellate Body, with the power of ex officio or, on request of at least one of the interested parties, the findings issued by the Amicable Settlement Committee.\textsuperscript{71}

The Consumer Ombudsman is also the national contact point for the ECC Net (European Consumer Centres Network), since 2012.\textsuperscript{72} ECCs are founded and co-financed by the European Commission and national governments as part of the European policy to inform and assist citizens on their rights under European and national legislation, to provide advice and direct assistance so as to resolve complaints in an amicable way with traders, or to redirect the consumers to an appropriate body under national law. ECCs offer valuable help especially in relation to trans-border transactions. Although the operation of ECCs has been made compulsory by the Services Directive,\textsuperscript{73} the Greek Government has, so far, made no funding available and the Centre is being manned on a voluntary basis by the Ombudsman’s personnel.

The main objective of the Consumer Ombudsman, as an Independent Authority, is to manage in the most suitable way and resolve the disputes that arise between consumers and suppliers, protecting the consumer and supporting businesses which provide goods and services.

The Consumer Ombudsman was introduced into the Greek legal order by Law 3297/2004,\textsuperscript{74} in accordance with Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.\textsuperscript{75} Its establishment is inspired by the dynamics of the alternative (non-judicial) settlement of consumer disputes (Alternative Dispute Resolution) promoted by the EU Commission as a flexible, immediate, effective and inexpensive –compared to the traditional judicial route– way of settling disputes arising out of transactions between consumers and suppliers.\textsuperscript{76} By

\textsuperscript{70} FEK A 87.  
\textsuperscript{72} Initially this responsibility was carried out by the Secretariat General for Consumer Protection, for which see above under 1.a.  
\textsuperscript{74} FEK A 259.  
\textsuperscript{76} See European Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes [1998] OJ L 115/31; and
the end of March of each year the Consumer Ombudsman submits its Annual Report to the Prime Minister, the President of the Parliament and the supervising Minister of Development; the report is being discussed in a special plenary session of the Parliament.  

According to the statistics of the most recent Annual Report 2014, the number of requests received by the Consumer Ombudsman has considerably increased since 2012. More specifically, the Independent Authority received 3,553 requests in 2012, 4,125 requests in 2013 (rise of approx. 16,1%) and 5,383 in 2014 (rise of approx. 30,5%). The sectors to which the majority of the requests are referred are, according to the report, postal services, electronic communications, consumer goods and training services. Out of the cases undertaken by the Consumer Ombudsman, only 18,8% remained unresolved. Of these, in 12,91% all the means of amicable settlement have been exhausted without success, and in the remaining 5,95% the supplier does not respond or has ceased to operate. From the 81,14% of cases that have been settled, 72,65% were in favour of the consumer, and 8,49% in favour of the supplier. Therefore, the mediation services of the Authority are considered hitherto highly significant for the benefit of consumers, given that these have been able to recover the amount of 31.562,68 Euros on the basis of their claims, amount which is more than three times the total ten-year-cost of operation of the Consumer Ombudsman.

B. Consumer associations

Consumer associations - established under Article 10 of the Law 2251/1994 - are associations that have the sole purpose of protecting consumers’ interests. Their duties include the representation of consumers in front of competent administrative, judicial and extra-judicial bodies, the provision of information and advice, as well as the submission of collective actions without having to prove individual interest. In order for a Consumer Association to be entitled to the above it has to be enrolled with the Consumer Associations Public Registry for over a year, and needs have at least 500 members. There are 44 first degree (local, specialized etc) associations and two second degree federations. The most prominent among the former are the Consumer Protection Centre and the


Law 3297/2004 Article 3, Rules of Regulation of the Parliament Article 138A.


Kentro Prostasias Katanaloton (KE.P.KA.), website http://www.kepka.org/
C. Codes of conduct

The protection of consumers through reference to codes of conduct has been promoted by the EU, most importantly by Directives 2005/29 and 2006/123. In Greece, however, an attempt to establish a horizontal catch-all code of conduct has not been concluded, thus leaving some (few) sector-specific initiatives, to which some efforts of self-regulation should be added.

1. The efforts for a horizontal code of conduct have not bore fruits

Law 3297/2004 foresaw (Article 7),\(^{84}\) the establishment of a "Consumer Code of Ethics". This should be drafted by the National Consumer Council, on a proposal by The Consumer Ombudsman and should be ratified by a Presidential Decree issued upon proposal of the Minister of Development. In the meanwhile Law 3587/2007 (which amended Law 2251/1994 in view of transposing into Greek law Directive 2005/29) set, for the first time, the legal framework of consumer protection through Codes of Conduct. In February 2007, the Consumer Ombudsman released a draft “Consumer Code of Ethics”, which mainly defines the principles that should govern the trading behavior and relationships between suppliers and consumers and their associations. The Consumer Ombudsman invited all agencies and stakeholders to take part in a public consultation and a final draft of this document was uploaded on the Ombudsman’s website on May 19, 2009.\(^{85}\) This text, however, does not seem to have been ratified in any way and remains of indicative value.

2. Sector-specific codes of conduct

The lack of a general and horizontal consumer code of conduct is partly alleviated by sector specific codes. These have been developed in the following areas:

- Energy: In June 2011, the Regulatory Authority for Energy (RAE) issued Decision n. 771/2011 on «Basic Principles and General Standards of Fair Commercial Practices for the Promotion and the Sale of Services for Electrical Energy Supply»,\(^{86}\) according to which, both consumer protection and data

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\(^{82}\) Institute for Consumers (IN.KA.), see [http://www.inka.gr/](http://www.inka.gr/)


\(^{84}\) FEK A 259.


\(^{86}\) Available at [http://www.rae.gr/site/categories_new/about_rae/actions/decision/2011_A0771.csp](http://www.rae.gr/site/categories_new/about_rae/actions/decision/2011_A0771.csp)
protection legislation also apply to the promotion and sale of electrical energy supply. In addition, the supplier shall upload to the website and at a point easily accessible to the consumer, a list with the updated full details of its commercial partners, as well as of the staff of the supplier or trade partner, which is in direct contact with consumers. Furthermore, it establishes an effective pre-contractual consumer protection system. According to its founding law RAEE has the competence to impose administrative sanctions to suppliers who violate any legal or regulatory provisions, as well as its own Decisions. The sanctions imposed are mostly of a pecuniary nature, though in cases of systematic and excessive violations of the legal rules, the Minister of Development, upon receiving the opinion of RAEE, may revoke the supplier’s authorization.

- Banking Services: Law 4224/2013 foresaw a code of ethics for banking services, which was eventually adopted and entered into force on January 1st, 2015. This Code aims at strengthening confidence, mutual commitment and sharing between borrower and banking institution, so that each side is able to weigh the benefits or consequences of alternative service solutions (setup options) or a final settlement (final settlement options) regarding loan contracts that are not terminated. The Code introduces the concept of ‘cooperative borrower’, opposed to the ‘uncooperative’ who needs to be duly notified of this qualification. Building on the “Brochure for borrowers with financial difficulties” foreseen in Law 4224/2013, the Code foresees the creation, in each institution, of a Debt Resolution Process which should reach a proposal for the appropriate resolution and/or settlement of each problematic case. The Code is completed by Act n. 42/30-05-2014 of the Executive Committee of the Bank of Greece, determining the specific set of requirements for the management of credit institutions in arrears and non-performing exposures.

- Multimedia: The NRA for posts and telecommunications (Elliniki Epitropi Tachydromeion kai Tilepikoinwnwn, EETT), has published a code of conduct by means of its decision n. 578/29 for the provision of Multimedia Information Services (MIS), codifying and replacing EETT Decision AP 451/010/2007 "Approval Code of Conduct for the Provision of Services Multimedia Reporting". The Decision sets a number of conditions for the provision of Multimedia Information Services, in accordance with transparency requirements, alongside the current legislation on personal data protection and privacy in the electronic communications sector (Article 4-6). Most importantly, Article 9 of the Decision, allows consumers to submit their complaints at any of the providers (Call

87 Law 2773/1999 (FEK A 286, Art 33(1) and (3)), as amended by Law 3426/2005 (FEK A 309, Art 22).
88 FEK A 288.
89 For the text of the code see http://www.hba.gr/Index.asp?Menu=23.
90 For the text of which see http://www.synigoroskatanaloti.gr/docs/law/gr/EETT-KwdDeontologias-YPP.pdf, FEK B 1651.
91 FEK B 1943.
Origination Network Supplier, or the Network Provider, or the Provider of Multimedia Information Services) involved in the provision of the MIS. Such provider is under an obligation to examine the complaint closely and in cooperation with the other providers involved and to provide a comprehensive response to the consumer. In case of mass consumer complaints for unlawful provision of specific Multimedia Information Services, the Call Origination Network Supplier is obliged to discontinue providing access to specific MIS and notify EETT. If after the written response to the complaint, the dispute between the two parties is not settled, the complainant may address to EETT to take up this matter on the basis of its competence. The latter can in this case impose administrative sanctions, as provided in Article 63 of Law 3431/2006.\(^\text{92}\)

3. **Self regulation**

While the above codes of conduct have received state approval, have been published in the Official Gazette and are monitored by some (semi) public authority, other purely self-regulatory efforts complete the image.

Manufacture: The working group of Federation of Greek Industrialists (SEV)\(^\text{93}\) took the initiative to draw up an utilitarian «Roadmap to better Consumer Service»,\(^\text{94}\) aimed at building a stable and sustainable relationship of trust between the companies and the consumer. To this direction, the Roadmap presents successive steps of communication and mutual understanding between the business and the consumer. First of all, it proposes an attempt to contact the enterprise, either on its customer service line, or by email. Most enterprises provide on their web page a complaint form, which is recommended for the consumer to fill. Depending on whether the complaint was made in oral, or in writing, the enterprise has the right to take a reasonable time to answer. According to SEV, the majority of the complaints registered, are resolved by the company itself. Nevertheless, if the competing interests between company and consumer cannot be amicably arranged, alternative ways of dispute resolution shall be sought, such as the intervention of the Consumer Ombudsman, the Amicable Settlement Committees, or the European Consumer Centre.

Communications and advertising: the Greek Advertising and Communication Code, was set by the Board of Control of Communication,\(^\text{95}\) in 2007. This Code sets the rules of professional code of ethics

\(^{92}\) FEK A 13.

\(^{93}\) Syndesmos Ellinon Viomichanon (SEV), see website [http://www.sev.org.gr/](http://www.sev.org.gr/)


\(^{95}\) A private company, not-for-profit, created by the professionals in the field of communication – advertising; see [http://www.see.gr/index.php](http://www.see.gr/index.php); for the text of the code see [http://www.see.gr/index.php?option=com_content&view=article&id=31&Itemid=33](http://www.see.gr/index.php?option=com_content&view=article&id=31&Itemid=33)
and behavior of all those who are related to advertising towards the citizens-consumers. Its enforcement relies on two Committees, Primary and Secondary, run by the Board.

*Electronic communications:* Another characteristic example is the Code of Ethics for the Provision of Electronic Services to the Consumers, signed by the major mobile operators in Greece and ratified by the Greek Committee of Telecommunications (EETT) in 2008. Its enforcement is being monitored by the Greek Committee of Telecommunications (EETT).

*Journalism:* The Code was introduced under the initiative of ESHEA (*Enosi Syntakton Hmerisiswn Efimeridwn Athinon*) in order to guarantee the freedom of information and expression, the autonomy and dignity of the journalist and shield freedom of the press in a democratic society. Violations of these obligations are monitored by the two Disciplinary Boards (Primary and Secondary) of ESHEA.

D. Crisis

The unprecedented financial and, then, economic crisis which hit Greece and the ensuing financial difficulties faced by consumers has led the legislator to intervene in their favour. Hence, Law 3758/2009\(^97\) tries to put some order on the activity of debt collection companies. Law 3869/2010\(^98\) establishes a special protected regime for specific categories of indebted consumers; this law has been modified – and partly extended – by Laws 3996/2011 and 4161/2013.\(^99\) It goes without saying that these laws have prompted the issuance of several implementing ministerial decisions and an indefinite number of circulars.

E. Enforcement

All the above bodies are involved in the enforcement of the applicable rules. Administrative enforcement is assigned to the SGCPMS.\(^100\) This administrative body is tasked with the auditing and the enforcement of the legal provisions arising from the above mentioned laws, which are relevant to consumer protection, and is competent for receiving administrative complaints, by either individuals or corporations. Complaints which do not fall within the competence of the Secretariat


\(^97\) FEK A 68.

\(^98\) FEK A 130.

\(^99\) FEK A 170 and FEK A 143, respectively.

\(^100\) For which see above under 2(a).
General are being forwarded to the appropriate body; those who do, are processed in accordance with the enforcement priorities set by the Secretariat General itself, occasionally after receiving advice by the Consumer Ombudsman.

Enforcement of the UCP Directive can also be achieved judicially, by filing a claim before the domestic Civil Courts. This action can be initiated not only by individuals, but also as a collective action from a consumer association. Individual claims are executed and produce res judicata only inter partes. The judgments issued on collective claims, on the other hand, apply to everyone, even to those who were not parties, or else represented, to the action. A competitor may not act as a plaintiff, since only consumers -in the sense described in Article 1 (4) and (9) of Law 2251/1994 and Article 12 of the Law 3587/2007- have this right. Collective claims filed by consumer associations typically follow a special, faster, procedure than ordinary proceedings. In cases of urgency, interim measures may be ordered. Most importantly, Article 9i (3) of Law 2251/1994 operates a reversal of the burden of proof in favour of the plaintiff/consumer.

Infringements of the legislation on consumer protection may lead to the imposition of civil, administrative and/or criminal sanctions. More specifically, the Civil Courts can take measures in order to stop an unfair commercial practice and to impede it from being repeated in the future, or to order the omission of an unfair commercial practice that has not yet occurred. The claim of non-pecuniary losses and the seizure of goods that are suspicious or harmful to the public and the public health is also common practice. Administrative sanctions for infringements of Law 2251/1994 can take the form of a recommendation to comply within a specific deadline, stop the infringement and omit in the future, a pecuniary penalty, and even the temporary suspension of the business operation. However, there are no direct provisions for criminal sanctions in law 2251/1994. Criminal penalties can only be imposed in specific cases of unfair trade practices incriminated by specific penal laws, such as unfair competition or misleading advertising in specific areas of practice (i.e. insurance, food, medicinal products) as well as in case of violation of specific provisions of the Greek Penal Code.

For self-regulatory enforcement please see above under D - Self regulation.

F. Case law


   a. Misleading commercial practices

   Among other cases, the following violations have been identified:
- publishing an advertisement in the newspapers, claiming that every day 400 customers would win the value of their purchases in the stores of the defendant, without any further explanation regarding the participation terms, the value of the prizes, the procedure for obtaining the prizes, and the like; this, despite the fact that documents including all such essential information could be obtained in the defendant’s stores;\textsuperscript{101}

- the advertisement, by an educational institute, that it had been honored by the 10th Directorate General of the European Commission as one of the seven best Educational Institutions in Europe, while this was not true;\textsuperscript{102}

- the advertisement of educational services that contained misleading statements regarding the validity and recognition under Greek law of the diplomas delivered,\textsuperscript{103} and in relation to the legal nature of the entities offering such services;\textsuperscript{104}

- the advertisement of a GPS device with the mention that the maps were periodically updated, without specifying that such update came at an extra charge;\textsuperscript{105}

- the advertisement of electrical devices which supposedly would limit energy consumption and reduce the electricity bills, while research conducted by the GSCPMS established no such reduction;\textsuperscript{106}

- the inclusion, in a daily newspaper, of a leaflet which urged consumers to participate in a competition that was supposed to offer money to anyone that could find the same three symbols after scratching a specific area of the leaflet, while all leaflets led to the same result;\textsuperscript{107}

- the omission, by a telecom operator, to make clear to a subscriber that in order for him to benefit from an extra discount to his monthly standard fee, he had to comply with specific conditions within a specific time period;\textsuperscript{108}

- the provision of only general pre-contractual information about the risk of a given financial product (bonds issued by the bank Landsbanki Islands), which led the consumer to find out the risk of his investment only when the issuer of the bonds stopped paying the interest coupons;\textsuperscript{109}

\textsuperscript{101} Consumer Ombudsman, 16th of July 2007 (Protocol No 1204).
\textsuperscript{102} Consumer Ombudsman, 6th of October 2011 (Protocol No 9039).
\textsuperscript{103} Consumer Ombudsman, 10th of October 2007 (Protocol No 1428).
\textsuperscript{104} Consumer Ombudsman, 9th of August 2010 (Protocol No 1752).
\textsuperscript{105} General Secretary for the Consumer, press release - 5th of January 2011.
\textsuperscript{106} General Secretary for the Consumer, press release - 8th of March 2011.
\textsuperscript{107} Consumer Ombudsman, 12nd of November 2009 (Protocol No 3664).
\textsuperscript{108} Consumer Ombudsman 1st of April 2013 (Protocol No 8377).
\textsuperscript{109} Consumer Ombudsman, 21st of November 2011 (Protocol No 10329); in the same sense (but with different products) see also Consumer Ombudsman, 25th of February 2013 (Protocol No 4995); Consumer Ombudsman,
- the inclusion, by an insurance company, of an arbitration clause in the General Terms and Conditions of an insurance contract;

- the advertisement, by a car importer, of prices which did not include the (mandatory) special registration tax applicable to all car imports;\textsuperscript{110}

- the refusal, by a company selling electronic equipment, to grant to the consumer a product’s extensive guarantee which included replacement in case of theft of the product, even though the conditions of this guarantee were not fulfilled, since the guarantee was broadly advertised without any explicit constraints or restrictions;\textsuperscript{111}

- the practice of TV stations to advertise banking products and then, separately, state the additional charges applicable.\textsuperscript{112}

However, the terms of the Directive were not violated by

- an insurance company who had clearly stated in the written documentation of the insurance policy concerned, that the proposed return is only indicative, that the defendant does not guarantee its future clients any potential benefits from the proposed investment product and that the return on the investment may change from year to year;\textsuperscript{113}

- a medical instruments and machines seller who in his advertisements towards the industry overstated the qualities of its goods, in view of the fact the addressees of such advertisement belonged to a group which was relatively informed;\textsuperscript{114}

- a television advertisement stating that the specific products (tickets) were offered with a “lowest price guarantee”, since the very brief air-time did not allow for the detailed terms of that guarantee to be made plain.\textsuperscript{115}

\textbf{b. Aggressive commercial practices}

Among other cases the Consumer Ombudsman has identified the following violations:

\textsuperscript{110} Ombudsman Consumer 23rd of April 2010 (Protocol No 906).

\textsuperscript{111} Athens Court of Appeal 3880/2010; \textit{Epitheorisi Emporikou Dikaiou} (2011), 629.

\textsuperscript{112} ESR Recommendation no 1/03-05-2008; it is interesting to note the role played here by a body not directly involved in consumer protection.

\textsuperscript{113} Athens Court of Appeal 2130/2013; \textit{Epitheorisi Emporikou Dikaiou} (2011), 458.

\textsuperscript{114} Consumer Ombudsman, 19th of April 2013 (Protocol No 10179).
- the refusal, by an aesthetics laboratory, to accept the consumer’s demand to cancel the provision of certain services (yet to be provided) and to offer refund for them from a front-payment already completed;\textsuperscript{116}

- the fact that a financial institution, had invested the plaintiff’s savings into investment products without her prior approval;\textsuperscript{117}

- the fact that the defendants had issued credit cards on the name of the consumers without their prior written consent;\textsuperscript{118}

- the refusal opposed by an insurance company to pay the entire cost for the repair of the complainant’s vehicle after an accident, supposedly grounded on a progressive depreciation of the vehicle, while such clause was not clearly made out in the contract;\textsuperscript{119}

- the practice of several insurance companies to delay payments at the termination of life insurance contracts, by a) creating obstacles, b) requiring additional documents, c) systematically omitting material information that is necessary for consumers to execute their contractual rights and d) providing information in an unclear way in order to hinder consumers in submitting the requested supporting documents on time;\textsuperscript{120}

- the fact that a mobile telephony operator charged roaming services to its clients while they were on holidays on a remote Greek island, because its network was not strong enough in the area;\textsuperscript{121}

- the practice of a maternity clinic to charge parents for the collection of their children’s blastocyes, without actually providing any additional service for such collection and without prior information thereon;\textsuperscript{122}

- the practice of several newspapers of giving out DVDs with hard pornographic material as a present for every issue bought;\textsuperscript{123}

- the issuance, by a telecom company, of invoices which had already been paid by the plaintiff, even if this occurs due to a mistake of the trader;\textsuperscript{124}

\textsuperscript{116} Consumer Ombudsman, 2nd of April 2008 (Protocol No 392).

\textsuperscript{117} Consumer Ombudsman, 11th of February 2013 (Protocol No 3700).

\textsuperscript{118} Consumer Ombudsman, 10th of March 2011 (Protocol No 2528).

\textsuperscript{119} Consumer Ombudsman, 16th of December 2009 (Protocol No 3990); see also Consumer Ombudsman 3rd of October 2011 (Protocol No 8947).

\textsuperscript{120} Consumer Ombudsman, 9th of December 2010 (Protocol No 2853).

\textsuperscript{121} Consumer Ombudsman, 10th of March 2011 (Protocol No 2532).

\textsuperscript{122} Consumer Ombudsman, 1st June 2010 (Protocol No 1192), NoB (2010), 1853; see also Consumer Ombudsman, 10th of September 2010 (Protocol No 1912).

\textsuperscript{123} Consumer Ombudsman, 25th of April 2007 (Protocol No 926).

\textsuperscript{124} Consumer Ombudsman, 3rd of May 2010 (Protocol No 1002).
- the practice of an electricity supplier to demand payment from a consumer for debts caused by other consumers (his wife);  

**c. Other – regulatory impact of case law**

An interesting issue arose out of the initiative of the Minister of Development to enact, according to Article 10 para. 21 of Law 2251/1994, a decision setting terms and conditions of transactional behavior of suppliers, based on irrevocable adjudications on legal actions taken either by a consumer as individual or by consumer associations; possibility which is foreseen when the aftermath of the *res judicata* has a wider public interest concerning the proper functioning of the market and the protection of consumers. Several banks contested the ban, in three categories of contracts, of certain “General Terms and Conditions”, which had been held to be unfair by irrevocable court decisions in actions brought by consumer associations. Under the ministerial decision were prohibited:

- the extra charges for the “financing”, “preliminary approval” and “examination of loan request”;

- the term providing that in case of late payment of an installment by the consumer, the credit institution may terminate the loan agreement and ask the entire outstanding amount with due interest default;

- the term providing that the credit institution may withdraw from the credit agreement with the holder at any time without notice or justification, or amend unilaterally the contract;

- the term allowing the credit institute to adjust the amount of annual credit fees with no prior notification of the holder, or terms that allow the credit institution to impose at its discretion additional expenses on any credit account in case it does not present balance exceeding a certain threshold.

The *Conseil d’Etat* rejected the complainants’ arguments about the Minister exceeding the law-making powers conferred to him and about violating the principle of proportionality and upheld the decision.  

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125 Consumer Ombudsman, 3rd of November 2011 (Protocol No 9842).


127 Contracts between credit institutions and consumers, more specifically: 1) Mortgage loans of floating rate, 2) Contracts granting credit cards, and 3) Deposit account agreements.

2. Related to the Consumers rights Directive (2011/83/EU)

Directive 2011/83/EU has been transposed into Greek Law by ministerial decision Z1-891/2013 (FEK B 2144). The length of judicial proceedings in Greece excludes that there is any case law applying the above mentioned decision. Similarly, the delay in reporting on the activities of the various extra-judicial bodies does not allow for any data to be gathered in this respect. A random research in Google did not yield any results.

IV. Digital era

The EU Data Protection Directive (95/46/EC)\textsuperscript{129} was incorporated into the Greek legal order by Law 2472/1997.\textsuperscript{130} In accordance with the Directive, Law 2472/1997 foresees that the Hellenic Data Protection Authority (HDPA, Arts 15-20) shall be responsible for monitoring the application of the Directive rules, giving advice to the government about administrative measures and regulations, and starting legal proceedings when data protection regulations have been violated.\textsuperscript{131} Moreover, the Authority may impose penalties on data controllers or on their representatives for violation of their obligations under this law and any other regulation on the protection of individuals against the processing of personal data. These penalties can be of an administrative (warning aiming at the withdrawal of the breach, fines, temporary or permanent revocation of licenses), of a criminal (fine, imprisonment) or of a civil nature (compensation for moral damage, according to the provisions of the Greek Civil Code).

HDPA’s role was reinforced by Law 3471/2006\textsuperscript{132} (incorporation of the Directive 2002/58/EC),\textsuperscript{133} which among others provides for the cooperation between the HDPA and the Hellenic Authority for Communication Security and Privacy, created by Law 3115/2003\textsuperscript{134} (Archi Diasfalisis Aporritou twn Epikoinwniwn, ADAE),\textsuperscript{135} in relation to the identity and data of telecommunication subscribers.


\textsuperscript{130} FEK A 50.

\textsuperscript{131} For a presentation of the Authority see http://www.dpa.gr/portal/page?_pageid=33,40911&_dad=portal&_schema=PORTAL

\textsuperscript{132} FEK A 133.


\textsuperscript{134} FEK A 47.

\textsuperscript{135} For ADAE see http://www.adae.gr/en/
Subsequently, Law 4070/2012 incorporated Directive 2009/136/Ec concerning the processing of personal data and the protection of privacy in the electronic communications sector. The incorporation of the Directive was partially related to the modification of the older Directive 2002/58/EC -known as the E-Privacy Directive or "Cookie Law", which has been incorporated into Greek legal order by Law 3471/2006. Directive 2009/136/EC goes a step further in the protection of user data on the internet, by ensuring the system "opt-in" into cookies, as opposed to the previously existing system of "opt-out" of Directive 2002/58/EC. The user's consent may be given either by appropriate settings in the browser, or by other applications (e.g. with a pop-up window). By the same token Law 4070/2012 also empowers the HDPA for more specific identification of ways to provide information and declaration of consent (L 4070/2012 Art 170 replacing Law 3471/2006, Art 4(5)).

A. The HDPA

The HDPA has been extremely active in pursuing its tasks and has issued several decisions with important political and social implications (such as e.g. banning the police from using traffic cameras for filming street demonstrations, limiting banks' access to personal data, banning the issuance of ID cards with reference to the religious beliefs of the holder, restricting the use of CCTVS in public areas etc.). According to the classification of the incoming, pending and completed cases the sectors which occupied the Authority (in 2013, last year for which statistical data is available) are electronic communications (38,08%), followed by the financial sector (8,54) other private economy activities (5,87%) public administration (5,34%), labour relations (3,56%) and healthcare provision (3,38%). Hence, HDPA's decisions are being felt - and may impose restrictions - in all important sectors of the economy. Restrictions may concern i.e. the source of data to be used, the retention and further exploitation of data, spamming, the use of technical means for recording transactions etc.

136 FEK A 82.
139 FEK A 133.
140 For a selection of the most important HDPA decisions in English see http://www.dpa.gr/portal/page?_pageid=33,43590&_dad=portal&_schema=PORTAL; it is worth noting, however, that very few decisions are available in English compared to the load of all the decisions issued by the HDPA.
What is more, all data controllers are supposed to notify to the HDPA their data protection policy and the use to be made of the data under their possession not only where a) they keep and/or manipulate personal data, but also when b) they intend to transfer data to some non-EU country (unless such country has been approved by the EU as satisfying a satisfactory level of protection or complies with the US ‘safe harbour’ programme) and c) they intend to interconnect data bases. What is more, anyone who wishes to establish a CCTV also need to notify to the HDPA.  

B. The right to be forgotten

The right to be forgotten was basically introduced by Directive 95/46, though it was fully recognized by the CJEU, in its ruling of 13 May 2014, in case Google Spain. The Court established “the right to be forgotten” by clarifying that individuals have the right - under certain conditions - to ask search engines to remove links with personal information about them. This applies where the information concerned is inaccurate, inadequate, irrelevant or excessive for the purposes of the data processing. At the same time, the Court explicitly clarified that the right to be forgotten is not absolute but will always need to be balanced against other fundamental rights, such as the freedom of expression, thus an ad hoc assessment of each case should be made.

In Greece, the right to be forgotten has not yet occupied the HDPA or, indeed, the Courts. It is worth noting that the HDPA has not even considered it necessary to post anything relevant on its website or even to update the content of the answer to the relevant FAQ.

Hence, the legal situation is that Article 12 (1) of Law n. 2472/1997 entitles any person to raise any objections –including deletion- to the processing of data related to them and hosted by internet content providers, including search engines. To activate the relevant legal protection, the data subject has to submit a written request to the internet content provider to proceed with the deleting of his personal data. In case of lack of response within 15 days on behalf of the provider, the subject may exercise an appeal to the HDPA, requesting that the internet provider be enforced to delete the data relating to him. The subject of the violation can also submit an application for


143 Article 12 (b), Right of the data subject to obtain the “rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data”.

144 Google Spain v Agencia Española de Proteccion de Datos, C-131/12, EU:C:2014:317.

145 Paragraphs 92-93 of the Ruling.

146 See http://www.dpa.gr/portal/page/?_pageid=33,148908&_dad=portal&_schema=PORTAL#3, available only in Greek.
interim relief as for the temporary deletion of personal data involved, as well as a claim of both a formative and compensative nature for property and/or moral damage.

Overall it may be said that data protection in Greece is in line with the requirements imposed by EU law and that the HDPA has been quite successful in putting to work the relevant rules. It is worth noting, however, that, the same as with the protection of consumers, data protection is being organized on the assumption that data subjects are able to read, write and, generally, communicate in Greek. As with consumer protection, however, data protection is supposed to be available to everybody, in simplified manners, without the need to go to court (where the intervention of a lawyer would, in any event, be necessary).

To this direct discrimination between Greek and non-Greek nationals, stemming from administrative practice in Greece, a second one, between EU and non-EU data controllers should be added: according to the relevant directives, where the data controller wishes to transfer data to some non-EU country (which will happen more often where the controllers themselves have a connection with a non-EU country), such controller is under an obligation to notify to the HDPA.

V. Conclusion

The above brief description of the rights recognized and the enforcement mechanisms put in place in Greece, in all three sectors examined, shows some points in common. At first glance it may be said that Greece has technically transposed into national law most, if not all, of the relevant EU rules. However, the level of implementation of the rules varies from sector to sector, in accordance to the pathologies of the Greek administration and the relative powers of local interest groups.

Professional qualifications constitute the show-case example of the way in which corporatist interests may block the proper application of EU law, for a period extending over 25 years. It offers an example of the various ways in which the various national interests, combined to administrative inertia and an extremely slow justice system, may overtake over the legal obligations stemming from EU law.

The same features apply, to various extents, to all other areas of implementation of EU law and set an unfriendly environment for ‘outsiders’ who are not familiar with the Greek administration. In actual fact, several individuals, companies and even corporations, have found it difficult to cope with the multitude of (often contradictory) legal rules, the discretion left to (often antagonistic) authorities, the maladministration and the occasional corruption of the Greek public sector. It is worth noting that even foreign law firms, by definition acquainted with dealing with forensic rules, have not succeeded in establishing themselves in Greece.

The above features constitute the core reasons which have led Greece to its current economic downfall. The ‘Troika’ of lenders have actively tried to counter those, with limited success. The
European Commission’s Task Force for Greece has also done some groundwork in order to enhance capacity building and to secure a more transparent and efficient public administration. These efforts, however, have been stalled after the January elections and the formation of a populist left-wing government. Thence, the situation has developed in the opposite direction, the Troika and EC Task Force have been incapacitated and any effort to evaluate and monitor the operation of the public sector has been stopped.

The above problems, which apply to Greek and EU citizens alike, become all the more difficult to tackle for the latter, in view of three factors: a) Greeks are used to coping with legal uncertainty and tailor-made solutions which are, however, inconclusive for legal certainty and, thus, unappealing for foreigners, b) the Greek public sector operates largely on a network and personal contact basis, which are not available to non Greeks and c) most, if not all, of the legal texts and the implementation/control mechanisms put in place only operate in Greek.
DELIVERABLE 5.2

COUNTRY REPORT
HUNGARY

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Introduction
In Hungary, the compliance with professional qualifications directives does not appear to raise particular problems. However, as the government has been in recent years constantly changing the regulatory context of higher education, and, as the Bologna process, or at least its realisation in Hungary has come under constant governmental critique, this statement might not hold true in the near future. It has only been due to massive student protests in the last few months that the government has not eliminated either the 3+2 system regarding some profession (such as notably psychology), or has not eliminated completely (in fact, banned) some popular BA programs, such as international relations or communication and media studies. While those plans were withdrawn, It also has to be noted that 21 (fully accredited) bachelor and 37 master programs will not be allowed to start in the academic year 2016/2017, not even as self-sustaining, tuition-based programs. The rest of university autonomy, which remained anyway very little after the 2012 reforms, will be virtually eliminated as a new body appointed in majority by the ministry will have veto power regarding important decisions, such as the research and development innovation strategy or the details of the budget. It is questionable how a higher education system fully under the manual control of government will fare in the European Higher Education Area.

However, as Hungary is not an immigration country, this state of affairs might not have Europe-wide ramifications. Quite to the contrary, among Hungarian professionals, doctors and medical personnel in general, are leaving the country in large numbers, for reasons of underpayment and worsening work circumstances at home. According to the authority responsible for monitoring the health care profession, 167 persons’ foreign qualification was recognized in 2013, while 1950 was the number of those who received a certificate of Hungarian qualification. Although probably not everyone who received the certificate leaves the country fully – for instance some doctors take up weekend or other part-time jobs in Austria, while keeping their Hungarian job – the drastic difference between the two numbers is indicative of the situation in Hungarian health care. Out of the 167, 143 came from the neighbouring countries (Romania, Serbia, Slovakia and Ukraine) with significant ethnic Hungarian population.

Implementation of directives

As to formal implementation, the directives are implemented throughout the legal system in very many instruments.

Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications was implemented in the following legal norms:

**Acts**

- **1996. évi LVIII. törvény a tervező- és szakértő mérmőkők, valamint építészek szakmai kamaráiról**
  Act No. LVIII of 1996 on the chambers of architects and engineers

- **1997. évi CLIV. törvény az egészségügyről**
  Act No. CLIV of 1997 on Health

- **2001. évi C. törvény a külföldi bizonyítványok és oklevelek elismeréséről**
  Act No. C of 2001 on the recognition of foreign certificates and degrees

- **2005. évi CXXXIII. törvény a személy- és vagyonvédelmi, valamint a magánnyomozói tevékenység szabályairól**
  Act No. CXXIII of 2005 on Security Services and the Activities of Private Investigators

**Government Decrees**

- **33/2008. (II. 21.) Korm. rendelet a külföldi bizonyítványok és oklevelek elismeréséről szóló 2001. évi C. törvény hatálya alá tartozó ügyekben eljáró hatóságok kijelöléséről, valamint a nyilatkozattételi kötelezettség alá eső szolgáltatások felsorolásáról**
  Government Decree No. 33/2008 on the on the designation of the authorities acting in matters under Act C of 2001 on the Recognition of Foreign Certificates and Degrees and services requiring declarations

- **247/2011. (XI. 25.) Korm. rendelet az atomenergia alkalmazása körében eljáró független műszaki szakértőről**
  Government Decree No. 247/2011 on the independent technical experts in the field of atomic energy

- **120/2013. (IV. 23.) Korm. rendelet az atomenergia alkalmazása körében eljáró független műszaki szakértőről szóló 247/2011. (XI. 25.) Korm. rendelet módosításáról**
  Government Decree No. 120/2013 on the amendment of Government Decree No. 247/2011 on the independent technical experts in the field of atomic energy

- **121/2013. (IV. 26.) Korm. rendelet az Oktatási Hivatalról**
  Government Decree No. 121/2013 on the Educational Authority
• **354/2013. (X. 7.) Korm. rendelet a belső piaći információs rendszer hazai működéséről és az abban való részvételnek a szabályairól, valamint a belső piaći szolgáltatásokról szóló 2006/123/EK európai parlamenti és tanácsi irányelv szerinti bejelentési kötelezettség teljesítéséről**

Government Decree 354/2013 on the functioning of the internal Market Information System in Hungary and the rules of participation; and on the fulfilment of the reporting obligation stipulated by Directive 2006/123/EC on services in the internal market

Ministerial Decrees

• **15/2006. (IV. 3.) OM rendelet az alap- és mesterképzési szakok képzési és kimeneti követelményeiről**

Decree No. 15/2006 of the Minister of Education on the outcome requirements of the Bachelor and Master programmes

• **22/2006. (IV. 25.) BM rendelet a személy- és vagyonvédelmi, valamint a magánnyomozói tevékenység szabályairól szóló 2005. évi CXXXIII. törvény végrehajtásáról**

Decree No. 22/2006 of the Minister of Interior on the implementation Act CXXXIII of 2005 on Security Services and the Activities of Private Investigators

• **35/2007. (XI. 13.) OKM rendelet a 2001. évi C. törvény III. részének hatálya alá tartozó, végbizonyítványnak minősülő képzések és bizonyítványok felsorolásáról**

Decree No. 35/2007 of the Minister of Culture and Education on the list of degrees and certificates which qualify as “final certificate” under Chapter III of Act No. C of 2001

• **36/2007. (XI. 13.) OKM rendelet a szakmai tapasztalat elismerésének szabályai alá tartozó egyes szakmai tevékenységek felsorolásáról**

Decree No. 36/2007 of the Ministry of Culture and Education on the list of professional activities pertaining to the rules of the recognition of professional experience

• **1/2008. (I. 11.) ÖTM rendelet az Európai Közösségi jog hatálya alá tartozó, feltétel nélkül elismerésre kerülő okleveles építészmérnöki oklevelek megnevezéséről és az ezen okiratok birtokosaival azonos jogállású személyek köréről**

Decree No. 1/2008 of the Ministry for Local Government and Regional Development on the denomination of diplomas of certified architects subject to unconditional recognition under European Community law and the group of persons with status equal to the holders of such diplomas

• **4/2008. (I. 16.) EüM rendelet az Európai Közösségi jog hatálya alá tartozó, feltétel nélkül elismerésre kerülő egyes egészségügyi oklevelek, bizonyítványok és a képesítés megtervezéséről szóló egyéb tanúsítványok megnevezéséről és az ezen okiratok birtokosaival azonos jogállású személyek köréről**
Decree No. 4/2008 of the Ministry for Health on the denomination of certain healthcare degrees, certificates and other documents attesting the obtention of qualification which are subject to unconditional recognition under European Community law and on the group of persons with equivalent status with holders of such degrees

- **30/2008. (VII. 25.) EüM rendelet az egészségügyi tevékenység végzéséhez szükséges oklevelek elismeréséről, továbbá az okszlerelek külföldi elismertetéséhez szükséges hatósági bizonyítványok kiadásának egyes eljárási szabályairól**

Decree No. 30/2008 of the Ministry for Health on the recognition of certificates necessary for the pursuit of healthcare activities and the procedural rules governing the certification of diplomas abroad

- **37/2008. (III. 27.) FVM rendelet az európai közösségi jog hatálya alá tartozó állatorvosi oklevelek elismeréséről**

Decree No. 37/2008 of the Ministry of Agriculture on the recognition of veterinary certifications under European Community law

- **90/2009. (VII. 24.) FVM rendelet az agrár-szaktanácsadói tevékenység engedélyezéséről**

Decree No. 90/2009 of the Ministry of Agriculture on the authorisation of the activity of agricultural experts


Decree No. 55/2011 on the amendment of Decree No. 22/2006 of the Minister of Interior on the implementation Act CXXXIII of 2005 on Security Services and the Activities of Private Investigators

- **22/2012. (IX. 14.) EMMI rendelet az egészségügyi felsőfokú szakképesítés megszerezéséről**

Decree No. 22/2012 of the Ministry of Human Resources on the obtention of tertiary qualification in the field of healthcare

- **37/2013. (V. 28.) EMMI rendelet az emberi erőforrások minisztere ágazatába tartozó szakképesítések szakmai és vizsgakövetelményeiről**

Decree No. 37/2013 of the Ministry of Human Resources on the examination requirements of qualifications in the sectors of the Minister of Human Resources

Act No. C of 2001 on the recognition of foreign certificates and degrees[^3] regulates the recognition which falls under the scope of EU law in part III. Translation of the act is provided on the website of the Education Authority, however, it is a version which is not any longer in force, thus it is misleading.

Separatedecrees regulate the unconditional recognition of veterinary surgeon’s, dentist’s, pharmacist’s, architect’s, general practitioner’s, nurse’s or maternity nurse’s degrees or certificates.

Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 has not yet been implemented. Legislative proposal No. T/4767, currently before the parliament on the Act on the amendment of certain acts regulating higher education includes implementation of the directive.

**Solvit (+ CHAP & EU-Pilot)**

No data is available on specific cases or specific problems related to the recognition of professional qualifications in Hungary. The annual reports only list cases in which Hungarian citizens have succeeded in obtaining recognition for their qualifications in other Member States, but not vice versa.

**Infringementdecisions**

**Notaries’ nationality requirement**

The European Commission has taken Hungary to court, because it believes Hungary should withdraw its nationality requirement for notaries. Hungary has argued that its notaries have judicial powers. However, its notaries do not have the power to rule on disputes, and that is considered to rule out their being qualified as having judicial powers by the Commission.

The EC first issued a reasoned opinion in 2007 with additional follow-ups in 2012⁴ and 2014, which was eventually followed by a referral to Court dated 29/04/2015 (according to the EC infringement decisions directory).⁵

**Recognition of professional qualifications**

In October 2008,⁶ The Commission has decided to take six Member States to the European Court of Justice, including Hungary for failure to send the Commission their measures transposing Directive 2005/36/EC on the recognition of professional qualifications.

The deadline for transposition of Directive 2005/36/EC was 20 October 2007. Hungary has implemented the directive in the instruments mentioned above (eg. in the act CX of 2007 modifying

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Part III of Act C of 2001), thus it is likely that it only omitted to notify the Commission thereof. It is noteworthy that no unequivocal information is available on this on the Commission’s webpage.

The EC launched an infringement procedure (formal notice only) in 2005 regarding the implementation of Directive 78/686 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services. The case was closed in the same year.

EC Reports
Between 2003-2005 there was no reference to the implementation of EU legislation in Hungary related to regulated professions/recognition of national qualifications.

In 2006, the Commission sent a letter of notice to Hungary, among many other member states, regarding the nationality requirement of notaries. 7

In 2007, the Commission started infringement proceedings against almost all Member States for non-communication of national implementing measures of Directive 2006/100/EC providing for technical adaptations to the Directives on professional qualifications further to the accession of Bulgaria and Romania to the European Union, which came into force on 1st January 2007, and Directive 2005/36/EC on the recognition of professional qualifications which had to be transposed by 20 October 2007. 8

Regarding the nationality requirement of notaries, the Commission issued reasoned opinions to several Member States, including Hungary. 9

The 2008 report informs that Hungary was sent to Court along with other 16 Member States for non-communication of national implementation measures for Directive 2005/36/EC. 10

In the 2008, 11 2009 12 and 2010 13 reports, the Commission reiterates that the infringements case against Hungary because of the nationality condition for notaries did not progress. This is due to the

fact that almost all the Member States concerned intervened in 2009 to support the Member States already referred to the Court of Justice (Germany, Austria, Belgium, France, Greece and Luxembourg).

Preliminary rulings of the ECJ
No reference for preliminary ruling was initiated by Hungarian courts regarding professional qualification.

National case law
There is no significant litigation related to recognition of professional qualifications in Hungary. In one case, which started in 2006, i.e. before directive 2005/36 came into effect, relating to a French diploma in law (maitrise or master 1), there was litigation, but there is no final public decision on the merit. There seems to be some confusion even within France or in the communication between French and Hungarian authorities, because the Hungarian court was informed by the respective French authority at one occasion that the maitrise is not a final degree, while at another point the Hungarian court seems to accept that the maitrise is a master’s degree in law when the court was provided with the non-official translation of the diploma. In any case, Hungarian courts all found that the requirement to pay around 200 euros for the procedure of recognition did not violate EU law.

2. THE PROTECTION OF ECONOMIC RIGHTS OF CONSUMERS

Background: legal and governance structure for consumer protection in Hungary
Responsibility for the enforcement of UCPD:

- General: Hungarian Authority for Consumer Protection, Hungarian Competition Authority, National Bank of Hungary
- Financial services: Hungarian Competition Authority; Hungarian Financial Supervisory Authority (from 2013: National Bank of Hungary)
- Immovable property: Hungarian Competition Authority; Hungarian Authority for Consumer Protection

Enforcement procedures and dispute settling mechanisms summary here (very important):


The most important elements of the procedure as summarized on the website of the European Commission:\(^{16}\)

1) Procedure of the Hungarian Authority for Consumer Protection ("HACP"): the HACP is entitled to act in the case of any kind of unfair commercial practice (provided that HCA or CBH are not competent). 2) Procedure of the Hungarian Competition Authority ("HCA"): the HCA is entitled to act in connection with unfair commercial practices if the commercial practice is suitable for influencing the competition (unless such unfair commercial practice only relates to the label of the product, the instructions for use, the warranty voucher or the information obligation set out in § 7 (3) of the Act on Prohibition of Unfair Commercial Practices); 3) Procedure of the Central Bank of Hungary ("CBH"): the CBH is entitled to take action in connection with unfair commercial practices if such commercial practice is connected to the activity of the trader supervised by the CBH.\(^ {17}\)

2) Any consumer or stakeholder or social organs representing consumers' rights are entitled to take action in front of the HACP, as well as the competent bodies of other EEA countries in the case of breach of the UCP directive (§ 46 (2) of Act on Consumer Protection); 2) Any person/entity is entitled to make an announcement or complaint at the HCA (§ 43/G of Act on Prohibition of Unfair Market Practices and Restriction of Competition); The complaint can be formal or informal 3) Any natural or legal person or any organisation without legal personality whose rights or obligations may be affected, is entitled to take action in front of the CBH, as well as the competent bodies of other EEA countries in the case of breach of the UCP directive and foreign financial supervisory authorities if their scope of duties is affected (§ 81 (1)-(3) and § 82 of Act on Central Bank of Hungary).\(^ {18}\)

Court action: civil damages and injunctions are possible. In the latter case, the Act on Consumer Protection establishes that the consumer protection authority, the social organs representing consumers' interest or the public prosecutor are entitled to initiate a lawsuit if an unlawful activity affects a large number of consumers or causes significant damage. The defeated party is obliged to satisfy the claims of the customer as ordered in the judgement. In its judgement the court might entitle the prevailing party to publish the judgement in a national daily paper on the cost of the defeated party.\(^ {19}\)

\(^{16}\) [link](https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.viewEnforcement&countryID=HU)

\(^{17}\) Id.

\(^{18}\) Id.

\(^{19}\) Id.
Transposition of the Directives in Hungary

The Unfair commercial practices directive 2005/29/EC (UPC Directive)

According to the EC report on the application of Directive 2005/29/EC (2013), only a few member states managed to transpose the directive on time (by 12 June 2007), most national legislation was adopted during 2008-2009. Hungary was among a group of member states (along with many of the new members) which adopted a new law that transposed the directive almost ad verbatim (Act no. XLVII of 2008 on the Prohibition of Unfair Commercial Practices against Consumers.

Another problem related to the transposition of the Directive was posed by the so-called “Internal Market Clause”, which stipulates full harmonisation, i.e. member states have to maintain the exact same level of consumer protection defined by the directive and cannot implement stricter measures. The full harmonisation effect of the Directive was confirmed by the ECJ in the “Total Belgium” case. This meant that member states had to screen their existing national legislation on consumer protection to rule out incompatibilities with the Directive, especially concerning commercial activities prohibited by national legislation which were not listed in Annex I of the Directive as unfair practices.

There are two fields, financial services and immovable property to which the “Internal Market clause” does not apply, therefore only minimal harmonisation is required and Member States can be more restrictive in these areas.

According to a study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU in relation to financial services and immovable property, in Hungary, the most common unfair commercial practices in the area of financial services are the following (EC Study, p84 and p92): product misdescribed (7 cases reported between 2008 and 2010 by the Hungarian Competition Authority), price not transparent. In the former category, the description of the cases provided by the Hungarian Competition Authority is the following:

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23Id. 102.
“Financial products, most often current accounts, mortgages, and other loans (including consumer credit), were mis-described. For example, a company states that the consumer will absolutely receive a loan in a given, short time period, but this does not happen. Or, a company advertises a certain interest rate but does not indicate its conditions.”

Description of “not transparent prices” cases by the HCA (GVH): 24 “Certain mortgage plans and other loan products (including consumer credit) did not make their prices transparent. The products were described as "free" or "without charge" when in fact customers did have to pay a fee or the vendor changed the terms and conditions of the product later to introduce charges.”

The Hungarian Financial Supervisory Authority reported 23 (unspecified) cases of unfair commercial practices for the period of 2008-2009. 25 “Financial products, most often current accounts, mortgages, and other loans (including consumer credit), were misdescribed. In the case of motor insurance products (third party liability) and home insurance, some of these misdescriptions led to UCP cases.” 26 The reported practices were met by administrative decisions in Hungary. 27

Immovable property cases reported by Hungarian authorities demonstrated the lack of transparency regarding certain features and intermediary costs related to property purchase. For instance, certain costs such as maintenance or renovation charges were not made clear. 28

In the area of timeshares, essential information was often omitted in the advertisement, such as information on withdrawal rights, 29 or there was no transparent information on prices. 30 Cases involving cross-border aspects are frequent, and in such cases, “the proceeding is likely to be longer, more complicated, more expensive and might not be successful, because it can be difficult to find enough proof to establish the illegal conduct.” 31

Finally, other common unfair practices related to immovable property were also identified by the Hungarian Competition Authority, such as “advertising around the selling of immovable properties

24 Id. 116.
25 Id. 93.
26 Id. 120.
27 Id. 100.
28 Id. 142-143.
29 Id. 126, 141.
30 Id. 151.
31 Id. 150.
made false statements, for example that the consumer could buy the property with cash within 30
days." 32

The report summarizes the main means of enforcement and the challenges faced by Hungarian
authorities in the following:33

As to the means, the act transposing the UCPD does not preclude parties to enforce civil law claims
directly in court based on the unfairness of a commercial practice, independent of administrative
proceedings. In such judicial proceedings the burden of proof regarding the authenticity of facts
comprising a part of commercial practices lies with the business entity. A general claim for civil
damages can be filed if there are no specific judicial proceedings for enforcing the UPCD.

As to obstacles to enforcement in relation to both financial services and immovable property, the
Hungarian Competition Authority reported that for commercial practices which are banned in all
circumstances problems with enforcement do not depend on the type of the infringement, but
relate to the proceeding itself. For example there is a judicial review of the resolutions, and if the
client is not from Hungary the enforcement is generally more difficult, especially if he or she is a non-
EU citizen. There can also be problems if the firm will be wound up and there is not any legal
successor.

As to problems associated with cross-border enforcement, the Hungarian Competition Authority
responded to every question that “if the client is not from Hungary, the proceeding is generally
longer, more complicated, more expensive and might not be successful, meaning it is difficult to find
enough proof to establish the illegal conduct.”34

Hungary adopted an act which transposed the Directive in its integrity in 2008. Other laws also had to
be amended to ensure harmonisation.

Act(s) of transposition:

évi XLVII. törvény a fogyasztókkalszembenitszességszellekmgyakorlattalalmáról)
  This law is referred to as the “UCP law” as it transposes most of the provisions of the
  Directive.

According to a commentary on the law, the legislator attempted to construct a coherent system of
consumer protection and thus the law contains several references to relevant national legislation and

32 Id. 150.
33 Id. 210-211.
34 Id.
it establishes new concepts.\textsuperscript{35} One of the new concepts introduced is that of the consumer: according to Act 47 of 2008 (Section 2), a consumer is “any natural person who is acting for purposes which are outside his trade, business or profession”. This is different from the general definition of consumer in Hungarian legislation, because it is narrower as previously it used to include “gazdálkodó szervezetek” (economic or business organizations) under certain conditions.\textsuperscript{36}

Another novelty is that the three authorities must cooperate in the interest of the consumer and efficient problem-solving and dispute settling: the HCA (GVH), the HCPA (NFH) and the CBH (MNB/PSZÁF).\textsuperscript{37} In case the consumer files a complaint to either of these authorities, but it falls under the jurisdiction of the HCA, the other authorities must forward the complaint to the HCA in a delay of 30 days.

- **Act no. 48 of 2008 on the Basic Requirements and Certain Restrictions Applying to Commercial Advertising Activities** (2008. évi XLVIII. törvény a gazdaságireklámtevékenységalapvetőfeltételeirőléseskorlátairól) – Note: there is no direct reference to the Directive in this act, but it is listed as a national law implementing the Directive in the UCP Database.\textsuperscript{38}

Additional transposition measures/amendments to existing national law:

- **Act no. CLV of 1997 on Consumer Protection** (1997. évi CLV. törvény a fogyasztóvédelemről): Section 43/A (k) stipulates that the Authority for Consumer Protection enforces EU legislation related to consumer protection and thereby it also acts in cases of unfair commercial practices (note: only in cases which do not fall under the duties of the Hungarian Competition Authority or the Central Bank /previously Hungarian Financial Supervisory Authority).

\textsuperscript{35} T. Gömöri (2010): A tiszteletlen kereskedelmi gyakorlatokról szóló irányelv átültetése a tagállamokban és hazánkban http://www.gvh.hu/data/cms1000452/gvh_vkk_tanulmanyi_palyazat_g%C3%B6m%C3%B6ri_tamas%C3%A1s.pdf


\textsuperscript{37} Id.

According to the Hungarian Consumer Protection Authority, this act established a comprehensive consumer protection legislation, which is based on five key principles of consumer protection:

- the protection of the health and safety of consumers,
- the protection of the economic interest of consumers,
- consumer information and education,
- enforcement of consumer claims, and
- representation of consumers.

The Hungarian Authority for Consumer protection and its regional offices were established by Government Decree No 225/2007 (VIII. 31.) on the Hungarian Authority for Consumer Protection as the legal successors of the General Inspectorate of Consumer Protection.  


- **Act no. CIV. of 2010 on the Freedom of Press and the Basic Rules of Media Content** (2010. évi CIV. törvény a sajtószabadságról és a médiatartalmak alapvető szabályairól)
  
  Article 25
  This Act serves the purposes of compliance with the following legislative acts of the European Union:

- **Act no. 139. of 2013 on the National Bank** (2013. évi CXXXIX. törvény a Magyar Nemzeti Bankról)
  Defines the duties of the NBH in the enforcement of the Directive.

- **Act no. 16 of 2014 on Collective Investment Forms and Their Managers and on the Amendment on Certain Financial Acts** (2014. évi XVI. törvény a kollektív befektetési formákról és kezelőikről, valamint egyes pénzügyi tárgyú törvények módosításáról)
  This law refers to the Unfair Commercial Practices Act (Act no. XLVII of 2008) in Section 137. (2), which authorizes the Authority to ban commercial communication if it is contrary to or contains

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misleading information compared with the information submitted to the Authority or permitted to be published by the Authority, or is otherwise contrary with the prohibition of unfair commercial practice in the law.

**The Consumer rights directive 2011/83/EU**

Prior to its national implementation, the Commission analyzed the potential impact of the Directive on existing national legislation, and regarding Hungary, expected the following provisions of the Directive to be introduced as new elements in national legislation:

- Wider definition of off-premises contracts (Article 2)
- Protection against hidden charges (Article 6(1): Traders have to explicitly inform consumers about all charges on top of the price. If a trader does not inform the consumer, the latter does not have to pay those additional charges.)
- Article 9(f) – Information that the contract is covered by consumer protection rules – i.e. the consumer is protected.
- Longer “cooling-off” period/ right to withdrawal (14 days) – Article 9
- Article 10 – where the consumer is not informed about the right to withdraw, the withdrawal period expires of 12 months after the trader has fully performed the contract (in the context of off-premises and distance sales).
- Decrease in level of consumer protection: Article 13 - trader’s right to withhold reimbursement. (If the consumer withdraws, the proposal introduces a right for traders to withhold reimbursement until receiving the goods or getting evidence from the consumer of having sent the goods back.
- Article 22 - the ban on pre-ticked boxes. Especially in the context of e-commerce, traders will not be allowed to use pre-selected (pre-ticked) options involving additional payments.

According to the information table on regulatory choices of Member States published by the Commission (of November 2014), Hungary did not choose to introduce any of the optional provisions contained in the Directive in its national law: meaning that it did not opt for not applying the Directive in certain cases (involving transactions under 50 €) and it did not opt for the introduction of special requirements (e.g. imposing national language requirement for contractual information;

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imposing additional information requirements under e-commerce, requiring written confirmation of contracts concluded by telephone, etc.)

The information leaflet of the federation of associations for consumer protection (FEOSZ -- NFACPH), important changes induced by the CRD\(^{43}\) includenew definitions of distance contracts, off-premises contracts, digital content and tangible medium, business premises.

Acts of transposition:

- Act no. 5 of 2013 on the Civil Code (2013. évi V. törvény a Polgári Törvénykönyvről)

Infringement decisions/EC reports

- One infringement procedure was launched regarding the transposition of the UCPD in 2008 (referral to Court over non-implementation), but it was stopped after Hungary fulfilled its obligations.

Preliminary Rulings of the ECJ

UCPD

- Judgment of the Court (First Chamber) of 16 April 2015 (request for a preliminary ruling from the Kúria — Hungary) — Proceedings brought by Hungarian Consumer Protection Authority. The Kúria asks whether under the UCPD, in case of deciding about misleading commercial practices, does the court need to verify if the conduct at hand was contrary to the duty of diligence, or it is sufficient if the service provider provided erroneous information, and this information gave incentive to the consumer to make a business decision which he otherwise would not have had, and secondly, whether such erroneous information directed at one single consumer qualifies as commercial practice.

Case C-388/13 –Judgment of the Court


\(^{43}\) Information leaflet of the Federation of Associations for Consumer Protection (FEOSZ -- NFACPH), http://feosz.hu/upload/FEOSZ%20Tajekoztato.pdf
amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) must be interpreted as meaning that the communication, by a professional to a consumer, of erroneous information, such as that at issue in the main proceedings, must be classified as a ‘misleading commercial practice’, within the meaning of that directive, even though that information concerned only one single consumer;

2. Directive 2005/29 must be interpreted as meaning that, if a commercial practice meets all of the criteria specified in Article 6(1) of that directive for classification as a misleading practice in relation to the consumer, it is not necessary further to determine whether such a practice is also contrary to the requirements of professional diligence, as referred to in Article 5(2)(a) of that directive, in order for it legitimately to be regarded as unfair and, consequently, prohibited in accordance with Article 5(1) of that directive.

CRD: no relevant case law although Case C-472/10 refers to the CRD, but only insofar as it affects Directive 93/13/EEC, and it was cited by the opinion of Advocate General Trstenjak as a remark, i.e. the CRD “made only minor amendments to Directive 93/13 that do not affect the resolution of the legal questions raised in the present case.”

National case law – notable examples

- UCPD
  - Bait advertising
    Typical cases include: challenging promotions whereby the seller does not supply adequate quantities of the advertised product based on Point 5 of the “black list” included in Annex I of the UPCD. This is a particularly difficult provision to interpret and enforce.44

   Authority: Hungarian Competition Authority
   Defendant: Penny Market Kereskedelmi Kft.
   Case description:
   The defendant made a sales promotion in June 2009, in which it stated that on certain days and hours, specific products could be purchased at a reduced price


(at a price which was used 13 years ago). However, the defendant was not able to supply some of these products in a reasonable quantity during the sales promotion. In most cases, it limited the amount of the discounted products that could be purchased by the consumers.

**Legal Issue:** Does it constitute "bait advertising" if a trader deliberately limits the amount of discounted products that can be purchased by consumers, because it cannot supply these products in a reasonable quantity?

**Decision:** On the basis of the available information, the Competition Authority decided that the defendant had to have reasonable grounds to believe that it was able to supply the reduced priced product in the necessary quantity. As the reduced price product could only be purchased during predefined hours, this should have been taken into account by the defendant. The defendant had no right to "transfer" the problems in connection with such promotion to the consumers.


2. **Procedure no.: Vj-25/2012/19** of 04/03/2013 on the website of the Hungarian Competition Authority:

   Defendant: ALDI Magyarország Élelmiszer Bt. (Food market chain)

   Case Description: During its sales campaign between December 2011 and January 2012, ALDI failed to provide sufficient quantity of the advertised product, a Tevion external hard drive.

   **Legal issue and decision of the HCA:**

   The Competition Council emphasized that point 5 of the black list cannot be seen as creating a duty for retailers to provide the product for the entire period of the promotion and to each and every consumer. The HCA argued that traders should organize their campaigns diligently. It was established that ALDI must have known that supplies will be scarce due to the drop in production, that the Tevion hard drives sold well in November even at normal prices and that a 28% reduction would surely stimulate further demand. A fine of 25 million Forints was imposed.

   "Buy Hungarian" movement

   Many supermarkets in Hungary promote products with slogans such as “Hungarian quality” or “Hungarian products”. After conducting a study, the HCA established

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47 Szilágyi and Tóth, supra n 44, 177-179.
that this type of advertisement influences the choices of otherwise price-sensitive consumers. The issue was also raised in the Parliament and lawmakers adopted a law\textsuperscript{48} which regulates the use of labels that mark products of Hungarian origin.\textsuperscript{49}

Sample cases:
Supermarkets which advertised certain products (mainly foodstuff) as Hungarian, whereas they were not produced in Hungary: Aldi Magyarország Élelmiszer Bt. (Vj-8/2011), Auchan Magyarország Kereskedelmi és Szolgáltató Kft. (Vj-17/2011),\textsuperscript{51} Spar Magyarország Kereskedelmi Kft. (Vj-21/2011)\textsuperscript{52}

- **Children’s products – vulnerable consumers – aggressive commercial practices**

Point 28 of Annex I of the UCPD specifies that “including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.”

Sample cases:
   Procedure no.: Vj-124/2009.\textsuperscript{53} 
   Description: Prompting children to collect stickers all year long.
2. Hungarian Competition Authority vs. M-Ágnes Játéknagykereskedő és –Készítő Bt.  
   Procedure no.: Vj-123/2009 \textsuperscript{54} 
   Description: Advertising products with a slogan “Collect them all” and selling the products in non-transparent packages which increased the number of “double buying”.

- **Mobile phone services**

\textsuperscript{48} Act XXX of 2012 on Hungarian values and Hungaricums.  
\textsuperscript{49} Szilágyi and Tóth, supra n 44, 175-176.  
A number of issues have been raised by procedures involving mobile phone companies:

- **Misleading commercial practices-omission of information**
  
  **Case no.: Vj/130/2009/35** of 14/12/2009 (Telenor Magyarország Zrt.)
  
  **Description:** The defendant launched a promotional campaign between 16 June 2009 and 31 July 2009 using several promotional means (including amongst others advertisings in magazines, posters in show-windows, leaflets). Certain additional terms and conditions were indicated in smaller letters beneath the eye-catching slogan, stating that the same service would be granted for a monthly fee after the expiry of the 3 months term, and that the free minutes would only be granted for inland calls within the network of the defendant.
  
  **Legal issue:** Does the mentioning of terms and conditions applicable to an offer by using a smaller font than the rest of the offer, ensure the right for the consumer to become acquainted with the information necessary to be able to take an informed transactional decision? (UPCD Article 7)
  
  **Decision:** The Competition Authority established that in case additional material information is placed under a slogan using a smaller font, a substantial risk is created that the consumer will neglect this information when the consumer has no possibility to hold in his/her hands the advertising material or when this material can only be examined for a shorter period. According to the Authority, in such a case, the consumer perceives the detailed information less clearly than the slogan.

- **Misleading commercial practices – comparative advertising**
  
  **Case no.: Vj-35/2012/34** of 06/03/2013 (HCA vs. Vodafone Magyarország Mobil Távközlési Zrt.)
  
  **Description:** Vodafone advertised itself as having the “fastest” and “best mobile data network” in the country.
  
  **Legal issue and decision:** This constitutes comparative advertising, since it clearly compared itself with other service providers. This type of advertisement is only lawful under the Hungarian law (Act 48 of 2008) if it
complies with the Act on Unfair Commercial Practices. Since the advertisement of the mobile service company was found to be misleading by the HCA, it was also found to be in violation of rules of comparative advertising (which also constitutes a breach of Directive 2006/114/EC on misleading and comparative advertising).

- Injunctions and class-action

1. “Ingatlandepo” case – No.Vj-122/201057 (Hungarian Competition Authority) – misleading information

   The Hungarian Competition Authority launched a public interest action against the operators of a website (ingatlandepo.com, ingatlanbazar.com, ingatlanbazar.net)

   The websites were operated between 14 August 2009 and 29 May 2010 and from 27 September 2010 by the Experient Entertainment Ltd. based in the Seychelles-islands, and between 30 May 2010 and 26 September 2010 by the WeltimmoS.r.o based in Slovakia.

   The HCA investigated the activities of these undertakings and decided that the operators had been concluding unfair commercial practices by publishing misleading information on the websites. The HCA imposed a fine and ordered the operators to publish corrective statements in Hungarian daily newspapers.

   The HCA launched a civil action in order to ask Budapest Metropolitan Court to establish the nullity of certain stipulations of the GTC (general terms of contract) with an effect that extends to all the contracting parties. The court confirmed the claim of the Authority.58

2. Intrum justitia case – (former) Hungarian Financial Supervision Authority – aggressive commercial practices

   Public interest litigation

   The HFSA asked the court to pronounce a certain letter sent to the consumers of the company (a financial services company) in breach of the law. The subject of the letter was “Notification of report to the police” which was found to be threatening and fear-inducing by the HFSA, and as a consequence, in breach of

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the UCP Act (sections 3 and 8). In the lawsuit regarding Intrum Justitia Zrt., the non-appealable decision of the court of first instance favoured the HFSA. 59
The HFSA/CBH regularly launches such claims and actions of public interest. 60

3. Commitments as surrogate of civil redress: practice in Hungarian competition law

In an academic article 61, Csongor István Nagy argues that in the decisional practice of the Hungarian Competition Authority, commitments are often used as a form of civil redress and provide compensation for consumers in unfair commercial practices cases. Commitments are acceptable means of addressing misconduct under European competition law (Article 9 of Regulation 1/2003). Commitments serve multiple purposes, among which procedural economy and the facilitation of remedies is cited by the author.

An example of such a procedure terminated by commitments:

Procedure no. Vj-118/2007/20 62 against Unicredit Bank Hungary Zrt. The Bank was found to be violating rules of unfair commercial procedures because it did not disclose important contractual terms. As a result of the commitment procedure, consumers were able to terminate their contracts.

CRD: no litigation yet

3. Right to be forgotten:

There has been no litigation in relation to the Google Spain judgment of the CJEU in Hungary yet.


60 See: https://felugyelet.mnb.hu/topmenu/penzugyi_felugyelet/jogorvoslati_eljarasok


DELIVERABLE 5.2

COUNTRY REPORT
ITALY

CONTRIBUTOR: UNITN

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1. ACCESS OF ECONOMIC ACTORS TO THE EUROPEAN/INTERNAL MARKET

With regard to the implementation rules to be studied, WP-participants ideally cover the (national fate of the) following categories of professional qualifications:

- qualifications obtained by EU citizens in another Member State (EU qualifications)
- qualifications obtained by EU citizens outside the European Union (non-EU qualifications)
- qualifications obtained by EU citizens prior to their country joining the European Union (pre-accession qualifications)
- qualifications obtained by nationals of EU associated third countries, when the relevant association agreement includes chapters on establishment and/or services.

To enhance both feasibility and comparability, D5.2 reporters are to concentrate on the national rules at stake in the last ten annual monitoring reports, i.e. 21th (2003) – 31th (2013), to be found at EU-website mentioned above, and to include in their analysis as much national – published – case-law involving recognition-problems/issues based on these rules as possible during the same period.

1.1 Recognition of EU qualification

As to the recognition of professional qualifications, Italy has been the first Member State transposing Directive 2005/36/EC.

In particular the directive has been implemented by means of Legislative Decree no. 206 of 9 November 2007, which, in line with the European instrument, provides for the rules governing the administrative procedures granting to European citizen with a professional qualification obtained in another Member State the access to or the pursuit of a regulated profession at the same conditions imposed to national citizens. The decree replaced the previous Italian rules concerning the recognition of professional qualifications, and the aim of the implementation is precisely to boost this recognition and the mobility of professionals within Europe1.

The Italian act regards the so-called regulated professions (professioni regolamentate), whose definition is included in Article 4.1 letter a). Accordingly, these professions are:

1. a professional activity or group of activities the pursuit of which is allowed only under registration to Professional Associations or Professional Registers held by public administrations or public bodies, if the registration is subject to the possession of professional qualifications or to the assessment of specific professional competences;

1 d.lgs. 27.1.1992, n. 115, d.lgs. 2.5.1994, n. 319 , d.lgs. 20.9.2002, n. 229 enforcing Dir. 89/48/CEE, Dir. 92/51/CEE and Dir. 99/42/CEE.
2. employed jobs, if the access to them is subject, by virtue of legislative or administrative provisions to the possession of professional qualifications;

3. an activity pursued on the basis of a professional title, whose use is granted only to the holders of a professional qualification;

4. activities in the healthcare sector in cases where the possession of a professional qualification is a decisive condition to determine wages or the access to reimbursement;

5. a profession practised by the members of an association or organisation listed in Annex I of the decree, and namely the list of professional associations or organisations fulfilling the conditions of Article 3(2) of the European Directive.

The decree applies therefore to EU citizens which aim to pursue a regulated profession in Italy, on either a self-employed or employed basis, including the so-called “free” professionals (liberi professionisti), using a qualification obtained in another Member State and that in their home State allows the holder of it to pursue the same profession there.

The said profession can be pursued either under the freedom of establishment or as a temporary provision of services.

In compliance with the Directive, the recognition of professional qualifications under the Italian decree allows the beneficiary to gain access in Italy to the same profession as that for which he/she is qualified, if the activities are comparable, in the home Member State and to pursue it Italy under the same conditions as Italian citizens.

Pursuant to the Directive the Member States shall designate a coordinator for the activities of the authorities and a contact point. Accordingly, Article 6 of Legislative decree no. 206/2007 confers to the Department for European politics of the Italian Government (Dipartimento per le politiche europee presso la Presidenza del Consiglio dei Ministri) the tasks of both the Coordinator and of the national contact point.

In particular, the Coordinator promotes the uniform application of the Italian decree by the national competent authorities (listed in Article 5 of the decree), as well as the circulation of the information relevant for its application, especially those regarding the conditions for access to regulated professions in the Member States.

The contact point\(^2\) provides the citizens and contact points of the other Member States with the necessary information related to the application of legislative decree no. 206/2007 and in particular those concerning the recognition of professional qualifications and on the Italian regulation governing the professions and the pursuit of those professions, including social legislation, and, where appropriate, the rules of ethics. The contact point provides also assistance in realising the rights conferred EU citizens by the

\(^2\) Punto di contatto italiano, Ufficio per la cittadinanza europea, il mercato interno e gli affari generali, Dipartimento Politiche Europee (centroassistenzaqualifiche@politicheeuropee.it).
Directive, in cooperation, where appropriate, with the other contact points and the competent authorities in the host Member State.

Specific issues regarding the recognition of professional qualifications arise with reference to the freedom of establishment. In this context, in compliance with EU law, the Italian decree provides for the regulation of three qualifications recognition regimes.

Some categories of profession, and namely doctors with basic training and specialised doctor, nurses responsible for general care, dental practitioners, specialised dental practitioner, veterinary surgeons, pharmacists and architects, can benefit from the previous harmonisation of minimum training conditions for their professions which have agreed by EU Member State, and therefore from automatic recognition of their qualifications in Italy, as throughout the EU. According to the recognition regime on the basis of coordination of minimum training conditions and principle of automatic recognition, the Italian decree does not impose compensation measures on EU citizens that are holders of the professional titles listed in Annex V of the Directive. Nonetheless, also in this case the Professional Associations are in charge of assessing the possession of the language knowledge necessary to the pursuit of the given professional activity in Italy.

Other activities in the craft, commerce and industrial sectors (such as for instance electricians, beauticians or hairdressers) can benefit from the recognition of professional experience, it means that their qualifications can be recognised automatically on the basis of previous work experience.

The remaining professions (or for those theoretically included in the principle of automatic recognition in cases where the migrant does not meet all the requirements for it) can benefit instead for the so-called General System (Sistema Generale in Italian) for the recognition of evidence of training.

This regime is based on mutual trust and qualifications are recognised not automatically but on a case by case basis through the comparison of the applicant’s training conditions and qualifications with those required in Italy. In compliance with the Directive, according to the Italian decree, in cases of substantial differences (“differenze sostanziali”) compensation measures can be imposed (which are covered by Article 22 of the Decree), and in particular an aptitude test or an adaptation period. The latter are generally regulated by Article 23 of the Italian Decree and are then defined by specific regulations concerning each profession.

From a general perspective, the Italian legislative decree provides for a so-called “conference of services” (conferenza di servizi), pursuant to law no. 241 of 7 August 1990 (the Italian law on administrative proceedings and access to administrative documents) upon consultation with the National University Counsel (Consiglio Universitario Nazionale), between the authorities in charge for the application of the decree (those listed in Article 5 of the same act), the already mentioned Dipartimento per le politiche europee and the Italian Ministry for Foreign Affairs.

A delegate of the concerned Professional Association or of the professional category is also consulted. Professional rules, disciplinary responsibility, rules of professional ethics and the role traditionally
acknowledged to Professional Associations in Italy perform indeed a specific role in the access and in the pursuit of a regulated profession by EU citizen in Italy. This is at the same time an important guarantee of professional competences justified on the basis of public interests, but also a possible further barrier that active EU citizens may face in their mobility, which must therefore also comply with the EU principles regulating the internal market as interpreted by the ECJ.

As to the aptitude test, following the “conferenza di servizi” the Italian competent authorities draw up a list of subjects which, on the basis of a comparison of the education and training required in Italy and that received by the applicant, are not covered by the diploma or other evidence of formal qualifications possessed by the applicant. The aptitude test is based on the subjects whose knowledge is an essential condition to the pursuit of the given professional activity and consists of a written of practical and oral or oral exam, and if not passed cannot be repeated within six months (Article 23.2).

In compliance with the aim of this questionnaire, we are not going into detail of the regulation of the free provision of services since “the implementation process of Directive 2006/123 has been closely monitored by the European Commission, and has led to numerous studies and analyses”.

As far as the access of professionals to the European internal market is concerned, it is nevertheless important to underline that for some professions the Italian law, similarly to other Member States, imposes to the EU citizens that pursue professional activities in Italy to forward a specific communication to the Professional Association of the Italian province in which they are going to provide the service. Moreover, EU professionals are subject to the disciplinary power exercised by the Italian Professional Association at the same conditions (and therefore also under the same code of professional ethics) provided for Italian citizens registered in the Professional Register. The Italian law no. 31 of 9 February 1982 concerning lawyers that transposed Directive 49/1977/EC is a case in point.

It is also worth mentioning that according to Directive 2005/36/EC, and in particularly under Article 5.3, a service provider shall be subject “to professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications, such as the definition of the profession, the use of titles and serious professional malpractice which is directly and specifically linked to consumer protection

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4 For a general analysis of this profession see, for instance, R. Danovi, Corso di ordinamento forense e deontologia, Milano, 2008.
and safety, as well as disciplinary provisions which are applicable in the host Member State to professionals who pursue the same profession in that Member State”. These rules are generally linked to the protection and safety of people subject to the regulated professional activities, including for instance patients in the healthcare contest.

It must be anyway pointed out that, as specified by the ECJ, these are disciplinary provisions imposing penalties for failure to comply with the professional rules, as referred to in Recital 8 in the preamble to the Directive (which also mentions rules relating to the scope of activities covered by a profession or reserved to it.), but the content of these rules must be directly linked to professional qualifications, and from the object and purpose and the general scheme of Directive 2005/36 professional rules are covered by the mentioned Article 5.3 only if they are directly linked to the actual practice of medicine and failure to observe them harms the protection of patients.

When these conditions are met and the protection and safety of consumers (or users) is at stake, the role of Professional Associations along with other competent public authorities in enacting these rules proves therefore to be crucial also in these matters and needs to be properly considered in the evaluation of the concrete framework for the access of economic actors in the internal market.

From a more general perspective (which goes beyond the mentioned directive), it is indeed interesting to mention the opinion of advocate general Cruz Villalón delivered on 31 January 2013 in the mentioned ECJ case, which, after having underlined the ECJ case law regarding rules of professional conduct states (point 61): “although a measure laying down standards of professional conduct does not of itself restrict the freedom to provide services, that conclusion changes radically if those standards are formulated in ambiguous and equivocal terms and are accompanied by strict disciplinary rules. The sum of those two features – ambiguity and penalties – is an outcome which clearly discourages medical professionals from other Member States from advertising, an activity which may be decisive for the purposes of securing their entry into the professional market in another State”.

As far as the Italian professional regulations are concerned, although on the one hand, the procedures for EU professionals (for both the freedoms of establishment and the free provision of services) are well explained and rather easily available on institutional websites, the role and the nature of code of conduct are still controversial and also the framework for the disciplinary responsibility and its implementation may

\[5\] In this perspective it is interesting to mention the Konstantinides case (C-475/11) on Freedom to provide medical services, and in particular on the applicability of the rules of professional conduct of the host Member State, in particular those relating to fees and advertising. This request for a preliminary ruling concerned precisely the interpretation of Articles 5.3 and 6(a) of Directive 2005/36/EC and was made in judicial proceedings for professional misconduct brought against a physician (Dr Konstantinides) on application by Association of Doctors of a German Land (Hesse).
sometimes turn out to be ambiguous, especially in comparison to other Member States, and therefore to discourage EU professionals⁶.

Moreover, as to the General System for recognition, it must also be underlined that the number of regulated professions may differ between EU Member States since the directive does not impose a specific duty. From this viewpoint, the Italian transposition decree does not introduce amendment to the Italian regulation for the access to professions⁷.

Each profession has a specific regulation and peculiarities also with reference to issues concerning the recognition of EU qualification.

In Italy, for instance, issues arose as to the possibility of refusing registration in the Bar Council register to nationals of a Member State who have obtained their professional legal qualification in another Member State, namely in Spain. Before focusing on the case law some preliminary remarks should be made on the profession of lawyer in Italy. The recognition of the concerning qualification may follow two procedures:

- the already mentioned Directive 2005/36/EC and, therefore, the rules provided by the Italian legislative decree no. 206/2007;
- Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, concerning the freedom of establishment and transposed in Italy by means of Legislative Decree no. 96 of 2 February 2001.

As to the first procedure, it must be also underlined that according to Article 49.2 of Legislative Decree no. 59 of 26 March 2010 implementing the so-called Services Directive (Directive 2006/123/EC), the qualification recognition gives right to the registration to the Professional Register (Bar). It therefore grants the possibility not only to have access to the profession and to pursue it at the same conditions provided for Italian citizens, but also to properly use the corresponding title (title of “avvocato”). The recognition is subject to an aptitude test and namely to a written and to an oral exam on some specific matters.

As to the second procedure, the lawyer with a qualification obtained in another EU Member State may ask to be register in a special Italian register held at the Tribunal of the district where he/she is domiciled or has the residence, thus becoming an “avvocato stabilito” (literally “established lawyer”). After having pursued the profession for three years under given specific conditions in Italy, he/she can ask to be exempted from the...

aptitude test and to become an “avvocato integrato” (literally “integrated lawyers”), which is equalised to the Italian lawyer (avvocato) with reference to both the registration and the use of the title.\(^8\)

In this perspective, issues arose with reference to the qualifications obtained in EU Member States, such as Spain, where the master degree has been for a long time (at least until 2011) sufficient to register to the Bar Association without exams.

Some Italian Bar Associations (ordini professionali) have refused to recognise the qualification of Italian citizens which went to Spain to obtain the title of “abogado”, and which then tried to obtain the Italian title of “avvocato” after three years pursuant to the mentioned Directive.

The Italian Supreme Court (Corte di Cassazione) recently stated that Professional Associations are not allowed to refuse to Italian lawyers which went to Spain to graduate and then came back to Italy to pursue the profession the registration granted to EU lawyers established in Italy.\(^9\) According to the Court neither the Bar Councils nor the Consiglio Nazionale Forense can disregard the mentioned European directives.

Moreover also the Italian Competition Authority (AGCM, see below) stated in 2013 that some Bar councils infringed Article 101 TFEU restricting competition by hindering the access to the Italian market to services of legal counselling by EU lawyers which wanted to use the procedure of establishment and integration granted by Directive 98/5/EC.\(^10\)

In 2013 the Italian Consiglio Nazionale Forense referred to the ECJ a requests for a preliminary ruling concern the interpretation and validity of that Directive with reference to two actions brought respectively by two Italian citizens (Mr Angelo Alberto Torresi and Mr Pierfrancesco Torresi) against the Consiglio dell’Ordine degli Avvocati di Macerata concerning the latter’s refusal to grant their applications for registration in the special section of the lawyers’ register. In particular, the applicants obtained a university law degree in Spain and were registered in 2011 as lawyers in the register of the Ilustre Colegio de Abogados de Santa Cruz de Tenerife (Bar of Santa Cruz de Tenerife, Spain). In 2012 they lodged with the Italian Bar Council applications for registration in the special section of the register concerning lawyers holding a professional title issued in another Member State established in Italy, pursuant to Article 6 of Legislative Decree No 96/2001 on registration.

The referring court (Consiglio Nazionale Forense) referred to the ECJ a question concerning the interpretation of Article 3 of Directive 98/5, namely whether it must be interpreted “as precluding the competent authorities of a Member State from refusing, on the ground of a claimed abuse of rights, registration in the register of lawyers qualified abroad to nationals of that Member State who, after obtaining a

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\(^8\) See for instance the website of the Italian National Bar Association (Consiglio Nazionale Forense): http://www.consiglionazionaleforense.it/site/home/area-avvocati/riconoscimento-titoli-stranieri/avvocato-nella-comunita-europea/lavvocato-stabilito-integrato.html


\(^10\) AGCM, decision no. 24327 of 23 April 2013. See also R. Danovi, Ordinamento forense e deontologia, Milano, 2015, at 186.
university degree in that Member State, have travelled to another Member State in order to acquire there the professional qualification of lawyer and have subsequently returned to the former Member State with a view to practising there the profession of lawyer under the professional title obtained in the Member State where the professional qualification was obtained”. In 2014 (17 July) the Grand Chamber held that the no abuse could be identified in that fact.

Another profession that raised specific issues in Italy is that of tourist guides, which is also covered by Directive 2005/36/EC. The problem was actually liked to the Services Directive. The Commission has indeed initiated a pre-infringement procedure against Italy (EU PILOT No 4277/12/MARK), on the basis of a breach of Directive 2006/123/EC. The rules at stake was the stipulation under Italian law that accreditation to exercise the profession of tourist guide is valid only in the region of issue.

As a consequence, aiming at addressing the points raised by the Commission in this pre-infringement procedure, the Italian Parliament passed European Law no 97 of 6 August 2013. Pursuant to its Article 3 the validity of the accreditation to exercise the profession of tourist guide is extended to cover the whole national territory. Professional qualifications obtained by EU citizens in another EU Member State can therefore be recognised throughout the national territory. The new Italian regulation allow tourist guides accredited in another EU Member State to exercise the profession in Italy without being required to obtain any additional authorisation or accreditation from the Italian authorities.

This law has raised a debate in Italy on the basis of the particularly rich cultural Italian heritage, which includes almost 200 000 listed properties from different historical and artistic periods, and which therefore imposes to tourist guides a deep knowledge in a limited geographical area (provincial or regional) in order to properly pursue their profession.

In this context, the parliamentary question (Question for written answer to the Commission) of 9 January 2014 is also to be mentioned. Nonetheless, according to the European Commission: “it would not appear [...] that promotion and conservation of national heritage can as such be considered an overriding reason, justifying a restriction to the exercise of certain activities. It would appear that the promotion of national heritage can be ensured independently from the question of where the provider of the service comes

11 ECJ, Judgement of 17 July 2014 (Joined Cases C-58/13 and C-59/13): “Article 3 of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained must be interpreted as meaning that no abuse can be identified in the fact that a national of a Member State who after successfully obtaining a university degree travels to another Member State in order to acquire there the professional qualification of lawyer and returns to the Member State of which he is a national in order to practise there the profession of lawyer under the professional title obtained in the Member State where that professional qualification was acquired”.

from, the important issue being the knowledge that the provider of the service has of a certain territory and its culture\textsuperscript{13}.

1.2. **Recognition of non-EU qualification**


However, Presidential Decree (*Decreto del Presidente della Repubblica*, hereinafter DPR) 394/99 on immigration (in particular Articles 39, 49, and, as regards healthcare professionals, Article 50), as modified by the following DPR no. 334/04, extends to non-EU titles the possibility to obtain the recognition of a given professional qualification. Accordingly, foreign citizens wanting to be registered in Italian professional associations or in the special lists held by the competent administrative authorities and which are holders of professional qualifications obtained in a non-EU State may ask for their recognition to gain access or to pursue the concerned profession in Italy.

Nonetheless, compared to the framework for EU qualifications, in this case citizens need to fulfill more formalities, especially with reference to the documents they need to display.

Besides the resident permit, if needed, citizens asking for the recognition of a non-EU qualification must display also a statements of value, the so-called "*dichiarazione di valore in loco*". This statement is an official document written in Italian and issued by the Italian authority of the country where the citizen obtained the qualification, which is required to verify the authenticity, the validity, the value and the correspondence into the Italian system of qualifications issued by recognised educational institutions (schools, colleges, universities) and professional bodies. It also gives information on the authenticity of the institution issuing the title and on the value of it in the Country where it has been obtained (such as: official character of the institution, access requirements, duration of education and training conditions, validity of the title to exercise a given profession in the Country issuing it, the activities whose exercise is allowed under that title, etc.).

After the display of all the necessary documents and the statement issued by the Italian consular authorities abroad, the citizen can ask for the recognition of his/her qualification to the Italian authority competent for the given profession in Italy.

Also in this case compensation measures may be needed, but differently from the possibility granted to citizens in cases of EU-qualifications, as far as non-EU titles are concerned the citizen cannot choose the

compensation measure, i.e. an aptitude test or an adaptation period, because the decision is due to the competent administrative authority.

EU citizens with a non-EU title must apply for its recognition in Italy even if the same title is already recognised in another EU Member State, in order to pursue the professional activity in a stable and continuous way.\(^{14}\)

It is worth to provide for some final considerations with reference to the possibility that the professional qualification is acquired before the date of accession of country to the EU (“pre-access qualifications”). We answer this question by taking into consideration two specific application scenario: health professions and architects. In the case of health professions (doctor, nurse, dentist, veterinary surgeon, midwife and pharmacist), if the qualification awarded a training period undertaken before the reference date specified in Annex V of the Directive for the qualification and the Member State in question and this training does not meet the minimum training requirements, you nevertheless benefit from automatic recognition if you can show, via an attestation of the Member State of origin, which the profession has been effectively and lawfully practiced for at least three consecutive years during the five years preceding the issue of the certificate. Similarly, in the event that the qualification comes under one of the provisions concerning the acquired rights specific to the professions concerned the Directive (for example, qualifications obtained in the former Yugoslavia, in the former German Democratic Republic, etc.), you must meet the requirements in regarding professional experience, proven by certificates, to take advantage of the automatic recognition. Instead, in the case of architects, if the qualification awarded a training period undertaken before the academic year of reference specified in Annex V of the Directive for the qualification and the Member State in question, even if that training does not meet the minimum requirements established by Directive 2005/36/EC, it is nevertheless possible to take advantage of automatic recognition on the basis of acquired rights, as long as you hold the status specified for the Member State in question in the Annex VI to Directive 2005/36/EC (i.e. the formal qualification and any certificate accompanying it). The requirement is generally satisfied when the training was undertaken at most in the academic year of reference specified in Annex V of the Directive. Moreover, if the qualification is related to a training unspecified neither in Annex V nor Annex VI to the Directive, you may nevertheless enjoy automatic recognition if you can show, via an attestation of the Member State of origin, which you has been authorized to take the professional title in that State prior to the date specified in the Directive and that the profession has been effectively and lawfully practiced for at least three consecutive years during the five years preceding the issue of the certificate.

Finally, the recognition of professional qualifications between Switzerland and the EU member states is based on an agreement of 21 June 1999 (supplemented by additional protocols to extend it to new Member States). This Agreement governs the free movement of people between the EU and the Swiss Confederation, and establishes the applicability of the EU directives on recognition of professional qualifications also to Swiss

\(^{14}\) For a more detailed analysis of the European and Italian regulation of qualification recognition, also with reference to the amendment introduced by Directive 2013/55/EU, see the website of the Dipartimento per le politiche europee available at http://www.politicheeuropee.it/attivita/19160/guida-utente
citizens. The Agreement includes provisions on the recognition of professional qualifications and an Annex III that contains the reference to the Directives on recognition of professional qualifications and the list of regulated professions. The Agreement, which has expired on 31 May 2009, has been renovated to adapt it to the entry into force of the new Directive 2000/36/EC. On 18 June 2008, in fact, the Federal Council of Switzerland took the decision to adopt the Directive 2005/36/EC, already in force for the EU/EEA, and proceeded to transpose Directive 2005/36/EC through an adjustment of its domestic legislation. Since September 1, 2013 came into force both the federal law of 14 December 2012 and the Order of 26 June 2013 on the obligation of prior declaration and verification of professional qualifications of the service providers of regulated professions. The entry into force of this new legislation represents the final step towards the adoption of the European Directive 2005/36/EC on the recognition of professional qualifications. Therefore, by virtue of that agreement, Switzerland will apply to EU citizens the same EU rules on the recognition of professional qualifications.

The State Secretariat for training, research and innovation (SEFRI) is the coordinating center (national contact point for the directive) to interview for general questions about the recognition of professional qualifications in Switzerland.
2. THE PROTECTION OF ECONOMIC RIGHTS OF CONSUMERS

To enhance both feasibility and comparability, D5.2 reporters are invited to concentrate on the national (implementation) rules and (enforcement) difficulties surrounding the application and enforcement of:

- the Unfair commercial practices directive 2005/29/EC
- the Consumer rights directive 2011/83/EU
and on the issue of solving consumer disputes via injunctions and/or (collective) judicial redress (such as class actions-initiatives), since the Directives mentioned above and the 2013-recommendation on collective redress
  http://ec.europa.eu/consumers/enforcement/injunctions/index_en.htm


In dealing with Italian rules implementing both Directive 2005/29/EC and Directive 2011/83/EU, it must be first of all, and from a comparative perspective, mentioned the main implementation approach chosen by Italy, i.e. the incorporation of most European provisions into an existing source of law, and namely into a consumer code.

The main Italian source concerning the protection of consumers’ and users’ rights is indeed the so called “Codice del consumo” (Consumer Code: Legislative Decree no. 206 of 6 September 2005, adopted under Article 7 of law no. 229/2003), which brings together, coordinates, and simplifies into a Consolidated Act the current enacted law regarding consumers and users.

The Code consists of 146 Articles covering a variety of aspects, and is particularly meant to foster consumers’ information, and to guarantee fairness in commercial practices and contractual terms. It starts by laying down the consumers’ fundamental rights, which shall be recognised, guaranteed and promoted at both the national and local level, individually as well as collectively and in form of associations:

a) health protection;
b) the safety and quality of products and services;
c) adequate information and correct advertising;
d) consumer education;

e) fairness, transparency and equity in contractual relations;

f) the promotion and development of free, voluntary and democratic associations between consumers and users;

g) the supply of public services according to standards of quality and efficiency.

Legislative decree (Decreto legislativo, hereinafter also D.lgs.) no. 221 of 23 October 2007 added subsection c-bis, i.e. the right to fair commercial practices in compliance with the principles of good faith, fairness and honesty.

As far as Directive 2005/29/EC (“Unfair Commercial Practices Directive”, hereinafter also “the UCPD”) is concerned, two implementation rules shall be considered:

- Legislative Decree no. 146 of 2 August 2007, “Implementing directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market”;


In particular, these two legislative decrees replaced and completed the previous regulation concerning misleading advertising.\(^{15}\)

Since tools and techniques that businesses may use to persuade the consumer are increasingly complex and sophisticated, the protection of consumers’ rights has been extended beyond the mere advertising message, and namely to “any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers”, as stressed by the definition of “business-to-consumer commercial practices” included in Article 18 letter d) of the Italian Consumer Code, faithfully transposing Article 2 letter d) of the European directive.\(^{16}\)

Misleading advertising is therefore included in the general notion of “commercial practices”, which proves to have a very wide scope of application.

The main goal of this regulation is the protection of the consumer and actually rules covering the competition warranty are limited to the amendment (Article 14) of Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, whose purpose is, at present, to “protect traders” against misleading advertising and its unfair consequences thereof, as well as “to lay down the conditions under which comparative advertising is permitted” (Article 1).


\(^{16}\) See, for instance, A. Fachechi, La pubblicità, le pratiche commerciali e le altre comunicazioni, op. cit., at 50.
The protection of consumers and the regulation of business activities are therefore separated.

Accordingly, Italy implemented Directive 2005/29/EC by means of the two different legislative decrees mentioned above. The first one, D.lgs. no. 145/2007, transposes Article 14 of the directive and its changes in the field of misleading advertising that limit the scope of the regulation to traders. As a consequence this regulation has been set outside the Italian Consumer Code and covered by the mentioned legislative decree.

The second one, D.lgs. no. 146/2007, replaced instead Articles from 18 to 27quater of the Italian Consumer Code transposing Articles from 1 to 13 and Articles 17 of the UCPD.

From a general perspective, the implementation of the UCPD has boosted market regulation as regards both the relationships between traders and consumers and the relationships among traders.

Since Article 4 of the UCPD (the so called “Internal Market clause”) embodies the full harmonisation effect of the directive preventing Member States from deviating from its rules, the latter have been transposed without any substantial amendment by the Italian legislator, especially as to the first ten Articles of the UCPD corresponding to Articles from 18 to 26 of the Italian Consumer Code. Changes are indeed mainly linked to terminology issues, due to the necessity of better complying with the Italian legal framework. Just to give an example the word used to translate “unfair” is not “sleale” used also in the Italian version of the UCPD, but “scorrette”, in order not to confuse the regulation of unfair business-to-consumer commercial practices with the Italian concept of “sleale” (unfair) used with reference to unfair competition (concorrenza sleale).

The framework for unfair commercial practices consists of a general clause (Article 20 of the Italian Consumer Code) and two main subchapters concerning, on the one hand, misleading commercial practices (Article 21 ff) and, on the other hand, aggressive commercial practices (Articles 24 ff).

Moreover, in accordance with the UCPD, the Italian code contains two lists of commercial practices that are to be considered misleading (Article 23) or aggressive (Article 26) in all circumstances. These lists are completely identical to Annex I of the European directive.

According to the general clause embedded in Article 20 a commercial practice shall be unfair:

- if it is contrary to the requirements of professional diligence, and
- if it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed.

With reference to this rule (faithfully transposing Article 5.2 of the UCPD), some national authorities raised the issue as whether in order to condemn a trader for a breach of the articles concerning misleading and aggressive practices, it had also to be demonstrated a behaviour in breach of “professional diligence”. According to the Commission there is no such need because professional diligence must be considered as

automatically violated in cases of misleading or aggressive actions. On the contrary the rule on diligence can be applied as an independent provisions, to ensure that any unfair practice can be penalised.\(^{18}\)

Accordingly, in a case dealing with water supply the Italian Competition Authority (AGCM, see below) considered its interruption without any prior communication as a breach of professional diligence. In particular, considering the relevance of water, the AGCM held that the trader was expected to guarantee a higher level of professional diligence by adopting specific measures before interrupting the water supply (AGCM, decision of 12 March 2009 PS 166 – Acea Distacco fornitura d’acqua).\(^{19}\)

Through the implementation of the UCPD the Italian legislator also acknowledged a new role to code of conducts and to codes of professional ethics, i.e. to regulations enacted by professionals, business associations and organisations. These codes shall be drawn up in the Italian and English languages and made accessible also via the Internet, in order to guarantee a high level of knowledge (Article 27bis of the Italian Consumer Code) and the breach of their rules is considered an unfair practice (Article 21.2 of the Italian Consumer Code). In compliance with the UCPD, the Italian Law also introduced the notion of “code owner” ("responsabile del codice"), i.e. “any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it”\(^{20}\).

As to the concrete role of these codes, the AGCM has considered the violation of them to ascertain the existence of a breach of professional diligence; whereas the respect of these codes is not considered as sufficient to exclude the breach of professional diligence. This principle has been confirmed also by the “Tribunale Amministrativo Regionale (T.A.R.)” (regional administrative court) of Lazio in decision no. 10185 of 24 December 2011.

In the perspective of code of self-regulation, an interlocutor of the AGCM should also be mentioned: the Institute for Advertising Self-Regulation (IAP – Istituto dell’Autodisciplina Pubblicitaria), whose aim is to ensure that commercial communications are honest, true and correct. The Self-Regulatory Code is “binding for (those advertiser that invest in communications) agencies, consultants, media, sales houses and all of those that accept this Code by entering into an agreement or by signing a contract for advertising.”\(^{21}\)

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\(^{19}\) Ibid.

Misleading commercial practices

Commercial practices are considered to be misleading if they contain false information and are therefore untruthful, or if they deceive or are likely to deceive the average consumer (even if the information is factually correct) and in either case cause or are likely to cause him/her to take a transactional decision that he/she would not have taken otherwise.

Besides misleading commercial practices, also omissions concerning specific information are considered “misleading” when causing the average consumer to take a transactional decision that he/she would not have taken otherwise. This is the case, for instance, of a commercial practice by which the trader “omits material information that the average consumer needs, according to the context, to take an informed transactional decision” (Article 22.1). Likewise as to the cases in which a trader “hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information […] or fails to identify the commercial intent of the commercial practice if not already apparent from the context” (Article 22.4). Paragraph 4 specifically lists the information whose omission is considered a misleading practice in the case of an invitation to purchase.

The aim of the mentioned rules is to foster transparency in negotiations in order to ensure really conscious decisions. In this perspective, since the power imbalance between professionals and consumers is mainly due to the use of communication tools, the guarantee of the conformity of the advertising message to the features of products or services gains specific importance and is expressly considered by the case-law.

Just to give a few examples, risks for consumers are more likely to arise in cases where the advertisement proposes the easy achievement of solutions in sensitive fields, such as the efficacy of beauty and slimming treatments.

See, for instance, the cases dealing with slimming treatments, where the Authority considered some advertisements as misleading on the basis of the lack of scientific evidence of the effects and of the absence of contraindications as boasted instead by the advertising message (among the most recent cases of the Italian Competition Authority: AGCM, 14 December 2011, no. 23105 – PS 6555 (“3 giorni dimagrante”; see also AGCM, 17 January 2002, no. 10344 – PI 25551B (KaloCell Line) available at: www.agcm.it).

Issues connected to misleading advertising arose also with reference to cigarettes, and namely to the notice “light” on some packages. See for instance the decisions by the Italian Supreme Court (Corte di Cassazione) no. 15131 of 4 July 2007 and no. 794 of 15 January 2009.

Misleading practices may also stem from redundant and excessive, although correct, information, which lead to a lack of clarification. Nonetheless according to the focus on the conditioning on the consumer’s economic choice and behaviour, really exaggerated advertising messages containing excessive boasting are not

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22 A. Fachechi, La pubblicità, le pratiche commerciali e le altre comunicazioni, op. cit, at 59.
considered as misleading practices by the Italian Competitive Authority since they cannot be literally understood by the consumer (AGCM, 28 April 2011, no. 22346 – SNAI – Pubblicità gioco d’azzardo).

In many cases the Italian Competition Authority censured as unfair some traders’ practices aimed at taking advantages from the incompetence or from the mistake of the consumer, although not directly caused by the trader itself. Among the most recent cases considering the omission of relevant information, see for instance: AGCM, 21 December 2011, no. 23155 – PS7256 (Comet-Aplice – Prodotti di Garanzia); 6 October, no. 21656 – PS1097 (Errebi Auto – Estensione Garanzia Peugeot); 22 December 2009, no. 20628 (Passante di Mestre); 26 May 2010, no. 21186 – PS5129 (Trenitalia – Modifica biglietto elezioni)\(^{23}\).

**Reference for a preliminary ruling to the ECJ**

Italy made a reference for a preliminary ruling concerning the interpretation of Article 6.1 of the UCPD in a proceedings between on the one hand, Trento Sviluppo srl (‘Trento Sviluppo’) and Centrale Adriatica Soc. coop. arl (‘Centrale Adriatica’) and, on the other, the Italian Competition Authority, regarding a commercial practice adopted by Trento Sviluppo and Centrale Adriatica which the AGCM classified as misleading (Case C-281/12). In particular, the doubt of the Italian referring judge (the Council of State, Consiglio di Stato) dealt with the scope of the concept of “misleading commercial practice”. The question arose from the differences between the language versions of Article 6, namely the contrast between the English and French versions of the expression “and in either case” (”et dans un cas comme dans l’autre” in French), on the one hand, and the Italian and German versions on the other (”e in ogni caso”; “und ... in jedem Fall”).

More specifically, the Italian Council of State refers the following question to the ECJ: “Is Article 6(1) of Directive 2005/29/EC, as regards the part in which the Italian-language version uses the words “e in ogni caso”, to be understood as meaning that, in order for the existence of a misleading commercial practice to be established, it is sufficient if even only one of the elements referred to in the first part of that paragraph is present, or that, in order for the existence of such a commercial practice to be established, it is also necessary for the additional element to be present, that is to say, the commercial practice must be likely to interfere with a transactional decision adopted by a consumer?”.

In other words the Italian judge asked whether a commercial practice must be classified as misleading “on the sole ground that practice contains false information or that it is likely to deceive the average consumer, or whether it is also necessary that that practice be likely to cause the consumer to take a transactional decision that he would not have taken otherwise”.

The ECJ (Sixth Chamber) in the judgement of 19 December 2013 held the cumulative nature of the conditions.

\(^{23}\) A. Fachechi, op. cit., at 61 and 62.
Aggressive commercial practices

The aggressive nature of a commercial practice is instead defined on the basis of its nature, its timing, its forms and the possible use of harassment, coercion, including the use of physical force, or undue influence. In particular, a commercial practise shall be regarded as aggressive if by using these kinds of behaviours the trader “significantly impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct” as to the product, thereby causing him/her or being likely to cause him/her to take a transactional decision that he/she would not have taken otherwise.

According to the Italian Competition Authority coercion also includes threats of legal actions. For instance, in 2012 the AGCM classified as aggressive the behaviour of some businesses which sent summons (atti di citazione) to consumers before an incompetent judge, only aiming at frightening them 24.

Misleading advertising

As to misleading advertising (at present relating to traders), Directive 84/459/EEC was transposed, with reference to consumers as well as to traders and generally to the public, by Legislative Decree no. 74/1992, then amended in 2000 (D.lgs. no. 67/2000) implementing Directive no. 97/55/CE and by Law no. 49/2005. With the enactment of the Consumer Code these rules have been included in its articles (from 18 to 27). As already mentioned, since the regulation on misleading and comparative advertising (as amended by the UCPD) concerns at present only traders, these Articles of the Italian Consumer Code have been repealed and replaced by D.lgs no 145/2007 (transposing the UCPD). The decree therefore mainly reproduces the previous legal framework, except for the scope of application. Moreover the power concerning administrative and judicial protection is conferred to the Italian Competition Authority, which, similarly to what is provided for misleading commercial practices, may act also on its own authority (Article 8).

The Italian regulation also contains further provisions specifically addressing the advertising of products that are dangerous to health and safety (Article 6), and the advertising involving children and adolescents (Article 7). The latter is meant to prohibit advertisements exploiting the natural credulity or lack of experience of children and adolescents, as well advertisements that, by using them, exploit the natural sentiments of adults towards children.

Accordingly, the Italian Competition Authority (see below) held commercial practices “that lead the consumer to neglect ordinary rules of caution and watchfulness related to the usage of products that could be dangerous for his health and safety or practices that could, even indirectly, threaten the safety of children and teenagers” 25 to be also illegal.

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25 www.agcm.it
As to the legal definition of advertising, it has a very broad conception including all forms of promotional communication, irrespective of the means or methods of their distribution. The Italian Legislative Decree defines indeed advertising as “the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations” (Article 2). Non-commercial advertising (i.e. messages not addressing economic activities, such as for instance social or political propaganda) is excluded. Nonetheless the notion of advertising includes forms of communication promoting business images as perceived by consumers, although not immediately involving forms of sales push.

The full harmonisation character of the UCPD is limited by Article 3.9 with reference to financial services and immovable property. Accordingly, in these fields, by reason of their complexity and inherent serious risks, minimum harmonisation applies and Member States may impose more restrictive or prescriptive requirements, including positive obligations on traders, thus going beyond the Directive.

Nevertheless the Italian rules implementing Articles 1 to 13 of the UCPD do not include special requirements applying only to commercial practices in the field of financial services and immovable property. Therefore, the derogations provided by Article 3.9 of the European directive have not been specifically used by the Italian implementation decree.26

There are however other sources of law regulating unfair commercial practices in these fields, already before the UCPD transposition.

For instance, as to financial services, the following acts are to be mentioned:

- Legislative Decree no. 385/1993 (TUB) for banking products, which regards transparency, information to consumer and firms behaviour;
- Legislative Decree no. 58/1998 (TUF) for financial instruments and investment services and activities, which includes rules on transparency, on information to be provided to consumers, and on investment firms’ behaviour;
- Private Insurance Code, namely Legislative decree no. 209/2005 regulating insurance services;
- Article 36bis of Law no. 214 of 22 December 2011.

Other legal provisions prove to perform an important function, and namely regulations enacted by IVASS (Istituto per la Vigilanza sulle Assicurazioni: Institution for the supervision of insurance), regulations by CONSOB (Commissione Nazionale per le Società e la Borsa), a public authority responsible for regulating the Italian financial markets, and regulations by the Bank of Italy.

As far as immovable property is concerned, Legislative Decree No. 122 of 20 June 2005 should be mentioned, which addresses the protection of the purchaser.

2.2. The implementation of Directive 2011/83/EU

Directive 2011/83/EU has been recently transposed by Legislative Decree no. 21 of 2014, which entered into force in June 2014 and is applicable to contracts concluded after the 14th of June 2014. Instead, rules on the competence of the Italian Competition Authority entered into force already on the 26th of March 2014.

The Authority has indeed in this field the same powers acknowledged with reference to unfair commercial practices (see below).

The implementation decree introduced a variety of provisions and its scope of application concerns business-to-consumer contracts, and in particular distance and off-premises contracts on the one hand, and contracts other than distance and off-premises contracts, on the other hand. The transposition of the directive led to the replacement of rules included in Chapter I (Dei diritti dei consumatori nei contratti, namely: consumers’ rights in contracts) of Title III of the third Part of the Italian Consumer Code (Articles from 45 to 67) and introduced both substantial and procedural changes. The latter concerns the power of the AGCM and will be further analysed below. As to the substantial changes, the most relevant provisions deal with the reinforcement of withdrawal and information rights of the consumer.

As to contracts other than distance and off-premises contracts the new regulation provides for new and specific information duties in the pre-contractual phase, stressing the need for clear and understandable information. This is actually the most significant change introduced for the protection of consumers in this field. Before the enactment of D.lgs no 21/2014 these information requirements were indeed limited only to specific type of contracts on the bases of their object (such as, for instance, package travel and timeshare) or negotiation techniques.

As to distance and off-premises contracts the new regulation introduced provisions concerning pre-contractual information (written, clear and understandable) and formal requirement27.

Just to give a few example, in contracts concluded by Internet the button or a link with a similar function shall be labelled in an easily legible manner only with the words “order with obligation to pay” (“ordine con l’obbligo di pagare”) or a corresponding formulation, which unambiguously indicates that the order entails an obligation to pay, otherwise the consumer shall not be bound by the contract (Article 51.2 of the Italian Consumer Code). In contracts concluded by telephone, the trader has to confirm that the consumer is bound only once he has signed the offer or has sent his/her written consent. These confirmations may be

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27 For a more detailed analysis on the information duties in the field of E-commerce, and with specific reference also to Directive 2011/83/EU see, for instance, G. Dore, I doveri di informazione nella rete degli scambi commerciali telematici, in Giurisprudenza di Merito, XLV – Decembre 2013, no. 12, 2569 – 2583.
done also on a durable medium, provided that the consumer gives his/her expressed consent (Article 51.6 of
the Italian Consumer Code).

Finally significant rules have been introduced with reference to withdrawal rights, extending, for
instance, the withdrawal period (14 days instead of 10 as previously fixed), introducing new information duties
on terms and procedures necessary to exercise the right to withdrawal and facilitating its exercise (Articles
from 52 to 57 of the Italian Consumer Code).

Further rights concerns the prohibition of additional fees in relation to specific means of payment, and
the delay of delivery and the passing of risk in case of late delivery.

2.3. Enforcement mechanisms

In Italy the enforcement system is based on a double-track model, confirmed also by the recent
regulation implementing the European directive on consumers’ rights: public and private enforcement, such as,
for instance, restrictive actions by consumers associations under articles 139 and 140 of the Italian Consumer
Code; class actions according to Article 140 bis of the same code)28.

The administrative enforcement is conferred to an Independent Authority, namely to the General
Division for user’s and consumer’s rights of the Italian Competition Authority (Autorità Garante della
Concorrenza e del Mercato, hereinafter AGCM). This Division is separate from the General Division for
Competition, which is in charge for the enforcement of antitrust laws.

Nevertheless it is worth stressing that in Italy the two competences (consumers’ rights and
competition) are gathered in a single Authority, and therefore that the protection of consumers becomes
integrated with the aim of the Authority itself, i.e. with the protection of free competition and market29. The
link between these two aspects is underlined also by the Communication from the European Commission on “A
European Consumer Agenda - Boosting confidence and growth”, 22 May 2012: “well designed and
implemented consumer policies with a European dimension can enable consumers to make informed choices
that reward competition, and support the goal of sustainable and resource-efficient growth, whilst taking
account of the needs of all consumers”.

The ACGM was established by law no. 287/1990 as an independent body: its decisions are based on
the competition law without interference by the Italian Government30.

The ACGM is in charge of the protection of consumers from misleading advertising and comparative
advertising which may bring discredit on competitors’ products or cause confusion. It also enforces rules

28 See for instance the website of the AGCM: http://www.agcm.it/trasp-statistiche/doc_download/4175-
tutelamercatiregolamentaticonsommerrights.html
29 M. Cerioni, Diritti dei consumatori e degli utenti, op. cit., at 297.
30 For more information see the general website of the AGCM available at http://www.agcm.it/index.htm.
against unfair commercial practices among undertakings. At the same time, the Authority monitors competitions, punishing anticompetitive agreements among undertaking, abuses of dominant position and concentration. The AGCM may also send official opinions to State and Local Authorities in cases where legislative and administrative measures proposed are likely to hinder competition. Another task concerns the enforcement of rules against conflicts of interest for government officials.

In particular according to the Consumer Code (Articles from 18 to and Article 37 bis) and to the mentioned Legislative Decree no. 145/2007, the AGCM is empowered to protect:

a) consumers from unfair commercial practices used by traders (as provided for by Directive 29/2005/CE);

b) micro-enterprises from unfair commercial practices used by traders;

c) traders in the case of misleading and illegal comparative business-to-business advertising by competitors;

d) consumers against unfair contract terms.

According to Article 66 of the Consumer Code, as amended in 2014, the Authority is competent also in matters covered by the implementation of Directive 2011/83/UE.

Thanks to recent reforms the AGCM has rather wide investigation powers: accessing relevant documents, requesting documents or information from any party (private or public) and imposing penalties in the case of refusal, inspections (also using the office of the Italian “Guardia di Finanza”), and ordering expert testimony.

The Authority can start investigation on its own authority or on request. From a general perspective, administrative complaints may be filed by any individual or legal entity, and no specific procedural requirements apply (consumers can either call a special Call Centre, created by AGCM to receive oral complaints, or send a written complaint).

There is an obligation to investigate but the AGCM can overturn a request if there are no grounds for proceeding. However, in this case, the Case Handler has the duty to inform the complainant, which can appeal the decision issued by the Authority before the Administrative Court (see for instance Article 27 of the Consumer Code).

Administrative sanctions for the infringement of the mentioned regulations are injunctions and fines, whose amount may be between 5,000 and 500,000 Euro. In specific cases the minimum fine is higher, such as for instance when the commercial practice concerns hazardous products that are likely to threaten the safety
of children. Other administrative fines may be imposed by the Authority if the traders fail to comply with the issued injunctions. A trader may also be ordered by the AGCM to suspend trading for a given period of time in cases of repeated non-compliance.

As to the civil enforcement through court action, jurisdiction is conferred to ordinary courts. Since the decree implementing EU law does not provide for special procedures applicable to these cases, consumers that have been victim of an unfair commercial practice shall apply ordinary procedures and actions for damages.

The action can be brought by an individual that has interest in the case or by consumers associations in the form of collective actions or class actions. On the contrary, such an action cannot be started by a competitor except in cases where an unfair commercial practice regarding also an unfair competition practice under Article 2598 of the Italian Civil Code is at stake. However in this case competitors must prove their direct and legitimate interest.

Civil remedies and sanctions for the infringement of the mentioned regulations are those covered by the Italian Civil Code; action for injunction and action for damages. Furthermore, the judge may declare the invalidity of a contract concluded by the consumer in cases where mistaken consent is proved.

Significant issues regarding the protection of consumers’ rights are linked to their effectiveness and in particular to the possibility for consumers to get redress.

It may generally be obtained by bringing an individual court action or a class action.

In this perspective some features and difficulties of the Italian legal system may nevertheless be underlined.

Indeed, for a long time it has been complained about the absence of procedural instruments easily available for consumers.

Originally, under Italian law a group of consumers had to bring actions in a separate way in order to obtain relief since they did not have the power to jointly sue a business entity. This situation made the possibility to obtain redress more difficult compared to class actions and raised also problems concerning the risk of conflicting judgements and the burden on the judiciary system.

A first instrument was provided by the restrictive actions under Article 140 of the Italian Consumer Code, available for consumer associations and aimed at opposing behaviours damaging the rights of consumers.

See, for instance, the information on Italy available at the website of the Database on the Unfair Commercial Practices Directive developed by the European Commission as a tool to support national enforcers in achieving a common understanding and a uniform application of the Directive https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.showCountry&countryID=IT

Ibid.

For an analysis of the remedies see, among others, M. Cerioni, Diritti dei consumatori e degli utenti, op. cit., at 295 ff, and A. Fachechi, La pubblicità, le pratiche commerciali e le altre comunicazioni, op. cit., at 70 ff.
and users. Nonetheless these remedies proved not to be sufficient for an effective protection of consumers and there was still a lack in the guarantee of an adequate possibility to obtain redress.

In this perspective class actions, which at present are an alternative to the already existing and mentioned judicial remedies, have been introduced only recently and their implementation still needs to be further improved.

The first step was the introduction in 2007 of a specific rule in the Italian Consumer Code by the Italian Budgetary Law: Article 140bis concerning collective actions.

It was meant to strengthen the possibility for consumer association and committees to claim for damages on behalf of their members.

This provision has been amended several times and, actually, in Italy class actions are in force only from January 2010 with reference to events occurred after August 16, 2009. Specific amendments have been introduced in 2009 (law no. 99/2009). Accordingly, these kinds of actions were intended to protect individual rights of the plaintiffs, rather than only collective rights. The rights and the situations of the plurality of consumers toward the business identities needed to be “identical”.

Indeed the class action was meant to enforce: “a) the contractual rights of a number of consumers and users who find themselves in the same situation in relation to the same company; b) identical rights due to final consumers of a given product in relation to its manufacturer, even in the absence of a direct contractual relationship; c) identical rights to payment of damages due to these consumers and users and deriving from unfair commercial practices or anti-competitive behaviour”.

From a subjective perspective, pursuant to Article 140bis of the Italian Consumer Code, only consumers or users (and not all individuals), as defined by Article 3 of the same code, may file a class action, either individually or through associations to obtain redress in cases where their rights appear to be violated. The Italian law does not specify a minimum number of consumers needed for a class action. With reference to the defendant, these kinds of action may me brought only against business, i.e. against entities acting within the scope of their business.

With reference to matters, according to Articles 140bis, section 2, class actions may be brought for the protection of the following rights:

- rights arising out of standard contractual terms and conditions binding the plaintiffs and the business entity;
- rights in respect of defects of products or services, regardless of any contractual relationship between the plaintiffs and the manufacturer;
- rights to compensation accorded to consumers or users for unfair commercial practices or anticompetitive conducts.
Afterward, a significant change concerned the actors allowed to introduce such an action. In the previous version of the rule, only national consumer associations and committees were empowered, whereas at present this power is conferred to single consumers and users, either individually or represented by an association or committee.

Another crucial amendment was introduced by law no. 27 of 2012, whose Article 6 expressly concerned “rules to make class actions effective” ("Norme per rendere efficace l’azione di classe" in Italian). Under this law, class actions are admissible also if class members’ rights are “homogeneous” and not only if they are “identical”. The adoption of a wider concept permits to lower the threshold needed to bring this kind of actions.

However, notwithstanding this legislative evolution, in Italy class actions are still not frequently used. Until now only a small number of class actions have been brought before Italian judges and in most cases they were dismissed on admissibility grounds or rejected on the merit.\(^\text{34}\)

Moreover as to the modality for joining a class action, Italy chose, also in compliance with the Italian constitutional principles, the so-called “opt in” system (therefore the decision on the claim action is binding only for those who formally joined the class action)\(^\text{35}\), which probably makes the collection of a large number of participants more complicated and difficult compared to legal system in which the opt-out method is applied. The lack of specific and adequate financial incentives in this field should also be mentioned as a further issue hindering the use of such remedies.

Nevertheless a landmark decision must be underlined. In 2013 (28 February) the Court of Naples upheld for the first time a private class action, at least with reference to many participants. The case concerned ruined holiday compensation linked to the purchase of all-inclusive tourist packages in Zanzibar in 2009. Although the Court dismissed the claims of a part of the members on the ground of a strict interpretation of the wording of the law at that moment applicable (the 2009 version of Article 140bis), namely the requirement of “identical” rights, in a significant obiter dictum the Court stated that the concept of “homogenous” rights introduced in 2012 is likely to improve the effectiveness of the protection of consumers’ right through the instrument of class actions.

In Italy, therefore, this kind of remedy still needs to be fully implemented to enable consumers to more effectively enforce their rights, thus increasing their confidence and preventing unfair commercial practices or misleading advertising from bringing a competitive advantage.

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\(^{34}\) M. Cerioni, *Diritti dei consumatori e degli utenti*, op. cit., at 320 ff.  
\(^{35}\) Ibid., at 329.
3. THE PROTECTION OF ECONOMIC CITIZENS' RIGHTS IN THE DIGITAL ERA

To enhance both feasibility and comparability, D5.2 reporters are invited to focus on the implications of EU Data protection legislation in their national legal order, with particular attention to citizens' rights “to be forgotten” after the ECJ ruling in case C-131/12 of 13 May 2014. In topic three, “citizens” include companies, in that their economic freedom to conduct a business may be hampered by the (corresponding) duty to forget.

3.1. Introduction: Data Protection Legislation in Italy


With regard to the Italian legal system, the Italian Data Protection Code (IDPC) (Legislative Decree 30 June 2003, no. 196) embodies the rules on privacy matters (also having incorporated the provisions of the Directive on electronic communications of 2002)37. It shall ensure that personal data is processed by respecting data subjects’ rights, fundamental freedoms and dignity, particularly with regard to confidentiality, personal identity, and the right to personal data protection. The Code can be divided into three main sections. The first one concerns the general provisions and defines the main principles of the regulation. These principles include: the right to data protection, which becomes a fundamental right established and guaranteed also at the European level; the data minimization principle, established by art. 3 and aimed at reducing the process of personal data; the concept of “high protection level”, important because it involves a level of hierarchy, and, at the same time, imposes to measure this level. Data Protection Code guarantees that data process takes place respecting the rights and the fundamental freedoms of the data subject, with particular attention to privacy,

36 See L. A. BYGRAVE, Data Protection Law. Approaching Its Rationale, Logic and Limits, The Hague – London - New York, 2002. At the European level, the Charter of fundamental rights of the European Union stated at the Article 8: “Everyone has the right to the protection of personal data concerning him or her”.
personal identity, and the new data protection right (Art. 2). All the definitions are gathered together in a unique article (Art. 4), in order to simplify the understanding of them. In the first part, the Code establishes systematically the rules to follow in order to process data, specifying which are the measures to be taken, depending on if the process is carried out by private or public parties and on the specific kinds of processing. The provisions referring to data and systems security are based on the former statute n. 675 of 1996 and on the d.p.r. n. 318 of 1999, but they introduce relevant innovations, in particular concerning the adoption of specific security measures. Another innovation regarding the notice procedure to the Data Protection Authority is that it has been significantly simplified: it is now compulsory only for a few specifically identified cases (see Artt. 37 and 38). The second section of the Code is dedicated to the regulation of specific sectors and includes, among other things: processing operations for purposes of justice and by the police; processing operations in the public sector; processing of personal data in the health care sector; processing of job and employee data. In the third section of the Code, we find the provisions regarding the procedure to safeguard the data subject. There are three remedies to be claimed before the Privacy Authority: the circumstantial claim (*reclamo circostanziato*), used to report an infringement to the regulation regarding personal data processing; the report (*segnalazione*), that is used when you cannot claim by a “*reclamo*” to ask for the monitoring of the Privacy Authority; and the claim (*ricorso*), when you claim specified rights (art. 141).

### 3.2. An outline on the Google Spain case.

Dealing with the citizens’ right to be forgotten within the European Union context, we have to make reference to the recent ECJ case C-131/12 of 13 May 2014, now known as “Google Spain”. We will briefly describe the facts below.

In 2010 a Spanish citizen submitted to the Spanish Data Protection Authority (AEPD) a complaint against La Vanguardia Ediciones SL (the publisher of a newspaper widespread in Spain), as well as against Google Spain and Google Inc., since, typing his name on Google the list of results shown links to two pages of the newspaper La Vanguardia, dated January and March 1998, announcing an auction of properties organized following a seizure made for the enforcement of social security credits against him. By means of the claim to the Data Protection Authority, the Spanish citizen asked, on the one hand, to order to La Vanguardia to delete or edit these pages (so that his personal data will not ever been displayed) or to implement certain tools provided by search engines to protect such data. On the other hand, he asked that Google Spain or Google Inc. will order to remove or conceal his personal data, so that they will cease to appear among the search results and did not feature more in the links of La Vanguardia. This was because the seizure made against him had been fully defined since several years and the mention of that was at that moment completely irrelevant.

The AEPD dismissed the complaint against La Vanguardia, believing that the publisher had legitimately published the information in question. However, the claim was upheld against Google and Google Inc. The AEPD has therefore asked the two companies to take the necessary steps to remove the data from their indices
and to make impossible in the future the access to the data themselves. Google Spain and Google Inc. have brought two actions before the Audiencia Nacional, seeking annulment of that decision. It is in this context that the Spanish judge has referred a series of questions to the European Court of Justice.

We can take as known, for reasons of synthesis, the further details concerning this case. As for the legal principles established by the judgment, they may be summarized in three points. First, the ruling states that the applicable law is the one of the country in which the search engine operates, exercising even other activities, such as the promotion and sale of advertising space. Second, Google, and in general search engines, are “data controller” and therefore the data subject has the right to request that the indexing is removed directly to the search engine, regardless of any request to the holder of the website that published the information. Third, data subject has the right that: information concerning his/her person is no longer attached to his/her name by the list of results that appears as a result of a research carried out from its name; and in assessing the conditions for applying these provisions, it is needed to consider in particular whether he/she is entitled to obtain that the information in question concerning his/her person is no longer, at present, connected to his/her name by a list of results that appears as a result of research.

3.3. The right to be forgotten: different meanings and conflicting interests

The expression “right to be forgotten” is used in at least three different meanings.\(^{38}\)

The first meaning is most dating back over time, developed by the doctrine and the case law, in the period before the advent of the Internet. It was, therefore, traditionally referred to the right of a person not to see published some news about events, already legitimately published, after a considerable amount of time. In this context, the right to be forgotten is related to events that have formed true story or otherwise relating to such events the publication of which, that means the escape from the sphere of privacy of the persons concerned, was to be considered lawful. The issue is whether the legitimately advertised events can always be the subject of new advertising or whether, instead, the passage of time and the changing situations make it unlawful.

The use of the Internet has changed the meaning of the right to be forgotten. Within the Network the republication is no longer required, since for the same organization of information in the network the information is not deleted, but remains available or at least theoretically available. Therefore, the time to be considered is no longer that which elapsed between the publication and republication of information, but that elapsed from the time of publication that endures. The need is not to not repost, but to place the publication, perhaps legitimate many years ago, in the present, thus giving a "weight" to information itself. This is achieved by placing it in the present context.

\(^{38}\) See G. FINOCCHIARO, “Il diritto all’oblio nel quadro dei diritti della personalità”, in “Dir. informazione e informatica”, 2014, 592 ff.
by contextualizing the information. The need is not, therefore, so much to erase, but rather to assign a weight to information as part of an overall scenario which sees identity as a protagonist.

A third meaning of the right to be forgotten is that which relates to the right to erase, block, or to oppose to the processing of data provided by Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the Protection of individuals with regard to the processing of personal data and on the free movement of such data. In particular art. 12, devoted to the right of access, states that: “Member States shall guarantee every data subject the right to obtain from the controller: (a) without constraint at reasonable intervals and without excessive delay or expense (...); (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data (...).” In the Italian context, the provisions of the European Directive have been implemented by the Italian Data Protection Code; in particular art. 7, para. 3, letter b) provides that: “A data subject shall have the right to object, in whole or in part, a) on legitimate grounds, to the processing of personal data concerning him/her, even though they are relevant to the purpose of the collection.”

Then the two regulatory systems provide for the right to erase the data and the right to object to the processing if specific requirements are met: that the processing was done in violation of the law or where legitimate reasons are given. The concept is recognized also by the proposed Regulation of the European Parliament and Council (General Data Protection Regulation), where art. 17 is governing the right to be forgotten and the right to erase the data.

Finally, to better define the boundaries between the two terms, one can define the “erasure” as an operation on the data, which excludes any further conservation, while “to be forgotten” seems rather to be a purpose, which can be reached by means of the erasure, but also by means of the blocking.

With reference to the Google Spain case, the EU Court of Justice was asked to comment on the interpretation of art. 12, letter b) which provides that “Member States shall guarantee every data subject the right to obtain from the controller: (...) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data”, and art. 14, para 1, lett. a), that states: “Member States shall grant the data subject the right: (...) at least in the cases referred to in Article 7 (e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data”.

The content of the right to be forgotten investigated by the European judge concerned, therefore, the right to erase, the blocking of data, and the opposition to the processing. The search engine cannot delete

39 See Corte di Cassazione, 5 April 2012, no. 5525, in Foro it., 2013, I, 1, 305.
personal data that are located at the data controller who published the information, but only the connection to such data (which may remain at the data controller).

We do not go into details with reference to the description of the points of the application of the Spanish court to the ECJ. It is worth noting that, by means of these issues, two different questions raises: if the person can apply directly to the search engine instead of to the person who posted the information online, and if the assumption of the application may be constituted by the consideration that the disclosure would undermine or desire that the information is forgotten. On the first question, the Court decided affirmatively, thus considering search engine as data controller. With reference to the second question, however, briefly speaking, the ECJ recognizes the right to delete data if they are inadequate, irrelevant or no longer pertinent to the purpose of processing.

The evaluation of the adequacy, relevance or irrelevance of the data must be done in relation to the purposes of the search engine. The legitimate interests pursued by the search engines are to facilitate access to information for users, improve the effectiveness of the dissemination of information, allowing different services of the information society. These interests correspond to three fundamental rights protected by the Charter of Fundamental Rights of the European Union: freedom of information, freedom of expression and freedom of enterprise.

In carrying on its processing, the search engine must respect the principles of data quality dictated by the Directive: personal data must therefore be adequate, relevant and not excessive in relation to the objectives pursued, and updated. The right protected is the identity. The personal data is inappropriate or not relevant with respect to the identity of a subject, given the suitability of the search engine to generate a “real” image of the individual online.

3.4. Italian legal framework with reference to the right to be forgotten in the previous Google Spain.

Even before the Google Spain case, cases very similar have already occurred in Italy, both in the administrative system (appeals to Italian Data Protection Authority (IDPA)), and before traditional courts.

It happened that citizens were complaining about the violation of their right to protection of personal data deriving (more than from the publication, even legitimate) by indefinite persistence and free availability to anyone on the Internet - even years later - of online newspaper articles bearing news (often of judicial reporting) dated back in time. Such information found by the search engines (for example, picked up in the editorial historical archives of newspapers online) resulted in the taking of knowledge from the users of the web of issues, data and profiles of the interested people in the meantime totally different.

The processing of personal data for journalistic purposes is specifically governed by IDPC, which provides regarding at art. 136 et seq. a specific exception to the consent of data subject. However, the exemption applies only to processing that are “carried out in the exercise of the journalistic profession and for the sole purposes related thereto”, or “carried out by persons included either in the list of free-lance journalists or in the roll of trainee journalists as per Sections 26 and 33 of Act no. 69 of 03.02.63”, or “carried out on a temporary basis exclusively for the purposes of publication or occasional circulation of articles, essays and other intellectual works also in terms of artistic expression”.

The Internet publication of personal data of the persons mentioned - for example - in newspaper articles is normally lawful, even if the IDPA clarified it by means of Provision of 6 May 2004 entitled “Privacy and journalism”. Some clarifications in response to questions of the Order of Journalists that the processing of data for journalism purposes - even without the consent of the parties concerned - must still comply with some main principles: proportionality and reasonableness, indispensability compared to the journalistic duty of the press, veracity of the facts, real interest of the public opinion to be informed on matters of detail. For example, the Authority has recommended to journalists - about the processing of personal data represented by the names of suspects in the exercise of journalism – that: “the possibility of spreading this information must get to grips with some fundamental guarantees granted to such persons. The journalist has to assess, for example, whether to disclose the full generality of those who are affected by an investigation still in very early stage, and modulate the assessment of the gravity of the judgment charge”.

On the other hand, and with specific reference to the processing of personal data on electronic communication networks, given the global accessibility to online information, the disclosure and/or the journalistic purposes pursued by the processing of personal data relating to third persons must be balanced with the right to be forgotten of the data subject on the Net, intended specifically as a right designed to prevent that the indefinite staying on the Internet of data and information dating back in time (and, especially, incomplete and not updated since lacking subsequent news reports about the evolution of the news originally reported) causes an injury of those very rights that the IDPC protects (art. 2 guarantees that: “personal data are processed by respecting data subjects’ rights, fundamental freedoms and dignity, particularly with regard to confidentiality, personal identity and the right to personal data protection”). For instance, this may happen on the occasion of a revival of personal information at a later date by the republication of old articles containing personal data made available online (eg: the historical archives of newspapers online, with the availability in pdf of old issues of the newspaper) that allows the easy availability of the items inserted through the external search engines.

In the case of online publication of old newspaper articles, and given that the fundamental criterion indicated by the IDPA to publish or not publish a news story is the existence of the public opinion interest, then anyone who wants to reproduce and republish (or simply to remain) on the Internet articles containing

41 The collection of the consent could conflict with the other fundamental right, namely that of the press and information.
personal data of third parties must first check (even more so when the intention is to give worldwide spread on
the web related to personal data of those concerned) that such interest exists at the time of re-publication,
performing a new assessment (compared to that carried out by the journalist who wrote the original
publication) that takes into account in the first place – in the view of the right to be forgotten - if the person
he/she wants to talk with again is a public figure or not.

The IDPA intervened several times with measures meant to protect the fundamental right to be
forgotten. By means of the Provision on “Online historical archives of newspapers and availability of data
concerned by external search engines” 8 April 2009, it recognized the exercise of the right to object to the
processing for legitimate reasons and the legitimacy of the aspiration of the applicant in that case “so that the
network, by means of “scanning” activities automatically carried out by the search engines outside the resitant
publisher’s website, the news object of the article do not remain permanently associated with his/her name”. The IDPA, therefore, imposed to the editor of the website to take “every measure technically suitable to
prevent the identity of the applicant contained in the article published online under investigation is found
directly through the use of common search engines external to the Internet website (including, for example, by
preparation of different versions or different presentation modalities of the web pages involved according to the
research tools used by users – Internet search engines or search functions within the website”.

In particular, the Authority, considering that “a permanent association to the applicant of the matter in
question involves a disproportionate sacrifice of his/her rights (see Art. 2, paragraph 1, IDPCA)”, indicated as a
specific measure to protect data subject rights concerned, that the web page containing the personal
information of the applicant was technically withdrawn, when searching the name of the applicant, from the
direct detectability through the most used external search engines, preventing the collection of the same
Information on pages available in the world wide web (“grabbing” phase) through a direct activity by the
administrator of the website (implementing robots.txt, provided by the “Robots Exclusion Protocol”, or through
the use of “Robots Meta tag”).

The right to be forgotten was also discussed by the courts. The Corte di Cassazione (Italian Supreme
Court), recently ruling on the matter, held that “The person whose personal data are processed must be
considered the holder of the right to be forgotten even in the case of storage on the Internet, mere deposit of
archives of individual users accessing the network and, therefore, owners of the sites which represent the source
of

the information. He/she must see recognized his/her control in order to protect his/her social image, that, even in
the case of real news, and a fortiori if a news, can result in the claim to the contextualization and update of the
data, and, where appropriate, having taken into account the purpose of preservation in the archive and the
interest that underlies it, even to its cancellation” (see Cass. civ., sec. III, 5 May 2012, no. 5525). The Supreme
Court states that “if the public interest underlying the right to information (Art. 21 of the Italian Constitution)
constitutes a limit to the fundamental right to privacy (Artt. 21 and 2), the person to whom the data pertain is
 correspondingly given the right to be forgotten (see Cass., 4 September 1998, no. 3679), and that is that news
are not further disclosed, when due to the passage of time they are already forgotten or unknown to the majority of associates. Since the processing of personal data may involve also public or published data (see Cass., 25 June 2004, no. 11864), the right to be forgotten actually safeguards the social projection of personal identity, the subject’s need to be protected from disclosure of information (potentially) harmful, since missing the topical character (because of the lapse of time), so that its processing is no more justified and indeed likely to hinder the subject in the developing and enjoyment of his/her own personality”.

The principles established by the Supreme Court do not preclude their applicability also to the operator of a search engine (like Google), now become as autonomous data controller of information collected from the links/results research.

3.5. First provisions of Italian Data Protection Authority following the Google Spain ruling

The repercussions in Italy of the judgment of the ECJ in the Google Spain case have not been long in coming: in November 2014 and February 2015, the IDPA adopted eleven provisions on the basis of as many reports by citizens resulting from the rejection, by Google, of their requests for de-indexing the Web pages that reported personal data (in all cases, new articles relating to legal proceedings).

The case law of the IDPA now conforms to that famous judgment. In nine of the eleven cases decided, in fact, the Authority rejected the request to prescribe to Google the de-indexation, judging the prevailing public interest in access to information, on the grounds that the events in question were related to trials that had not yet been fulfilled all instances.

We may report one case for all: the Provision of 18 December 2014. The suspect asked to delete the reference to journal article because, in his/her view, the text reproduced was “extremely misleading and highly prejudicial”. During the investigation carried out by the Authority, however, the news appeared to be challenged very recently and especially to secure public interest, covering a major judicial investigation which involved many people, albeit locally. Personal data contained, among other things, had been processed in compliance with the principle of materiality of the information. The Authority has, therefore, rejected the applicant’s request to block Google the processing of his personal data - not associating anymore in search results his name mentioned in the article - because, in this case, the freedom of the press than the right to be forgotten appeared to prevail. It also recalled that the person concerned, if he/she considers false the news regarding him/her, may still ask the publisher for the updating, rectification and integration of the data contained in the article. In the same proceeding, for the first time, even the problem of consistency with the original texts scanned by the engine of the so-called “snippet” took place, i.e. the automatic synthesis generated by Google and available along with the search results. The applicant had in fact asked Google, as an alternative to de-indexation, to wipe out or alter the snippet that appeared under the link to the article, since it

Available at: http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/3736353.
associated his name to more serious crimes than those for which he was investigated. From the findings of the IDPA, the abstract proposed, actually, resulted possibly misleading as not in line with the narration of the facts reported in the article. This request, considered legitimate, was individually greeted by the American multinational that has, thus, taken steps to eliminate the summary generated by its own algorithm.

But in other two cases, the Authority has accepted the request of the citizens reporting. For instance, in a Provision as a result of a request for erasure from the list of results returned by a search engine of the links to web pages that contain the name of the data subject (Provision 5 February 2015 43): in this case, the IDPA declared founded the request of the reporting of removal from the search results of Google of the URL containing the newspaper article under analysis.

The article subject to report, findable among the list of results generated by Google as a result of research carried out starting with the name and surname of data subject, gave notice of the visit by the person reporting of an inmate at one prison, in a special area, and that, following this meeting, the anti-mafia prosecutor of Palermo would open an investigation to understand whether the visit was only aimed at controlling the “general conditions of detention” as prescribed by law for members of the Parliament. The IDPA noted that the processing of personal data that is referenced by the reporter, at the time carried out for purposes of journalism, about facts of public interest, involves now, because of the indexing the article in question, a violation considered disproportionate because of the significant amount of time spent from the fact and the statement made by the reporting data subject according to which it was not initiated any criminal investigation against him.

This is precisely the kind of measure “legitimized” by the decision of the ECJ.

3.6. Google Spain and economic freedom to conduct a business

3.6.1. Establishment principle within the EU and applicable law

A relevant question on business activities concerns the role of the establishment of a company responsible for the processing of personal data, for the application of the territorial, national implementation of Directive 95/46/EC. This represent also the first of the issues examined by the ECJ in Google Spain, with particular reference to the activities of an Internet Service Provider (ISP) that operates as search engine in a monopolistic position44.

The activities of Google Group are carried out, in part, by the main company in a third country (California/USA) that indexes and stores the web searches; in part by the establishments/subsidiaries in various

43 Available at: http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/3793836.
EU Member States that offer the interface of the search service to users of a Member State and directly manage advertising to the domestic market through a series of links sponsored by companies. The activity of the Google search engine could also take the form of provision of services without any obligation of establishment. The establishment of branches in some Member States only counts as autonomous choices of industrial development policy of the Group within the Union, especially in regard to relations with the collection of advertising communication addressed to the national market affiliate.

With reference to the right to free movement, the principle of EU law is that individuals who exercise self-employment and legal persons who operate legally in a Member State may perform an economic activity in another Member State other than that in which they are established on a stable and continuous manner (art. 49 TFEU) and provide, so, for services across borders while retaining their establishment in their country of origin (art. 56 TFEU).

As to the statutory rule, in the European context the discipline on data protection applicable law is established in art. 4 of Directive 95/46/EC: “1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where: (a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable; (b) the controller is not established on the Member State’s territory, but in a place where its national law applies by virtue of international public law; (c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community. 2. In the circumstances referred to in paragraph 1 (c), the controller must designate a representative established in the territory of that Member State, without prejudice to legal actions which could be initiated against the controller himself”.

A contribution to the consolidation of the interpretation of the connecting factors concerning the processing of personal data is provided in recent years by the Art 29 Working Party. According to Opinion 1/2008 on data protection issues related to search engine of 4 April 2008, where the headquarters of a company responsible for processing the data is located outside the EEA territory and the treatment involves establishments on the territory of a Member State, “the effective and real exercise of the activity through

45 The Italian adaptation is provided by art. 5: “1. This Code shall apply to the processing of personal data, including data held abroad, where the processing is performed by any entity established either in the State’s territory or in a place that under the State’s sovereignty. 2. This Code shall also apply to the processing of personal data that is performed by an entity established in the territory of a country outside the European Union, where said entity makes use in connection with the processing of equipment, whether electronic or otherwise, situated in the State’s territory, unless such equipment is used only for purposes of transit through the territory of the European Union. If this Code applies, the data controller shall designate a representative established in the State’s territory with a view to implementing the provisions concerning processing of personal data”.
stable arrangements” according to the case law of the Court of Justice is realized. The following Opinion n. 8/2010 on applicable law of 16 December 2010 states that the territorial scope of the national legislation implementing Directive 95/46/EC depends on the place of establishment of the data controller, not being decisive criteria nor the nationality or place of habitual residence of the person nor the physical location of the personal data.

The Working Group has proposed that, in future legislation, an “oriented approach to service target” should be drafted when the controllers are not established in the Union. This should be an activity targeted, based on the actual link with a specific EU Member State, such as service specifically targeted to residents through the presentation of information in the EU languages. This is not the place to address the analysis of proposed General Data Protection Regulation. It is worth citing that the discipline on applicable law is contained in Article 3 (Territorial scope), which states: “1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union. 2. This Regulation applies to the processing of personal data of data subjects residing in the Union by a controller not established in the Union, where the processing activities are related to: (a) the offering of goods or services to such data subjects in the Union; or (b) the monitoring of their behaviour. 3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where the national law of a Member State applies by virtue of public international law”.

With direct reference to the case under discussion, the Spanish Court had asked the ECJ the interpretation of ruling set by art. 4 Directive 95/46, in particular the criterion relating to the processing carried out “in the context of the activities of establishment” (par. 1, lett. a) and the criterion relating to the “use of equipment in the territory of that Member State” (lett. c).

The decisive argument for a purposive interpretation of the provision in question appears to be “the ways of business” of the search engines, to the extent that the establishment is connected to a personal service selling advertising targeted to residents of a Member State.

In dealing with this issue, the Court, after having first pointed out that the main company globally indexes the websites and that the information collected is stored in a server whose location is not made public, underlines that Google plays parallel activities of advertising communication via the domestic establishments that provide for the management of the sales of advertising space. In light of these considerations, the ruling of Google Spain states that the establishment in a Member State of a company operating outside the Union has a key role in the definition of the criterion of the territorial applicability if a service of selling targeted advertising to the inhabitants of that Member State is implicated.

Bringing the issue on a more general level, in some other judgments the ECJ favored the criterion that the activity of a site was directed respectively to the public of the European Union or to the public of a Member State (intention target) (see ECJ 18 October 2012 Football Dataco Ltd. et al., C-173/11; ECJ 21 June 2012 C-5/11).
In the field of jurisdiction and conflict of laws, that criterion linking the territorial applicability to the public where the activity is directed is provided by the Brussels I and Brussels I-bis, as well as by the Rome I Regulation (art. 6). Finally, it is useful to point out that, in view of determining jurisdiction, the Court has had the opportunity to specify the importance of the “concept of the centre of interests” of consumers stating that it corresponds in general to his/her habitual residence (see EUCJ 25 October 2001 eDate Advertising GmbH vs. Martinez). The impact of information on the rights of personality may be, in fact, better appreciated by the courts of the place where the victim has his/her own “centre of interest”, corresponding mainly to the residence.

Finally, while in the rule of Google Spain the Court held that the activity of the search engine is definitely qualifies as a data-processing activities, in other cases, it preferred to leave the national court ruling to concretely qualify the ISP activity in the context of the main proceedings. In this scenario, but here there is neither time nor space for fully analysing it, it is worth mentioning the state of the case law of the ECJ on the liability of “intermediaries” operators (ISP) that provide the technologies and support activities for the online market.

3.6.2 Search engines strategies after Google Spain, competitiveness, and eventual damages

Following the ruling, Google introduced a module on its European Web sites for removal of search results. By means of these modules users can request that results related to a specific name may be removed. Then, Google only communicates to the person who posted the content that it has removed the link, but it does not allow him/her to replicate, pleading the existence of one of the "special reasons" succinctly evoked by the Court.

More generally, it can be argued that the search engines will tend to reduce their exposure to danger. It is theoretically conceivable that, if operators do not follow the solution now adopted by Google, the publisher of the content is not informed and became aware of the removal only when performing a search using key word as that of the person submitting the instance to the search engine. It can then be assumed that, in case of failure of removal, the reporting person will strive to achieve it by the Data Protection Authority or by the Court. In the event that it is ascertained that there is a right to be forgotten (i.e. erasure of the data), the operator of the search engine could be liable either as data controller, for the unlawful processing of personal data, and, if it is considered that the permanence of personal data represents an independent damages, by way of the tort law.

46 See, for example, the case law relating to so-called “passive” ISPs (judgments Scarlet c. Sabam and Scarlet c. Netlog) in which the Court held incompatible with Community law the imposition of filtering systems of digital contents to protect the intellectual property rights of all electronic communications in transit for its services, in particular through programs "peer to-peer "if directed indiscriminately to all its customers.

47 G.M. Riccio, “Diritto all'oblio e responsabilità dei motori di ricerca”, in Dir. informazione e informatica, 2014, 753.
In light of these circumstances, if we consider the role of the holder of the search engines, it is easy to argue that it is more cost effective to “settle” all the reporting, rather than analytically evaluate the conditions of each individual request. This could lead to a phenomenon of “overdeterrence”, which should push the intermediaries to opt for the least risky (i.e. the removal of search results), regardless of whether there is a real right to be forgotten and the non-presence of causes that justify the permanence of the information on the Net.

The search engines may, instead, prefer a different approach, rejecting the majority of requests in order to overburden national data protection authorities, probably unprepared to handle hundreds of appeals. Thereby resulting in two possible consequences: on the one hand, raising the “politics” issue of the impossibility of implementing effective protection; on the other, reserving for search engine the selection criteria for the choice of links to be removed.

The measures deriving from the implementation of the judgment will be applied, finally, only to search engines established in Europe: this might create a competitive advantage for operators outside Europe (see Baidu in China, and Yandex in Russia) that will index a higher number information and, being accessible from Europe, could attract users, at the expense of their competitors.

Finally, at least it deserves to be mentioned the issue of possible damage related to the persistence of the search results. The scenario becomes even more difficult to be handle if you analyze the national context.

When adopting Directive 95/46/EC, the Italian legislature has made use of Article 2050 of the Italian Civil Code to assess the responsibility of the person that causes damage to others due to the processing of personal data (see art. 15 IDPC). The assimilation of the processing of personal data to a dangerous activity responds to the need, indeed already established by art. 23 of the Directive, to facilitate the rest of the damage suffered by the data subject for unlawful processing of personal data. This leads, on the one hand, to the simplification of the position of the injured, who will be required to prove only the damage and the causal link, and, on the other, to the worsening of the position of the data controller, which, on the contrary, will have to prove he/she has taken all the necessary measures to prevent the occurrence of damage. It should, however, be cleared up a possible misunderstanding: even reaffirming the existence of an independent right to the cancellation of the data, which declination of the right to be forgotten, it is not sufficient, however, the failure to remove the search result for having compensation: the data subject, in fact, must in any case demonstrate that he/she has suffered damage by the permanence of the hyperlink.

3. 6.3 Final remarks

There are two issues that seem most relevant and make the judgment a significant case: the applicability of EU law to those who offer services to the citizens of the Union; the substantial support to the recognition of the right to erase personal data. Both of these profiles are at the same time the central points of
the proposed Regulation and relevant EU legislation on protection of personal data that would seem to be, hopefully, in the final phase of its process. Profiles also controversial because of the clear implications and impact on business models adopted by some of the major players in the digital market.48

However, it should be emphasized that the freedom of enterprise, although recognized in the Fundamental Charters, remains subject to the protection of the interests of the person as an individual and as part of social communities. Then, the business models have to adapt themselves to the respect of fundamental rights and not vice versa. What, in fact, seems to be sometimes lacking is the maturity of the business community in understanding how policies aimed at protecting the rights of the users of the services and, more generally, citizens can have favourable effects in competitive perspective, more than they do with aggressive policies, aimed at maximizing the commercial interests.

The Court has however recognized the right of the individual not to see indexed in search results personal information that are "inadequate, irrelevant or no longer relevant, or excessive" compared to the processing purposes. The Court did not properly confuse the right to erase with the right to oblivion and, in that sense, the ruling is more oriented to a (implicit) comparison with art. 17 of the proposed EU regulation on the protection of personal data, rather than with the only case law on the right to be forgotten.

Therefore, reading the decision, the intent to live the existing regulatory framework for the benefit of its reform appears evident; reform often strongly opposed by the business world.

Finally, a question emerges in the Google Spain story: the judicial activism on the subject of Internet and regulatory aspects of the same. The national and European judges are showing care and sensitivity to the development of law in the technological society, behaving as in a common law scenario.

48 See A. Mantelero, Il futuro regolamento EU sui dati personali e la valenza “politica” del caso Google: ricordare e dimenticare nella digital economy, in Dir. informazione e informatica, 2014, 681.
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DELIVERABLE 5.2

COUNTRY REPORT
THE NETHERLANDS

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Introduction

This report builds upon the foregoing country report and more specifically looks into the economic rights of EU citizens in the Netherlands in three identified areas:

- Recognition of professional qualifications
- The protection of consumers’ rights
- The protection of (economic) rights in the digital market, in particular the right to be forgotten vis-à-vis the freedom of information and the freedom to conduct a business.

Due to the relative ‘openness’ of the Dutch economy and labour market, the difficulties that citizens face in exercising these economic rights appear to be relatively small. Considering the right to be forgotten, which was recognized by the European Court of Justice (hereafter: CJEU) in the Google Spain case, it is particularly noteworthy that Dutch courts have meanwhile delivered three judgments, providing for different interpretations of the CJEU’s judgment.

I. Access of economic actors to the market: professional qualifications

A) Implementation of the Professional Qualifications Directive into Dutch law and its application

Implementing the Professional Qualifications Directive

The Dutch legislator implemented an important part of Directive 2005/36/EG on the recognition of professional qualifications (hereafter: old PQ directive) through the adoption of the Algemene Wet erkenning EG-beroepskwalificaties (General Act on the Recognition of EC-Professional Qualifications, hereafter: General Act).

By including the basic principles of the old PQ directive in this single Act, the legislator did not have to individually adjust all Acts that regulated different professions. The law came into force on 21 December 2007 and has been amended three times, in 2009, 2011 and 2013. The amendment of 2009 implemented the changes that were introduced by the Services Directive, while the amendments of 2011 and 2013 reflected only small changes in the national law.

The General Act follows the structure of the PQ directive to a large extent. The responsibility for the recognition of professional qualifications is divided among the different ministries, which are entrusted with the regulation of these

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1 Case...

2 See also laws and regulations related to the General Act on the Recognition of EC-Professional Qualifications Act: <http://wetten.overheid.nl/BWBR0023066/geldigheidsdatum_26-06-2015> accessed 26 June 2015; The Architects Title Act was adapted to the PQ Directive through a separate legislative procedure.

professions under Dutch law. Health care professions, for instance, fall under the responsibility of the Ministerie van Gezondheidszorg, Welzijn & Sport (Ministry of Health, Welfare and Sports), whereas the qualifications for policemen are regulated by the Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (Ministry of the Interior and Kingdom Relations).

The Ministries are also granted the power to set more detailed rules and to delegate the duties and competences conferred upon them under Articles 33 and 36 of the General Act. As a result, profession-specific regulations have been adopted, including specific rules for various categories of professions, ranging from lawyers to inland navigators.

In the Netherlands there are approximately 135 regulated professions, which means that compared to other Member States, not that many professions have been regulated.\(^4\)

The Ministry of Education, Culture and Science is responsible for the coordination of the system of recognition of professional qualifications and the NUFFIC (Netherlands University Foundation for International Cooperation) and Colo (Centraal Orgaan Landelijke Opleidingsorganen) are appointed as contact points within the meaning of Article 57 of the Directive. The website of NUFFIC provides detailed information in Dutch and English, including flowcharts for prospective mobile workers and the way in which the Netherlands evaluates professional qualifications obtained abroad.\(^5\) Whilst the NUFFIC is responsible as overall contact point in the Netherlands they also cooperate with the SBB, which is the Foundation for Cooperation on Vocational Education, Training and the Labour Market. SBB is the National Reference Point (NRP) in the Netherlands, the national contact point for information on vocational education in European countries.

As regards the seven professions for which the principle of automatic recognition applies, i.e. architects, dentists, doctors, midwives, nurses, pharmacists and veterinary surgeons, the former directive was integrated in different existing national legislation.\(^6\) In the latter case the General Act served a complementary function.\(^7\) Additionally, different ministries adjusted their orders-in-council and ministerial regulations to the former directive according to Article 33 of the General Act.\(^8\)

\(\textit{Directive 2013/55/EU}\)


\(^7\) Parliamentary Papers II 2006/07, 31 059, nr. 3, p. 15-17.

\(^8\) RVA Bishoen & IM Welbergen, ‘Herziening richtlijn erkenning beroepskwalificaties’ (2014) NTER p. 11.
With respect to the Directive 2013/55/EU on the recognition of professional qualifications (hereafter: PQ directive) the Dutch legislator has started the implementation process. All relevant national legislation will be scrutinized. Generally, the Netherlands has been supportive to the adoption of the new Directive, particularly where it leads administrative simplification or the inclusion of an alert mechanism for suspended or prohibited activities of certain professionals, however, regarding the introduction of a European professional card. The European professional card is a digital card that is issued by the country of origin and will facilitate the process of recognition of professional qualifications. Since the Netherlands has a rather limited number of regulated professions, fears were expressed as to whether the introduction of such a card, which is the responsibility of the country of origin, would not increase the administrative burden on Dutch authorities? The competent authority in the Netherlands may be confronted with requests by Dutch nationals, who need this card to work in a regulated profession abroad, and will then have to check whether the conditions are fulfilled.

Applying and enforcing the PQ Directive – problems encountered

In its report of 2010 on the application of the PQ Directive to the European Commission, the Dutch government notes that in general no major problems have been encountered in applying the system of recognition of professional qualifications. But the government also states that certain aspects of the system could be improved. Regarding administrative procedures, these are in some cases still rather complex. Information on the quality of the educational programme, the differences between the educational programmes or on disciplinary or criminal procedures is sometimes poor, insufficient or even lacking.

Regarding the minimal training requirements, the criteria are, according to the Dutch government, open to multiple interpretations. The codification of the training requirements can have a stifling effect on the development of the educational system.


Furthermore, a number of profession-specific difficulties have been encountered in the Netherlands. Regarding veterinary surgeons, the Faculty of Veterinary Medicine of Utrecht University lodged a complaint with the Ministry of Agriculture, Nature and Food Quality (now merged with the Ministry of Economic Affairs) submitting that the automatic recognition of professional qualifications for veterinary surgeons is not desirable considering the differing quality of the educational programmes across the EU. Approximately 10 to 15% of the veterinary surgeons in the Netherlands comes from another EU Member State, particularly Belgium, Germany, Denmark, Italy and Sweden.

With respect to the profession of architects professional experience with a view to registration as an architect was originally not required. As a consequence, architects from other Member States, where professional experience is required, sought to register in the Netherlands, allowing them to use their title in other states (a so-called U-turn construction). The Netherlands has now adapted its legislation and included a requirement of two years professional experience before one can register as an architect.

A third issue that was observed in the 2010 report, is the fact that Article 7(4) of the PQ Directive restricts the legality of prior inspection of professional qualifications in case of temporary or incidental provision of services, which in the field of health care may compromise public health and safety. In the new PQ Directive (Directive 2013/55) Article 56a includes an alert mechanism for a number of professions, including doctors, specialists, veterinary surgeons, dentists, midwives and professionals exercising activities relating to the education of minors. This requires Member States “to inform the competent authorities of all other Member States about a professional whose pursuit on the territory of that Member State of the following professional activities in their entirety or parts thereof has been restricted or prohibited, even temporarily, by national authorities or courts”.

The Netherlands has welcomed this alert mechanism and has already set up a ‘black list’ of Dutch and foreign professionals working in the healthcare sector, who are prohibited or temporarily suspended from exercising their activities due to a court order.

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13 Report on the implementation of the EU Professional Qualifications Directive (23 April 2010), p. 9
14 Report on the implementation of the EU Professional Qualifications Directive (23 April 2010), p. 10
Qualifications obtained by EU citizens in the Netherlands

The scope of application of the old PQ Directive

In some cases the Dutch courts had to decide that the PQ Directive was not applicable, either because it concerned an ‘internal situation’ as the qualifications were obtained in the Netherlands, or it did not concern the recognition of a professional qualification as such, but the mere ‘re-registration’ of a qualification.

Internal situation

In 2012 the Council of State (Raad van State), the Dutch Court for administrative law, declared the PQ directive inapplicable when an applicant who had obtained her qualification as a psychologist in the Netherlands, the Member State of origin, requested the Netherlands to register and recognise her qualification. She had to register first as health psychologist before she could register as a clinical neuropsychologist, which decision she contested on the basis of the Services Directive (Directive 2006/123/EC)17 and the old PQ Directive. The Council of State first held that health services are excluded from the scope of application of the Services Directive. It then stated, by referring to the case law of the European Court of Justice, that the old PQ Directive does not apply to nationals who have obtained their qualification in the home (regulating) state.18

‘Re-registration’

In another case, the applicant requested the Dutch authorities to recognise his professional qualification as an internist, which was obtained in the Netherlands but recognised and registered in Belgium before. The Council of State held in an interim relief procedure that the principle of automatic recognition as laid down in the old PQ Directive was not applicable.19

Qualifications obtained by EU citizens in another Member State (EU qualifications)

The application and interpretation of the old PQ Directive


Refusal to register in the architects’ register

A number of Dutch cases concern the interpretation of a concept such as the ‘professional experience requirement’ in Article 13 of the old PQ directive. According to Article 13(2) of the Directive “[a]ccess to and pursuit of the profession [...] shall also be granted to applicants who have pursued the profession referred to in that paragraph on a full-time basis for two years during the previous 10 years in another Member State which does not regulate that profession, providing they possess one or more attestations of competence or documents providing evidence of formal qualifications”.

In this case the applicant had obtained a bachelor degree at the Faculty of Architecture of the Polytechnic University of Minsk. She then worked in the Netherlands, where after she obtained a Master of Arts (MA) degree from the Architectural Association School of Architecture (AA) in London by following an approved programme in Housing and Urbanism. The AA programme does not concern a regulated programme, which, according to the Bureau Architectenregister meant that she first had to pursue the profession as an architect for two years in another Member State before her profession could be registered in the Netherlands.

The Trade and Industry Appeals Tribunal, known as Administrative High Court for Trade and Industry, agreed and held that this requirement was not met, as the applicant, who had acquired her professional qualification in the United Kingdom, exercised her profession as an architect in the Netherlands, the host Member State. 20

Recognition of qualifications to practice as a health psychologist

Furthermore, the Council of State confirmed a decision adopted by the Minister of Health, Welfare and Sport with regard to the interpretation of Article 14 of the old PQ directive, which concerns the possibility for the host Member State to require from the applicant to complete an adaptation period of up to three years or to take an aptitude test under certain conditions, in another case.

In this case the applicant had followed courses in another Member State, France, that were significantly different from the training required for health psychologists in the Netherlands. She also obtained a PhD in clinical and social psychology. But the knowledge she had acquired during her education, training and work in France could not compensate the substantial differences that existed between the requirements for practising as a health psychologist in the Netherlands and the education and training acquired in France, which in part concerned pedagogics rather than psychology. In an interim judgment the Council of State, by extensively referring to both the Directive and the case

law of the European Court of Justice, \(^{21}\) held that the decision of the Minister of 18 December 2008 violated Articles 39 and 43 of the EC Treaty (now Articles 45 and 49 TFEU) and Article 14 of Directive 2005/36/EC. More specifically the existing framework for assessing the obtained qualifications did not comply with the requirements of EU law and therefore needed to be adapted.\(^{22}\) The Minister took a new decision, taking account of the requirements set by the PQ Directive, allowing the applicant to choose between completing an adaption period, or taking an aptitude test.\(^{23}\)

**Recognition of the qualification to practice as a nursery teacher**

In some other cases the Dutch courts more extensively reviewed the Minister’s decision. In 2010 the Minister of Education, Culture and Science refused recognition of applicant’s qualification as a nursery teacher. The applicant has the Belgian nationality and had obtained her professional qualifications in Belgium. In the following procedure the District Court of Arnhem noticed that in Belgium, the Member State of origin, the profession of a nursery teacher was a regulated profession, which was not the case in the Netherlands. However, in the Netherlands the profession of a primary schoolteacher is a regulated profession. Furthermore, in the Netherlands the nursery teacher’s training course is part of the schoolteacher’s training course. Hence, recognition of her professional qualifications would mean that she would in part get access to a regulated profession in the Netherlands – the profession as a schoolteacher -. According to the Minister the applicant’s admission as a nursery teacher on the basis of her qualifications obtained in Belgium would lead to organizational problems within Dutch schools. According to the District court, though, these problems are not as such that the public interests are at stake and cannot therefore justify a restriction on the free movement of persons.\(^{24}\)

**Nationality requirements for notaries**

With regard to the recognition of professional qualifications, one of the main issues, according to the 2007 report of the European Commission, was the nationality requirement for the profession of notary. The European Commission (hereafter: EC) reported in 2007 that the Netherlands intended to abolish the nationality condition for individuals who

want to practice as notaries.\(^{25}\) But this ‘process’ of abolishing the nationality requirement lasted for another 3 years, as the Dutch government wanted to wait for the judgments of the European Court of Justice (hereafter: CJEU) in cases concerning the nationality requirement for the profession of notaries. These cases were the result of infringement procedures brought by the EC against Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia.\(^{26}\)

**Qualifications obtained by EU citizens or non-EU citizens outside the EU**

In situations where qualifications are obtained outside the EU the relevant authorities will assess to what extent the diplomas obtained are equivalent to Dutch diplomas. They will also take into consideration the professional experience gained abroad. The EU legal framework does obviously not apply in these cases and the registration of a diploma obtained outside the EU may therefore be more complicated and take more time.\(^{27}\) The nationality of the professional does not seem to be a factor that plays a role in this context.

**II. The protection of economic rights of consumers**

**A) Implementation and application of the Unfair Commercial Practices Directive into Dutch law**

*Implementing the UCP Directive*

Rather than creating a separate, self-standing, ‘transposition law’, the Dutch legislator took a pragmatic approach by implementing and integrating the Unfair Commercial Practices Directive (hereafter: UCP directive) into existing legislation.\(^{28}\) The implementation into national law was realized through the adoption of the *Act of 25 September 2008 bringing Volumes 3 and 6 of the Civil Code and Other Acts into line with the Directive concerning unfair business*

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\(^{27}\) See for veterinary surgeons: https://www.diergeneeskunderegister.nl/doc/pdf/130501-Factsheet-DIRIS-april%202013-web-DEF_32629.pdf

to-consumer commercial practices in the internal market (hereafter: ‘UCP Act’)\textsuperscript{29}. This act describes which provisions of the Dutch Civil Code have been adjusted and adapted in order to implement the UCP Directive.

The main changes concern the amendment of Article 3:305d and a new section on ‘unfair commercial practices’ in Volume 6 of the Civil Code.\textsuperscript{30} Other national laws implementing the UCP directive are the UCP Act on the establishment of an Authority for Consumer & Markets, Act on Enforcement Consumer Protection, General Administrative Act, the Door-to-Door Selling Act, the Gas Act and the Book Pricing Act.

The text of the Unfair Commercial Practices Act is very close to that of the UCP Directive - provisions are often literally translated – yet, given the fact that the UCP Directive aims at full harmonization this is not an unwise decision.\textsuperscript{31} The UCP Directive also does not explicitly state which enforcement measures or -methods need to be used. Different legal facilities and/or administrative authorities can be called upon, as long as Member States ensure “adequate and effectives means (...) to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.”\textsuperscript{32}

The Directive frequently uses open norms, like “professional diligence”\textsuperscript{33} and “material distortion of economic behavior”,\textsuperscript{34} which are broad terms that are not clearly defined in the UCP Directive. The EU legislator chose to use these terms in order to cover all types of unfair commercial practices, even the ones that were not known or invented at the time of the adoption of the UCP Directive.\textsuperscript{35} The Dutch legislator decided to stay close to the text and spirit of the UCP Directive: the open norms were almost literally copied and integrated into national law\textsuperscript{36}. Article 6:193b, which implements Article 5 of the UCP Directive, states that:

“A trader shall be deemed to be acting unlawfully if he engages in an unfair commercial practice towards a consumer.

A commercial practice shall be considered unfair if the trader:

\textsuperscript{29}The proposal was presented on 15 January 2007, and accepted by the Dutch Assembly (Tweede Kamer) on 6 November 2007.

\textsuperscript{30}Article 1 of the Act of 25 September 2008 bringing Volumes 3 and 6 of the Civil Code and Other Acts into line with the Directive concerning unfair business-to-consumer commercial practices in the internal market; Article 2 of the Act of 25 September 2008 bringing Volumes 3 and 6 of the Civil Code and Other Acts into line with the Directive concerning unfair business-to-consumer commercial practices in the internal market.


\textsuperscript{32}Article 11(1) of the UCP Directive.

\textsuperscript{33}Article 5. (2) (a) jo. article 2 (h) of the UCP Directive.

\textsuperscript{34}Article 5 (2) (b) jo. article 2 (e) of the UCP Directive.


\textsuperscript{36}L Steijger, ‘Wetgevingspraktijken onder de loep genomen: een analyse van de implementatie van de Richtlijn Oneerlijke handelspraktijken in Nederland’ 2007 NTER p.124.
a) fails to display the appropriate level of professionalism and
b) the ability of the average consumer to make an informed decision is significantly restricted, or may be restricted, with the result that the average consumer makes, or may make, a decision that he would otherwise not have made.”

Both the concept of ‘unfair commercial practice’ and the catch all prohibition have thus been – although in slightly different terms – incorporated into Dutch law. Critics have argued that by simply copy-pasting abstract EU-terms into national legislation, Member States create a situation in which businesses and consumers do not know how to act and national judges do not know how to interpret the rules.

Instead of harmonizing the national laws of the Member States, this might even cause more differentiation between the various levels of consumer protection in Member States. Nevertheless, it is expected that the open norms will be further explained and elaborated by the CJEU in its case law, which will facilitate the implementation of the Directive both for national judges as well as consumers.

**Applying and enforcing the UCP Directive**

The Dutch legislator did not choose between strictly civil or administrative enforcement; both are possible. Regarding administrative enforcement, the Authority for Consumers & Markets (De Autoriteit Consument en Markt; hereafter: ACM) is entrusted with the enforcement of the UCP Directive based on the Act on Enforcement Consumer Protection. Its sanctions may include an administrative penalty or an order subject to a penalty (section 2.9 of the Act on Enforcement Consumer protection). Next to the ACM, the Advertising Code commission (Stichting Reclame Code) is also authorized to act against unfair commercial practices. Based on the Advertising Code, also competitors can file a complaint for the Advertising Code commission.

Consumers can file a complaint by phone, e-mail or regular mail at Consuwijzer, which is constituted by ACM.

With regard to enforcement through court action, section 3:305 d prescribes the following specific procedure: The Court in The Hague may order the cessation of any infringement, within the meaning of Article 1.1k of the Consumer Protection (Enforcement) Act. Furthermore, the general civil procedure against an unlawful act applies. The consumer as well as the ACM can start a court action.

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37 Article 1 of the Act of 25 September 2008 bringing Volumes 3 and 6 of the Civil Code and Other Acts into line with the Directive concerning unfair business-to-consumer commercial practices in the internal market.
38 Article 5 of the UCP Directive, now article 193b (1) BW.
Looking at the case law of the Dutch courts, there have been a number of cases decided by different courts on the UCP Directive. These cases can inter alia be found at the European Commission’s website on Unfair Commercial Practices: [https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.showCountry&countryID=NL](https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.showCountry&countryID=NL) (consulted: 3 June 2015).

The judgments of the Dutch courts firstly concern the general scope of application of the UCP Directive. One case concerned a manufacturer and trader of jewellery, who claimed that the defendants, also active in the jewellery business, infringed plaintiff's copyrights by trading in identical and/or similar jewellery. They invoked inter alia section 3A of book 6 of the Dutch civil code but the District Court of Roermond held that legal provisions in national law implementing the UCP Directive cannot be applied in a business-to-business ("B2B") context. Their scope is limited to a business-to-consumer ("B2C") environment.41

But under certain circumstances small and medium sized enterprises can seek legal protection under the UCP-rules in case they can be considered equivalent to a consumer on the basis of certain factors. According to the District Court of North-Holland in this case on advertising, the following factors were relevant:

- The plaintiffs were small organizations with a low budget, while the defendants, on the contrary, were commercial companies concluding commercial contracts on a daily basis;

- In the present case, the plaintiffs concluded contracts containing clauses that went beyond the scope of their normal businesses;

- The defendants had taken the initiative to contact the plaintiffs by phone to offer services;

- A consumer could have entered into such agreements as well.42

Most other cases concern the interpretation of concepts, like, what does constitute a misleading commercial practice within the meaning of the Directive and Dutch law,43 misleading omissions, whereby the average consumer is taken as a point of departure,44 or who is ultimately responsible for the unfair commercial practice? In the latter case, the question arose as to whether someone could be regarded as officier of the UCP-rules in case the violations have not been committed by himself but by people for whom he is ultimately responsible. The District Court of Rotterdam

answered this question in the affirmative. It held that considering the role of the plaintiff in the violations of the rules regarding unfair commercial practices - i.e. the plaintiff carried the ultimate responsibility in respect of the recruited sellers -, the plaintiff was considered to be liable for the acts of the sellers on the basis of the author in an organization context-concept.

B) Implementation of the Consumer Rights’ Directive


The implementation of this Directive was realized through the Act of 12 March 2014 bringing Volumes 6 and 7 of the Civil Code, the Consumer Protection (Enforcement) Act and some Other Acts into line with the Directive on Consumer Rights (2011/83/EC) (hereafter: ‘Implementation Act Consumer Rights’). Similarly to the Act implementing the UCP Directive, the Dutch legislator chose to closely follow the text of the CRD here as well. Furthermore, the Directive should not lead to ‘gold plating’, which is a term used in situations where the implementation of a Directive is used as an opportunity to introduce additional legal rules in this field.

This, however, could not prevent that the Dutch legislator was rather late in implementing the Directive. The Act implementing the CRD was published in the Staatsblad, the official journal of The Netherlands, on 3 April 2014, whereas the Directive included an implementation deadline of 13 December 2013.

Scope of the CRD

In accordance with a general trend in the Netherlands, the legislator seeks to prevent that the implementation of Directives, like the CRD, entail a more encompassing revision of national legislation. It has not, or hardly used the

(limited) possibilities that the Directive offers to extend the reach of consumer rights. 48 One the questions was whether or not the scope of the CRD was to be expanded to all contracts, or to be limited to B2C-contracts, and whether or not the provisions should be applied also to these contracts which were excluded from the scope of the CRD, such as contracts for the construction or sale of immovables. Aanwijzing 331, which is a non-binding instruction for regulation but followed by the legislator, indicates that the Dutch legislator should not make use of the options in a directive to derogate from the directive or to provide additional rules. 49

No additional language requirements

The fact that the Dutch legislator stays as close as possible to the text of the CRD implies that no additional pre-contractual information or language requirements are imposed on sellers or service providers. Loos refers in his paper to the Italian seller, who may provide the information he is required to give in Italian, as long as he does so in a clear and comprehensible manner. 50 However, where the information is provided in a language, which is different from the contracting language, this is probably in breach with the transparency principle and considered to be an unfair commercial practice. 51

The use of optional possibilities

The European Commission has published a survey on the use of regulatory choices under Article 29 of the CRD. These are the ‘may’ provisions of the Directive, which the Member State can choose to implement or not. Although according to the explanatory memorandum of the Act implementing the CRD in principle no use will be made of these possibilities that the Directive offers, it is striking to observe that the Dutch legislator has in fact implemented four out of seven of these ‘may’ provisions. 52 They concern:


50 M. Loos, ibid, p. 3.

51 M. Loos, ibid, p. 3.

- Article 3(4), which stipulates that the CRD does not apply to off-premises contracts less than 50 euro; the legislator was of the opinion that this would be too burdensome for the trader and thus hereby copied the exception of the Doorstep Selling Act.  \(^{53}\)

- Article 7(4), which makes it possible to not apply the light information regime for repair works under 200 euro; according to the Dutch legislator, applying the light information regime would not lead to a significant decrease in the administrative burden.

- Article 8(6), which requires written confirmation of contracts concluded by telephone; the Dutch legislator, though, restricted the scope of this provision to contracts between consumers and suppliers of services of gas, electricity, water or district heating, which are concluded as a result of a telephone call. The government believes that with respect to these types of contracts there is a substantive risk that the contracts are concluded as a result of aggressive or misleading conduct.  \(^{54}\)

**Enforcement of the CRD**

The CRD is publicly enforced by the Authority for Consumers and Markets (ACM) and, individually, by the courts or by Alternative Dispute Resolution (ADR).

As the CRD was only recently implemented into Dutch law, there are hardly any cases, which specifically concern the implementing Act and the CRD. It is interesting to observe that in a case of the Court of Appeal of ’s-Hertogenbosch of April 2014, the Court referred to the CRD in assessing whether the concept of consumer should or could be extended to firms. According to the Court, the CRD maintains the concept of consumer as it was previously incorporated in EU legislation and does thus not include firms.  \(^{55}\)

**III. The protection of citizen’s rights in the digital era**

Rapid technological developments in the field of the Internet have considerably increased the possibilities for citizens to do business, also cross-border, to provide and receive information via the Internet and to process and store data. The positive effects of these developments can hardly be denied. But at the same time there are growing concerns about the protection of citizens’ personal data and privacy in the digital society, not only as a result of the state

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\(^{54}\) M Loos, ibid, p. 4.

seeking to collect personal data in its fight against crime and terrorism, but also of the increasing ability and desire of companies using these data for business purposes.

Trust is essential for the development of the Digital Single Market and the abolishment of barriers for citizens to sell and purchase goods and services cross-border. A number of measures have been adopted at EU level to enhance the internal market and to protect citizens’ privacy and data. The most relevant Directive is Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. This Directive was at issue in the case Google Spain, in which the CJEU decided that the Directive ought to be interpreted as including a ‘right to be forgotten’. Other Directives that deal with the protection of citizens’ privacy and personal data specifically relate to electronic communications networks and the electronic communications sector. We will focus on the implementation of the Data Protection Directive in the Dutch legal order.

Implementation of the Data Protection Directive

The Data Protection Directive (hereafter DP Directive) has been implemented into Dutch law by the Law on the Protection of Personal Data (Wet Bescherming persoonsgegevens, hereafter: Wbp). Before the adoption of the Wbp Article 10 of the Dutch Constitution (Grondwet, hereafter: Gw), Article 8 ECHR and the Law on the Registration of Persons (Wet Persoonsregistraties, hereafter: WPR) covered the right of citizens to protection of personal data.

The Dutch legislator adopted a rather nuanced approach in implementing Article 5 of the DP Directive, which reads as follows:

“Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful.”

The Dutch legislator chose to concretize only part of the rights and principles laid down in the Directive in the Wbp and, it has furthermore incorporated the principles of the Directive in sector-specific legislation. An example is Article 9(2) Wbp, which elaborates Article 6(1) sub b of the DP Directive:

“Member States shall provide that personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards.”

57 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 (Data Protection Directive); Case C-131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (ECJ, 13 May 2013) para. 94 (Google Spain).
59 See also Explanatory Memorandum, Memorie van Toelichting (MvT), p. 7.
Article 9(2) Wbp stipulates which factors play a role in determining whether the processing of data is compatible with the objective for which the data have been obtained.  

The right to be forgotten, or rather the right to ‘resistance’

The Wbp does not now an explicit right to be forgotten but rather a right to resist the (un)lawful processing of data (Articles 36 and 40 Wbp), which has also been subject to a procedure before the courts, applying the CJEU’s judgment in Google Spain (see hereafter). The Wbp thereby follows the articles of the DP Directive. In case of lawful processing of data (Article 40 Wbp), other principles, in particular proportionality and subsidiarity have to be taken into account. The Explanatory Memorandum does not explicitly refer to other fundamental rights, like the freedom of information or the freedom to conduct a business. With regard to the latter, this is perhaps not that surprising, considering the fact that such a right is unfamiliar to Dutch constitutional law.

Applying and enforcing the Data Protection Directive

The Dutch Data Protection Authority (College Bescherming Persoonsgegevens -DPA) supervises processing of personal data in order to ensure compliance with the provisions of the law on personal data protection and advises on new regulations. The Dutch DPA is entrusted with the administrative enforcement of the Wbp (particularly Article 60 Wbp). The tasks and powers of the Dutch DPA particularly concern: supervision - the Dutch DPA can use its (administrative) enforcement powers, for example by issuing an order to cooperate or by issuing a conditional fine -; providing advice; providing information, education and accountability; international assignments.

Next to administrative enforcement, the Wbp can be enforced by means of criminal or civil law.

National case law after Google Spain

Meanwhile, there have been three national follow-up judgments by Dutch courts on the question of whether Google is required to remove certain links from the search results of its search engine. The three cases concern ‘right to be forgotten requests’ by a businessman and a convicted criminal respectively, which were rejected by Google.

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61 Explanatory Memorandum, p. 163.

Court of Amsterdam, 12 February 2015 – preliminary injunction

This case was initiated by a business partner of KPMG (hereafter: X), which is a large accountancy firm in the Netherlands. He had requested Google to remove the links that refer to websites on which newspaper articles were published, inter alia by the tabloid ‘De Telegraaf’. The newspaper articles concerned a conflict between X and a construction company regarding the payment for the construction of a luxurious house. According to the newspaper article, the construction company claims from X an amount of 200,000 euro for additional work, which it has never received, and as a consequence replaced the locks of the house. X was therefore forced ‘to camp’ in three containers on his estate.

In the following procedure before the Court of Amsterdam X requested Google to remove the URLs of the webpages, which connect X with the so-called ‘retention or container story’. In assessing the case the court refers to Dutch law, the Wet bescherming persoonsgegevens (Wbp) and in particular Article 36 thereof, the Data Protection Directive (Directive 95/46/EC) and the CJEU’s judgment in Google Spain. The court then reiterates the CJEU’s judgment in Google Spain and holds that if the “information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased”. 63

The Court, whilst referring to Article 40 Wbp, states that it must be examined whether there are important and justified reasons relating to the specific personal circumstances of the claimant. And in applying Articles 36 and 40 Wbp, various fundamental rights that are at issue must be taken into account, i.e. the right to privacy (Article 8 ECHR) and the freedom of information (Article 10 ECHR and Article 7 of the Dutch constitution). Interestingly, the Court does not refer to the EU Charter and the right to protection of personal data as contained in Article 8.

The Amsterdam district court then concludes that are no important and justified reasons for X to claim a right to request Google to remove the links to the newspaper articles. In short, the court is of the opinion that the freedom of information prevails over the right to be forgotten, the right to privacy of the business man. The court considers that the right to remove the links following a search on the Internet constitutes an exception to the general rule (point of departure), which concerns the right of Google Inc. to freedom of information. 64 This seems to be an erroneous interpretation of the CJEU’s judgment in Google Spain, in which it assumed that the right to protection of personal data and the right to privacy take precedence over other, conflicting, fundamental rights.

Court of Amsterdam, 18 September 2014

This case concerned a criminal who was sentenced to 6 years in prison for an attempt to evoke an assassination. A writer, who found inspiration in this event, wrote a book in a crime series, which was published in 2013. In this book, 63 See also Case C-131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (ECJ, 13 May 2013) para. 94 (Google Spain). 64 District Court of Amsterdam (18 September 2014) ECLI:NL:RBAMS:2014:6118,para. 4.7 <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2014:6118> accessed 25 June 2015
which is described as a mixture of facts and fiction, the person who carries the name of the convicted criminal commits a murder.

The criminal had requested Google to remove a number of URL’s of websites for books, which include information of the book containing his name, from the search results following a search on his name. The court of Amsterdam in the following procedure refers to two fundamental rights that are at issue, i.e. the right to privacy as laid down in Article 8 ECHR and the freedom of information as contained in Articles 10 ECHR and 7 GW. The court does not mention the EU Charter of Fundamental Rights. Furthermore, it is noteworthy that the court speaks of the freedom of information – or the fundamental ‘right’ to information – of Google - and mere ‘interests’ of others, who include the users of the Internet, webmasters and other providers of information.

Similarly to the above-mentioned case, the Court adopts a restrained approach when it comes to the right to be forgotten and the corresponding restrictions imposed on search engines like Google. According to the court of Amsterdam, the judgment in Google Spain does not aim to protect people against negative information on the Internet, but against being chased for a long time or against announcements, which are irrelevant, excessive or unnecessarily defaming. The fact that you commit a crime has, according to the court, the consequence that you come up negative in the news, which leaves traces on the Internet for a considerable amount of time. As a result, Google did not have the obligation to remove the links to the webpages, which concerned the convicted.

The judgment was happily received as giving more justice to the right to information. But it is questionable whether the interpretation of the court of Amsterdam of Google Spain in this case, similarly to the above-mentioned case, is entirely correct. The right to privacy is (too) strictly interpreted – particularly by introducing the condition that announcements should be unnecessarily defaming or excessive –, which at least gives the impression that the freedom of information of Google prevails. In the hereafter discussed follow-up case as a result of an appeal lodged by the convicted, the Court of Appeal of Amsterdam appears to correctly interpret and apply the criteria set out by the CJEU in Google Spain.

Court of Appeal of Amsterdam, 31 March 2015

The Court of Appeal of Amsterdam firstly refers to the Data Protection Directive (Directive 95/46/EC) and states that the point of departure is that every person (data subject) will have the right to rectification, erasure or foreclosure of data, if it appears that processing of these data is incompatible with the Directive. It then continues by stating that
‘such an incompatibility cannot only be the consequence of inaccuracy of the data, but also of the data being inadequate, extraneous or excessive in relation to the aims of processing, because they have not been adapted meanwhile or because they are being stored longer than is necessary’. The court explicitly refers to Articles 7 and 8 of the EU Charter, which allows the data subject to request, that the information in question no longer be made available to the general public by its inclusion in such a list of results. And this, however, will not be the case, if interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question, such as the role played by the data subject in public life.

Although eventually the court of appeal rejects the claim by the convicted, as he had been convicted for a serious crime and the public has an interest in getting access to information on serious misdemeanours and as a consequence the conviction of the ‘escort boss’, its reasoning substantially differs from that of the district court of Amsterdam. The judgment implies that the average criminal who has not been convicted for ‘serious’ crimes should have ‘a right to be forgotten’.

The freedom to conduct a business vis-à-vis the protection of privacy or personal data?

The above-mentioned cases have been decided against the backdrop of two conflicting fundamental rights: the company’s freedom of, or right to, information (Google Spain), and the data subjects’ rights to privacy and protection of personal data. The freedom to conduct a business did not play a role in the judgment of the CJEU. In cases, however, where Internet service providers are confronted with Internet pirates, e.g. illegally downloading music, and intellectual property right holders, the European Court of Justice – and now also the national (Dutch) courts - have referred to the freedom to conduct a business as contained in Article 16 of the EU Charter. It has sometimes given preference to the Internet service providers’ freedom to conduct a business with a view to prevent them from having to install expensive and complicated filtering or blocking systems, but thereby outflanking other fundamental rights, such as the rights of Internet users to privacy and to the protection of personal data.

The case law in the field of the Internet is developing and so is the way in which the different economic interests and rights, and other fundamental rights, of the various parties are balanced by the CJEU and the national courts.

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69 See also Case C-131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (ECJ, 13 May 2013) para. 97 (Google Spain).
70 Idem, para. 97.
71 See, for instance, CJEU 6 September 2012, C-544/10, Deutsches Weintor; CJEU 22 January 2013, C-283/11, Sky Österreich; CJEU 24 November 2011, C-70/10, Scarlet Extended; CJEU 18 July 2013, C-426/11, Mark Alemo Herron.
Conclusion

This report has shown that the Dutch legal system in the fields of professional qualifications, consumer protection and data protection has - so far - not revealed any major obstacles for (EU) citizens to exercise their economic rights in the Netherlands. With respect to the protection of personal data and particularly the right to be forgotten, the case law is still in its infancy. It is interesting to see, though, that already three cases have been decided by the Dutch courts following the CJEU’s judgment in Google Spain, having to balance the (economic) rights and interests of Google and other parties on the Internet, vis-à-vis the rights to privacy and protection of personal data.
DELIVERABLE 5.2

COUNTRY REPORT

SPAIN

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European Citizens’ Economic Rights has been at the core of the European integration process inasmuch at this has been primarily conceived as an economic integration process. In fact, although European Citizenship was forged by the Maastricht Treaty of 7 February 1992, economic rights were still regulated by Treaties and Community Secondary Law.

1. General Aspects on application of EU Law in Spain

As for Spain, transposition of Directives related to economic rights must take into account, in one hand, that –according to the Council of State (Consejo de Estado), the advisory organ of the Government- domestic transposition norms must have the same rank as those which the matters of the transposable Directive currently have. The problem arises when such matters are submitted to the principle of reserve of Law. Then, in those cases, due to the length of the legislative process, sometimes is not possible to respect the transposition terms and the solution which has been found is the for of the Royal Decree Law. However, if there is not such reserve of law, the form of Regulation (Reglamento) -through a Royal Decree- is normally used.

On the other hand, it must be remembered that Spain, as a State with decentralized structure –the Autonomous Communities-, institutional autonomy operates according to Spain’s Constitution provisions. Then, if the matter of the Directive to be transposed is a matter of autonomic competence, the transposition will generally correspond to Autonomous Community, following the rules described above as to the rank (legislative or regulatory) of the domestic norm to be adopted. The relevance of the powers in the hands of Autonomous Communities must not be underestimated; in fact, there are salient developments concerning consumer protection, where their powers are exclusive –notwithstanding the basic legislation attributed by Spanish Constitution to the State. However, even in areas like professional qualifications there has been incidental (collateral) regulations adopted by many Autonomous Communities and, sometimes, regulation related to data protection has been adopted by some Autonomous Communities (Catalonia, Basque Country and, more recently, Andalusia) as a gesture of “independence” towards the State.

Moreover, according to the reports periodically submitted by the Ministry of Foreign Affairs and Cooperation, Spain continues to test a sustained effort to improve the transposition of directives, forming part of those Member States that meets the transposition target set by the European Council, showing sometimes a brilliant performance (0,8% of transposition deficit in May 2008). This tendency was sustained along the years: even in 2011 Spain showed one of the best rates –the fifth of 27th Member States- on transposition of Directives.\(^1\)

\(^1\) In fact, in this year there were only 17 late transposition infringements launched by European Commission against our country. Only Ireland, Latvia, Denmark and Malta showed better scores. See 29th Annual Report on Monitoring the Application of EU Law (2011), Brussels, 30.11.2012, COM(2012) 714 final, p. 4. Although this year Spain started a sound decrease in the fulfilment of their obligations, even this year it was not involved (neither in 2012 nor in 2013) in the procedure for penalties related to late transposition infringement, established under art. 260.3 TFEU (Ibid., p. 5; 30th Annual Report on Monitoring the Application of EU Law (2012), Brussels, 22.10.2013, COM(2013) 726 final, p. 5; 31st Annual Report on Monitoring the Application of EU Law (2013), Brussels, 1.10.2014, COM(2014) 612 final, p. 6).
However, probably due to the severe restrictions introduced in the work of Public Administrations along the financial crisis, starting from 2011, these trends had changed substantially in more recent times. In fact, actually, Spain - with 86 infringement cases more accumulated in 2014 - is the third country in the European Union not to apply correctly European standards or transpose them incorrectly or in late form, as reflected in the annual report of the European Commission for the last year (2014). As a matter of fact, only Greece and Italy - with 89 records each one - have more open cases in late 2014 than Spain.

2. Access of Economic Actors to the Internal Market

As has been repeatedly said, mobility of the workforce, both between jobs (job mobility) and between countries (geographic mobility), is a fundamental requirement to help the European economy to adapt more easily to the changes that occur continuously in an increasingly competitive global economy.

With this objective, one of the main fronts of action amounts to enhance the recognition of professional qualifications, given that existing national barriers are one of the main obstacles to labor mobility.

2.1. Introduction: Regulated Professions and Internal Market. The case of Spain.

The adoption on 28 December 2006 of EC Directive 2006/123 regarding services in the Internal Market was seen in Spain as a challenge and an opportunity, as a unique occasion to lower unjustified and disproportioned barriers to the access and exercise of a service activity in certain sectors, which will encourage business activity and contribute towards improving regulation, gaining in productivity, efficiency and employment.

However, in practice the transposition of the Directive 2006/123 was extremely complex, since it affects all service sectors (70% GNP) in which 66% of Spanish employees work. Concerning this
development one of the most relevant issues is connected to the situation of regulated professions, inasmuch Spain has a significant number\(^3\).

As for the distribution in Spain of professions regulated there are\(^4\):

**Reserves of activities** which refers to professions where certain activities are reserved to the holders of a specific professional qualification. This may include instances where there are shared reserved activities with other regulated professions. In Spain those professions are 12: among them, electrician, optician-optometrist, sport instructor, tourist guide, driver instructor or psychologist.

**Protected title (without reserves of activities)** which refers to professions where only the title is protected. In concerns only Real State Agents.

**Reserves of activities and protected title** which refers to professions where there are both reserved activities and protected title. In Spain there are only 5 professions listed: Civil Engineer, Technical Civil Engineer, Architect, Technical Architect and Physiotherapist.

\(^3\) In fact, according to the EC Regulated Professions Database Spain is the 10\(^{th}\) country of European Economic Area with most professions regulated. Among its reference group (DE, FR, UK, IT, POL), only Poland (347), France (260) and United Kingdom (221) have a higher level.

However, Spain has not yet submitted any information concerning 172 regulated professions as for the type of regulation applicable. Among them, there are included many of Higher Education diplomas, but also other professions linked with vocational education and training (sailor, diver, body guard, paymaster, actuary, etc.).


Annex VIII of the Royal Decree 1837/2008 describes those professions and activities regulated in Spain. As has been pointed, the core concept is that of "regulated profession", which differs from unregulated professions and activities i.e. which are freely exercise and therefore require no recognition. It should also be noted that, according to Article 45 of the Treaty establishing the European Community, Royal Decree 1837/2008 shall not apply to professions and activities involving the exercise of public authority, such as notaries. On the other hand, Annex IX refers to regulated professions for which exercise precise knowledge of national law is required and that, therefore, applicant has no option between fitness assessment or training. Finally, under Annex X, according to article 73, there is a description of Spanish authorities competent in relation to the various regulated professions.

Acting in such way, Spain -fiercely defending its exclusive power to regulate professions- sustains that it has a discretionary power to decide on it. According to Spanish authorities, when social reasons warrant undertaking the regulation and management of a particular profession or professional capacity, it is incumbent for the Legislature to define the deemed skills that are proper and, where appropriate, their connection with the possession of a certain official title. Such move has been harshly criticized. As wisely has been pointed:

"Regarding restrictions to professional practice in Spain, it should be emphasized that, in general, they are not set in specific provisions, but in most cases in a leafy integrated by

5 SOJ, n° 280, 20 November 2008. Such regulation was questioned by different Spanish Professional Associations of Engineers, sustaining presumed changes introduced in their professions; those requests were consistently dismissed by the Supreme Court (Third Chamber-Contentious Administrative) in their Judgments of 13 July 2010, 22 December 2010, 1 March 2011, and 10 October 2011.

6 Such distinction –professions and activities- was defined by the Constitutional Court in its Ruling 386/1993.
infra-Statutory regulations, whose adoption by the administration has no other foundation than general clauses, only indirectly related to the regulated matter. “7

According to this author:

“Hence, to avoid a regulation totally left into the hands of the Administration, we should have in mind as a parameter for their validity the principle of freedom enshrined in section 1.1 of Spanish Constitution as a higher value of our legal system, from which it follows that citizens are allowed to carry out any activities not prohibited by law or whose exercise the law does not subordinate to certain conditions, and all in compliance with the principle of administrative legality, according to sections 103.1 and 93 of Spanish Constitution.”8

Unfortunately, this openness has not been shared by the supreme interpreter of Spain’s Constitution. In fact, early, confirming the wide discretion of the Legislature -and of the Public Administration-, the Spain’s Constitutional Court in its Ruling 42/1986 stated that:

“bearing in mind the requirements of public interest and the data produced in social life, is for the legislature to decide if a profession must remain entirely free or become regulated.”9

Notwithstanding, more recently, the case law of the Supreme Court has defined in narrower terms the powers in the hands of the Legislature, stating that:

“...the Legislature can create new professions and regulate their exercise, (but) taking into account, as has been said, that the regulation of the exercise of a profession entitled should be based on the criterion of public interest and having as a limit the respect of the substance of the professional freedom. And bearing in mind also that the scope of these regulated professions should have a restrictive treatment, and therefore applies only, as already said, to the professional activities affecting the public and general interests.”10

Moreover, it should be borne in mind that in Spain the Community system on the recognition of professional qualifications regulated by the Royal Decree 1837/2008- coexists with the procedures for approval and recognition of titles and foreign studies, currently regulated by Royal Decree 285/2004 of 20 February, on the conditions of approval and Recognition of foreign qualifications and studies of Higher education, and by Royal Decree 104/1988 of 29 January on the approval and recognition of diplomas and foreign studies of non-university education. In those cases, unlike the Community system set out by Royal Decree 1837/2008, whose foundation and effects are professionals, and which it is based on the freedoms of movement, establishment and provision of

7 GONZÁLEZ CUETO, T (2007),“El concepto de profesión regulada a que se refiere el documento La organización de las enseñanzas universitarias en España”, Informe para el Ministerio de Educación y Ciencia, Secretaría de Estado de Universidades e Investigación, 11 de abril de 2007, p. 12.

8 Ibid.


10 Supreme Court (Contentious-Administrative Chamber, Section 4), Judgment nº 2966/2012, 28 March 2012. In the same way, see Supreme Court (Contentious Administrative Chamber, Section 4), Judgement nº 2998/2012, 27 March 2012.
services within the objective of a single market, such internal regulations provides for an academic comparison, but its effects are both academic and professional, because since its approval confers the full effect, academic and professional, if applicable, to the Spanish title with that is homologous.

From another point of view, the Spanish legislation has been affected by the rules governing services.

Finally, it must be recalled the incidence of Autonomic Communities (ACs) Legislation related to the creation of Professional Associations, as the Constitutional Court has recognized such competence in the hands of the Autonomous Communities, notwithstanding the power of the State to regulate the basic trends of this matter (Constitutional Court Rulings 76/1983 and 20/1988)\(^\text{12}\). However, this ACs legislation, sometimes, has been modified –suppressing restraints to professional activities linked previously to compulsory affiliation to professional associations- as a way to transpose the content of EC Directive 2006/123 regarding services in the Internal Market: e.g. art. 9 of the Law 8/2009, 21 December, on measures to liberalize and support Madrid enterprises, modifying the Law 19/1997, of July 11, on Professional Associations of the Community of Madrid.

2.3. Providing information on professional qualifications: The role of IMI in Spain


One of the tools most relevant to handle correctly the applications concerning professional qualifications is the IMI\textsuperscript{13}, as the figure (below) shows:

![Distribution of time of answer in Spain](image)

\textit{Source: Ministry of Finance and Public Administrations (2012)}

In Spain, the efficiency of this system is clearly revealed by the records (below) related to the time between question and answer among Member States Public Administrations concerned (period January-May 2012). In fact, according to the European Commission, in 2013, as in the previous period, Spain has performed extremely well in IMI even though it has had to deal with a high number of incoming requests. Since the last Scoreboard, Spain has even further improved its already outstanding results. Furthermore, Spanish authorities are one of the fastest in accepting and replying to incoming requests. These efforts are clearly appreciated by their counterparts and should be continued\textsuperscript{14}.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|c|c|c|c|c|}
\hline
Year & Q1 & Q2 & Q3 & Q4 & Q1 & Q2 & Q3 & Q4 & Q1 & Q2 & Q3 & Q4 \\
\hline
2009 & 13 & 45 & 123 & & & & & & & & & \\
\hline
\end{tabular}
\caption{Distribution of time of answer in Spain}
\end{table}

\textsuperscript{13} http://ec.europa.eu/imi-net

In Spain the Ministry of Finance and Public Administrations is the authority responsible to coordinate at national level the functioning of IMI, integrating both State’s Authorities and Autonomous Communities organs (See below).
Also, it must be taken into account that since September 2014, the launch of notifications in the area of Professional Qualifications means that Member States can use IMI to notify new diplomas for architects and medical professions (doctors, dentists, nurses, midwives and veterinarians)\(^\text{15}\).

2.4. Qualifications obtained by EU citizens in another Member State (EU qualifications)

Within the general system of recognition of higher education diplomas laid down in Directive 2005/36/EC, which applies to diplomas awarded a cycle of post-secondary education of at least three years, and entitle the holder to pursue a profession in the State of origin, provided that it is regulated in the host.

2.4.1 Recognition at State level.

According to the art. 70 of RD 1837/2008, at State level, each sectoral Ministry has competences concerning recognition of professional qualifications related to their field of activity. However, the national contact point is placed in the Ministry of Education\(^\text{16}\).

The Ministry of Health, Social Services and Equality, process and resolve applications for recognition to practice in Spain of the regulated professions (Annex X of Royal Decree 1837/2008 of 8 November), and the General Health Psychologist diplomas\(^\text{17}\). As for the diploma of social worker the competent authority to recognize inside the Ministry is the General Direction on services for Family and Childhood\(^\text{18}\).


\(^{16}\) Ministry of Education, Department of Qualifications and Recognition of Qualifications, Paseo del Prado, 28, E-28014 Madrid (Responsible: Margarita Lezcano Núñez-Mujica; Tel: +34 91 506 57 38/ Fax: +34 91 506 57 06). E-mail: margarita.lezcano@educacion.es

\(^{17}\) The later one, according to the seventh additional provision of Law 33/2011, 4 October, on General Public Health (SOI, nº 240, 5 October 2011), which provides that it will be considered entitled and regulated health profession under the name of General Health Psychologist's degree / graduate level, under the terms provided in Article 2 of Law 44/2003, of 21 November, on the Regulation of Health Professions, the graduates / graduates in psychology when developing their professional activity or self-employed in the health sector, where, besides the aforementioned degree bearing the official title of Master in Health Psychology General, whose curricula are adjusted, whatever the university that imparts to the general conditions set by the Government under the provisions of Article 15.4 of Royal Decree 1393/2007, of October 29, on the organization of official university studies.

\(^{18}\) Order SSI/131/2013, 17 January (SOI, 1 February 2013). According to this order, the applicant must provide, among other documents, a certification of the competent authority of the Member State of
The Ministry of Education, Culture and Sports handles –through its General Technical Secretariat- applications for the recognition of the following professions: Teacher of Early Childhood Education, Primary Teacher Education, Professor of Compulsory Secondary Education, University Professor, Professor of Art Education, Professor of Language Teaching, Professor of Sports Education and Professor of Vocational Training19.

The Ministry of Works and Public Procurement it handles Civil Engineer, Channels and Ports, Aeronautical Engineer, Engineer of Public Works, Technical Engineering in Topography and Aeronautical Engineer20. Moreover, it is for the sectoral centers listed below, the implementation of Directive 2005/36/EC or, where appropriate, sector-specific directive as regards the recognition of certificates and formal qualifications professional titles other than post-secondary education of at least three years; and, where appropriate, those other planned in other specific rules providing for the issuance or validation of certificates and licenses:

- Directorate General of Land Transportation (or, where appropriate, the competent body of the Autonomous Region in which recognition is requested: transport agency, warehouseman-distributor, freight)21.


origin demonstrating that the applicant is a professional who it is not disqualified to practice (Certificate of good standing) and meets the requirements of EU Directive to exercise it (this document is void if not submitted within three months following the date of issue), a certificate of the competent authority of the Member State of origin demonstrating that the title presented allows practice in the country of origin and also meets the conditions laid down in Directive 2005/36/EC, and a certificate on the title stating the specific content of practice, issued by the Member State competent authority, on having worked for at two years full-time during the previous ten years, only in the event that this is not a regulated profession on that State.

19 As for the approval of foreign higher education studies, involving both academic and professional purposes, really a different concept and normatively differentiated of the recognition of professional qualifications See Royal Decree 967/2014, 21 November (SOJ nº 283, 22 November 2014).

20 Order of the Ministry of Parliamentary Relations and the Government Secretariat, of 12 April 1993, which develops the Royal Decree 1665/1991, of 25 October, regulating the general system of recognition of qualifications of Higher Education of the members of the European Economic Community which require minimal training of three years, as it affects the profession of Civil Engineer, Channels and Ports, Aeronautical Engineering, Telecommunications Engineering, State Engineer of technical Works, Surveying Engineer, Aerospace Engineer, Telecommunications Engineer, and Technical Architect (SOJ, 20 April 1993).

21 As for procedures intended to recognize in Spain, to citizens from other Member States of the European Union, the requirement of professional competence required to practice the profession of road transport and auxiliary and complementary activities thereof regulated by Regulation (EC) no 1071/2009 of European Parliament and the Council, 21 October 2009, see http://www.fomento.gob.es/MFOM/LANG_CASTELLANO/DIRECCIONES_GENERALES/TRANSPORTE_TERRESTRE/MERCANCIAS/Acceso_transportista_ESP.htm
• State Aviation Safety Agency (Crew cabin, and others)

As for the Ministry of Industry, Trade and Tourism, it handles the Telecommunications Engineer and Technical Telecommunications Engineer.

The Ministry of Agriculture handles the applications of recognition for professional purposes of EU higher education qualifications to practice in Spain the profession of Agronomist, Forest Engineer, Engineer on Agricultural, Technical Forestry Engineer, Geologist and Winemaker.

In the case of the Home Ministry, recognition of professional qualifications from EEA University diplomas or VET qualifications related to security posts—including private investigators and gun instructors—is open. However, other professional qualifications (security watchmen, private body-guards and rural guards) are open only to possessors of Spain’s certificates.

The Ministry of Justice handles the recognition of professional qualifications of Lawyers and Solicitors. In fact, this year the Order PRE / 421/2013, of March 15, regulates—according to art. 23 of the Royal Decree 1837/2008- the aptitude test to be performed by national lawyers and solicitors of any EU member states and the European Economic Area to establish a precise knowledge of Spanish positive law.

The Ministry of Employment is competent for the recognition of professional qualifications of Social Graduates (Graduado Social), according to the procedure specifically set up by Order PRE/1733/2012 of 27 July.

The Ministry of Economy handles the recognition of professional qualifications of Economists and Insurance Actuaries.

22 Notwithstanding, applicants are required to pass an assessment test on Spanish Law, whose contents are described in <http://www.interior.gob.es/web/servicios-al-ciudadano/personal-de-seguridad-privada/detectives-privados/programa-de-cursos-y-pruebas-compensatorias>.

23 See Resolution of September 25, 2014, of the Directorate General on relations with the Administration of Justice, regulating the aptitude tests to be held to provide access to the exercise of the profession of lawyer in Spain by citizens of the European Union and other States party to the Agreement on the European Economic Area.

24 Order PRE / 1733/2012 of 27 July, which regulates the recognition professional qualification to exert in Spain the activity of Social Graduate (SOJ, n° 187, 6 August 2012). However, a study has revealed that EU’s mobility among social graduates is non-existent; according to it, the System of Internal Market Information (IMI) just pick a shift from Italy to Spain, and the application of recognition appears as pending since 2011; and another instance from Spain to Italy, a Spanish title approved as Consulente del Lavoro, after passing an aptitude test, during 03-04 (See MORENO LISO, L. (2014), Los Graduados Sociales en Europa: el ejercicio de la profesión en Reino Unido, Francia, Portugal, Alemania y España, University of Extremadura (34)).

25 It must be taken into account that the procedure regulated by Royal Decree 1837/2008 is also partially regulated by the Order of the Ministry of the Presidency of May 19, 1995, developing the Royall Decree 1665/1991, 25 October, by which the general system of recognition of diplomas of higher education in the Member States is regulated EU requiring minimum training of three years’
The Ministry of Foreign Affairs handles the applications of Nationals of the Member States of the European Union and the Signatories of the Agreement on the European Economic Area who have obtained in the country of origin the corresponding authorization to practice the profession of sworn translator / interpreter /, and meet the requirements established by current regulations 26.

2.4.2. Procedure concerning the resolution of the applications.

As a general rule the proceedings concerning recognition has a maximum length of 4 months. The resolution of proceedings could be:

- positive, recognizing the title to the exercise of the profession in Spain.
- rejection for not meeting the requirements of the applicable regulations
- Partial resolution requiring the relevant person to do an aptitude test or a traineeship under Article 5 of Royal Decree 1837/2008, of November 8, so that the compensation mechanisms provided are used to adapt to the new professional environment.

- If the applicant chooses to do internships the Technical Secretary General (TSG) of the Sectoral Ministry concerned is incumbent to appoint a guardian for such practices, to be met under the established program as indicated by the professional association.

- If the applicant chooses to undertake an aptitude test, the TSG will proceed to the appointment of the Assessment Committee that will convene and hold the test (Every year each Ministry held assessment exams related to the professional qualifications to be recognized).

After the traineeship or an aptitude test, the Assistant Secretary shall issue its final resolution.

2.4.3. Competences of the Autonomous Communities

According to art. 70 of Royal Decree 1837/2008, among the authorities competent to recognize foreign qualifications are also the correspondent organs of the Autonomous Communities.

These ones are specially relevant in relation to some professional qualifications concerning Health sector 27, because Health competences has been attributed to Autonomous Communities, duration, which affects professions Economist, Insurance Actuary, Diploma in Business Studies, Commercial Professor, Auditor and Enabled Passive Class (SOJ, no. 124, 25 May 1995).

26 In Spain the conditions set up by the Royal Decree 1837/2008 and Order of 23 August 1999 which develops the Royal Decree 1665/1991, 25 October on the profession of sworn (as does not contradict the provisions of current and applicable law contained in the Royal Decree 1837/2008).

27 This is the case for Care Technician Nursing Assistants, Pharmacy Technician, Senior Technician in Pathology and Cytology, Senior Technician in Hearing Aid, Senior Technician in Dietetics, Senior Technician in Health Documentation, Senior Technician in Dental Hygiene, Senior Technician in Dental
2.4.4. Recognition of professional qualifications acquired through work-life

Finally, it must be taken into account that the recognition of professional qualifications covers also the accreditation of professional skills obtained through worklife or via non formal processes of training\(^{29}\). In those cases, the recognition procedure –handled by the State Public Service for Employment (SEPE)- is based on a National Catalogue of Professional Qualifications where Titles of Vocational and/or Professional Certificates are assimilated to the skills and competences obtained during work-life\(^{30}\). Participation in such procedures of recognition is open to European citizens and their families. Work experience and/or training related to the professional skills that are to be checked is based on these prerequisites:

Prosthesis, Senior Technician in Radiotherapy, Senior Technician in Environmental Health, Senior Technician in diagnostic imaging, Senior Technician in Clinical Diagnostic Laboratory.


\(^{30}\) Integrated into the Spanish Qualifications Framework (MECU) –that follows the lines of the non-binding European Qualifications Framework (EQF)- the Spain’s National Catalogue of Professional Qualifications (CNCP) is the tool of the National System of Qualifications and Vocational Training (SNCFP) conceived to ordering the professional qualifications suitable for recognition and accreditation. It includes the most significant professional qualifications of the Spanish productive system organized into professional families and levels. It constitutes the basis for developing the ranks of titles and certificates of professionalism. The CNCP includes the content of training associated with each qualification, according to a structure of training modules .The National Institute of Qualifications - an institution depending of the Ministry of education, Culture and Sports- is responsible for defining, developing and updating the CNCP and the corresponding Modular Catalogue of Vocational Training (See <http://www.mecd.gob.es/educa/incual/ice_catalogoWeb.html>). As for professional certificates, they are regulated by Royal Decree 34/2008, 18 January, on professional certificates (*SOJ*, nº 27, 31 January 2008).
In the case of work experience, the applicant must justify, at least three years, with a minimum of 2,000 hours worked in total in the last 10 years prior to the application. For units of competence level I, they will require two years of work experience with a minimum of 1,200 hours worked in total.

In the case of training, the applicant must justify, at least 300 hours in the last 10 years prior to the application. For units of competence level I, they will require at least 200 hours.

2.4.5. Conflicts related to the implementation of EU Rules in Spanish Order

As for the compliance by Spain of EU rules, according to the Commission, there were a lot of significant complaints related to professional recognition in 2011 and 2012. However, along the period concerned by this report, no cases against Spain were referred to the Court of Justice concerning presumed infringements on these matters.

As for SOLVIT system Spain is a net receiver of cases (with France, UK and Italy) and is one of biggest contributors to the network (with UK, Germany, France and Poland); among the most recent

46 complaints against Spain were reported in 2011 (43 in 2012), although they involved not only professional recognition cases but also infringement of free provision of services (See Annual Report on Monitoring the Application of EU Law (2011), Brussels, 30.11.2012, COM(2012) 714 final, p. 26; Annual Report on Monitoring the Application of EU Law (2012), Brussels, 22.10.2013, COM(2013) 726 final, p. 64). However, this trends were in line with the total of complaints (254) registered at EU level in the period 2011-2013.

Previously -in 2005- there were concerns about the presumed infringement of Council Directive (89/48/EEC); at this time, the Commission received a number of complaints from Italian engineers from which it appears that this was applied incorrectly by the Spanish authorities (See ACA Newsletter, Education Europe, edition 51, July 2005). In June 2006 the Commission brought the case to the Court of Justice, who finally found Spain guilty (See Judgment 23 October 2008, Comission v. Spain, C-286/06); since this decision Spanish Courts, had taken into account the Ruling of EUCJ, citing it expressly as a basis for accepting the rights of claimants (e.g. Supreme Court (3rd Chamber-Contentious Administrative) Judgment 4139/2009, 23 June 2009). Again, in 2006 new complaints concerning recognition of qualification of hospital pharmacist move the Commission to send a reasoned opinion against Spain (See IP/06/88). However, those problems of implementation were finally solved.

In fact, only one case referred to the Court in June 2013- could seem to be linked with the question of professional recognitions, but it really lies with the right of establishment: It concerns the recruitment of port dockers (estibadores), albeit really there are no problems related with professional qualifications (See IP/13/559). Also, nowadays, there are concerns about restrictions linked with the professional services of Procuradores (Solicitors). In fact, the Commission sent last June a letter of formal notice to Spain-, although in this case the problem lies on the implementation of the Directive 2006/123/EC on Services (See IP/15/5199).

See [Link to SOLVIT webpage].
problems settled through this procedure concerning recognition of professional qualifications in Spain (17% of cases in 2012) were those related to recognition of Portuguese engineers and nurses, professional divers coming from the UK and Italian medical specialists.

2.5. Qualifications obtained by EU citizens outside the European Union (non-EU qualifications)

The Spanish Legal system does not provide for general rules concerning this situation.

However, there are specific provisions concerning recognition of qualifications related to some Health professions, and the procedures of recognition established in some sectoral Ministries, sometimes, take into account the recognition of Diplomas obtained outside EU and the EEA State Members and previously recognized in other EU Member State; a solution generally applied, notwithstanding its omission, in the departments of the Spanish public administration (ACs included).

2.5.1. Recognition concerning Health Professions.

The recognition in Spain of professional specialist qualifications obtained in non-member States of the European Union, is carried out by the Ministry of Health through the procedure regulated by Royal Decree 459/2010 of April 1635, which implements Article 18 of Law 44/2003 of the Regulation of Health Professions.

Among the most characteristic features of this Royal Decree, its main objective is that the procedure of professional recognition of foreign qualifications must not be detrimental to the high standards achieved in both Spain as in the other Member States of the European Union in the training of specialists. Hence, a highlight of this procedure is not only the inevitable comparison between the training acquired in the country of origin and granted the Spanish program specialty in question but also the realization that foreign titles, whose professional recognition is sought, they met in the case of professions harmonized, such as Medical Specialist (which includes 44 specialties) and Matrona (Matrona) the minimum training requirements established for this purpose by the European Union in the Directive 2005/36/EC of September 7, 2005, which has been transposed through Royal Decree 1837/2008, of 8 November.

The procedure regulated by this rule it provides that the applicant must not only need to demonstrate documented equivalence of training acquired abroad with that required in Spain but that in any case it will be ensured that such training has resulted in the acquisition of the skills inherent in the practice of the specialty deemed appropriate, through a period of professional internships or further training, in both cases evaluated, to be carried out in close collaboration with the Autonomous Communities36, because the National Health System (NHS) has a vested interest in professionals who join their organizations have an adequate level professional competence to ensure

35 Royal Decree 459/2010 of 16 April, on conditions for recognizing foreign professional effects to titles Specialist Health Sciences obtained in non-member States of European Union, SOJ, nº 107, 3 May 2010.

36 See above,
the right to health of citizens and the proper functioning of health institutions. The procedure of recognition also takes into account the relevance of communicative aspects with users, other professionals and healthcare organizations included in the NHS. This objective—if required—is met by the previous accreditation of knowledge of Spanish and through periods of professional internships or further training, which are expected in the procedure for recognition and intended, among others, to such goal.

The positive resolution of applications for recognition grants the inherent professional effects to a corresponding Spanish title, among those listed in Annex I of Royal Decree 183/2008 of 8 February, which identifies and classifies the specialties in Health Sciences and certain aspects of the system of specialized medical training.

Therefore, the aforementioned recognition accords the same rights and obligations than the Spanish professional title of specialist and will be essential for the exercise requirement - as employee or self-employed - of the profession in question in Spain.

2.5.2. Recognition in Spain of Diplomas obtained outside EEA, previously recognized in other EU Member State

The diploma issued in a non-member State of the European Union nor signatory to the Agreement on the European Economic Area, may be recognized in Spain provided that the holder thereof give evidence of three years of professional experience in the territory of the Member State which has recognized this diploma, duly certified by this Member State. In those cases:

- Spain's competent authority has four months to process the application and to adopt a decision recognizing the degree, or condition its recognition to a compensatory requirement (e.g. supplementary training), or deny the request.

- The decision must be reasoned and may be appealed.

Also, it must be remembered—as seen in the previous section—that competences to recognize are both in the hands of State Authorities and of the Autonomous Communities.

2.6. Qualifications obtained by EU citizens prior to their country joining the European Union (pre-accession qualifications)

As Spain became member of the EC in 1986, there are no pre-accession cases involving the application of the general system of recognition of qualifications (established initially in 1989). Eventually, people possessing qualifications obtained prior to Spanish accession are probably near to retirement, then it remains hardly hypothetical such situation.

2.7. Qualifications obtained by nationals of EU associated third countries, when the relevant association agreement includes chapters on establishment and/or services.

No cases has been identified.
3. The Protection of Economic Rights of Consumers

3.1. General aspects on the Consumer Protection in Spain’s Legal Order

Until 1984, with the enactment of the General Law for the Protection of Consumers and Users -LCU-, there was not in Spain nor a legislative body nor a unitary policy of legal protection to consumers. Certainly, there were, however, some provisions of range and efficiency very different, which served the same purpose, to which must be added a scarce but significant jurisprudential work of the Supreme Court in defense of the legitimate interests of consumers and users.

In fact, it is from the enactment of the Spanish Constitution when explicitly, through his section 51, the Spanish Legal Order introduces the idea of the defense of consumers and users as a guiding principle, then defining a series of social relationships classified as consumer contracts.

The Law 26/1984 for the Defence of Consumers and Users was approved by the government of the PSOE after “the crisis of adulterated rapeseed oil” (el fraude del aceite de colza). The new law was poorly received, under criticism for its lack of legal and political consensus between the different sectors involved in its implementation, and its lack of connection with the provisions of the Civil Code and the Commercial Code. Notwithstanding, in its original wording it covered among other questions, some contractual relations (e.g. advertising messages), the promotion of consumer associations or a consumer arbitration system.

From the underlying purpose of the Law 26/1984 and his special concern for the protection of consumers and users, is derived as one of its fundamental criteria, the peremptory character of its main provisions, then the correlative indispensability of the rights and powers granted by it to consumers, and the statement of annulment of any acts or contracts made in fraud of it.

The publication of the Law 26/1984 was just the beginning. Therein after, many special laws were promulgated, such as:

- Law 26/1991 on contracts concluded outside commercial establishments.

37 Section 51 of the Spanish Constitution (1978) states that: “1. The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests. 2. The public authorities shall promote the information and education of consumers and users, foster their organizations, and hear them on those matters affecting their members, under the terms established by law. 3. Within the framework of the provisions of the foregoing paragraphs, the law shall regulate domestic trade and the system of licensing commercial products.”

38 This was a serious health crisis (1981) - at least one hundred dead and some thousand of people injured - caused by industrial oil handling directed for human consumption.

• Law 7/1995, on Consumer Credit.\(^{41}\)
• Law 21/1995 on Combined tours.\(^{42}\)
• Law 7/1996 on planning retail.\(^{43}\)
• Law 7/1998 concerning the general terms for contracts.\(^{44}\)
• Law 28/1998 on installment sale of personal property.\(^{45}\)
• Law 34/2002 on information society services and electronic commerce.\(^{46}\)

Also it must be pointed, the adoption of the Law 39/2002 on transposition of some European directives related to consumers protection as the reform of the Law 1/2000 on Civil Legal Procedure, with particular impact in relation to consumers’ access to justice.

3.2. Distribution of powers between the State and the Autonomous Communities (ACs) on issues related to consumer protection

The Title VIII of the Spanish Constitution -related to the distribution of powers between the State and the ACs- does not contain any specific reference to consumer protection. This lack is likely to cause a collision between the State exclusive powers and the ACs general interests.

3.2.1 The recognition of Autonomous Communities power related to consumers’ Protection

However, there has been a self-attribution of competence in some regions, introducing in their Statutes of Autonomy powers related to consumers protection. This move has made necessary the involvement of the Constitutional Court with the aim to clarify it.\(^{47}\) According to its case law, are the exclusive competence of the State, matters such as:

\(^{40}\) SOJ n° 161, 7 July 1994. Also derogated by the Royal Legislative Decree 1/2007.


\(^{43}\) SOJ, n° 15, 17 January 1996. In force, albeit this law has been modified many times since its adoption.

\(^{44}\) SOJ, n° 89, 14 April 1998.


\(^{46}\) SOJ, n° 166, 12 July 2002. In force, albeit this law has been modified many times since its adoption.

\(^{47}\) The leading cases on the issues were Constitutional Court Rulings 71/1982, 30 November, 15/1989, 26 January, and 62/1991, 22 March.
market unit,
civil law, with the exception of the Foral civil law (where it exists)\textsuperscript{48},
commercial law,
regulation of bases of contractual obligations,
contractual responsibility and tort liability; and,
regulation on the general conditions of contracts and contractual arrangements.

As for the Autonomous Communities, according to the Constitutional Court

- is for ACs with full powers on consumer protection, to legislate and regulate public administrative matters; especially issues linked to sanctions and administrative controls.

- is for ACs without full powers on the matter, to adopt regulations (reglamentos) and implement those rules.

In fact, most of the Autonomous Communities have made use of their competences, legislating on consumer protection, mainly as a way to address administrative aspects related to this matter. At present, they have enacted laws protecting consumers Andalusia (8 July 1985), Balearic Islands (Law 7/2014, of July 23), Basque Country (November 18, 1981, as amended in 1985 and 1986), Castilla-La Mancha (9 March 1995), Galicia (Law 2/2012, 28 March), Murcia (June 14, 1996), La Rioja (Law 5/2013, 12 April), and Valencia (Law 1/2011, 22 March).

3.2.2. The Case of Catalonia: its exclusive competences and the Codi de Consum de Catalunya

A special case is that of Catalonia, where initially its legislative competences were actualized through Laws of 8 January 1990 and 5 March 1993; further creating the Catalan Consumer Agency\textsuperscript{49}. However, after the reform in 2006 of its Statute of Autonomy, that increased significantly its powers according exclusive competences on the matter following art. 123 of Catalan Statute, its Parliament enacted the Law 22/2010, 20 July, on the Consumer Code of Catalonia (\textit{Codi de Consum de Catalunya})\textsuperscript{50}. The Consumer Code of Catalonia expands on, updates and enhances the rights of consumers in Catalonia and provides a comprehensive legal framework, in the sphere of consumer affairs, which seeks to become the reference model in many sectors of economic activity. The Catalan

\textsuperscript{48} The “\textit{Foral}” (from “\textit{fuero}” –“right”, in ancient Spanish) Civil Law is a remnant of the old civil laws existing in former kingdoms and territories of Spain, prior to the adoption of the Civil Code (1889). Nowadays, there are Foral Civil Laws in Aragon, Balearic Islands, Basque Country, Catalonia, Galice and Navarre. A recent example of such legislation is the Law (Basque Country) 5/2015, 25 June, on Basque Civil Law (\textit{Basque Country Official Journal}, 3 July 2015).


Code purported the unification in a single legal text of all the rules on consumer affairs which until now were fragmented, achieved an improvement in the protection of consumers and the incorporation into the autonomic legal system of the new EU regulations affecting consumer affairs and it has adapted the basic rules and general protection of consumers to current social and realities. Among its trends: a) It defines the concept of responsible consumption, becoming at the same time, a principal reporter on consumer rights; b) guarantees every citizen easier and closer access to the consumption of public services since there must be at least one in each county; c) companies that provide basic services such as supplies, transport, social care and health care are obliged to provide consumers with a physical address in Catalonia in which they can lodge their complaints and claims; d) regulates obligations in terms of information and the system of liability in relation to businesses or companies that carry out mediation work; e) imposes to Public companies its compulsory participation as members of the arbitration board and this fact must be taken into account when awarding grants to private companies.

This Law was subsequently modified by Law 9/2011, 29 December, Law Decree 6/2013, 23 December and Law 20/2014, 29 December.

3.3. Recent Proceedings related to consumer protection and its impact on Spanish Consumer Protection System.

The most salient feature nowadays is linked with judicial cases related to mortgage debtors. In fact, the Ruling EUCJ of 13 March 2013, Aziz (C-415/11) had a deep impact both in Spanish Legal Order as in Case Law. The Law 1/2000, on Civil Procedure was amended by Law 1/2013, 14 May, and a lot of judicial resolutions were adopted in line with the Ruling of the EUCJ.

Again in 2014 the EUCJ ruled against Spain on these issues in its Ruling of 17 July 2014, Sanchez Morcillo and Abril Garcia (C-169/14), stating that a system of enforcement which provides that mortgage enforcement proceedings may not be stayed by the court of first instance but also precludes the debtor from bringing an appeal in the enforcement proceedings breaches the Directive 93/13/EEC on unfair terms and Article 47 of the Charter of Fundamental Rights. Then, a new reform of the Law 1/2000 on Civil Procedure was needed in order to comply with EUCJ Ruling, implemented through the Royal Decree Law 11/2014, 5 September.


As has been considered in our previous National Report, the internal regulatory framework in Spain is still based today mainly on a characterization of some economic rights as Legislature


52 Among the most recent, See Provincial Court of Barcelona (Section First), Judgement 211/2015, 18 May (Rec. 626/2013).

53 SOJ, nº 217, 6 September 2014.

mandates and therefore lacking direct effect. A structural weakness that even renovator momentum created by the wave of statutory reforms of the past decade has managed to redeem because of the structural inadequacy of these texts in order to meet this challenge; in this regard, it is worth remembering that the constitutionality of the incorporated references to social and economic rights, *inter alia*, the Statute of Autonomy of Valencia and Catalonia could only be "preserved" by the Constitutional Court in their Rulings 247/2007, 12 December 2007 and 31/2010, 28 June 2010, at the price of devaluing such pronouncements as simple guidelines for the Regional legislators and not likely to generate genuine individual rights.

In this context of weakened social and economic rights—and paying special attention to Consumers’ Rights—relevant NGOs (Amnesty International, Oxfam and Greenpeace) have launched these days a campaign of strengthening the constitutional guarantees relating to these rights urging a reform of art. 53 of our Constitution designed to review the so-called guiding principles of economic and social order, in which—rightly sees established a “second-class rights”.

### 3.5. The Unfair commercial practices Directive 2005/29/EC

As has been said, the Directive 2005/29/EC is a remarkable development on EU legislative action against unfair competition. In fact, The level of harmonization in this area was far from satisfactory in earlier EC legislative action, and it certainly can not surprising, since previous measures only addressed some respects, certainly important, but all partial case (e.g. advertising on TV, e-commerce or ban on advertising of “demerit” products). And even in some cases it was done through

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55 The crucial provision is the section 53 of Spanish Constitution that has been correctly described as a “clause of fear”, expressing the favorable constitutional option that political variables on redistribution of resources corresponding to the parliaments and governments, neither to judges nor courts. Although, this does not mean, however, that the Constitution does not impose limits on action by parliaments and governments to develop public policies, by setting the content of the economic rights enshrined in Chapter III of Title I (where Consumers’ Protection is guaranteed). In fact, the claim that these limits exists – constituting real constitutional “red lines” - has been plausibly argued sustaining that both formal limits (e.g. reserves of law, restrictions on the use of Decree-Law, …) as the substantive result of the principles of prohibition of arbitrary and retroactive restrictive provisions or legal certainty lead to a constitutional recognition of human dignity that would provide constitutional economic rights of a minimum content in large measure comparable to the "substance" that operates as a limit to the configuration of fundamental (civil and political) rights. See PONCE SOLÉ, J. (2013), *El derecho y la (ir)reversibilidad limitada de los derechos sociales de los ciudadanos*, Madrid, INAP.


57 On this campaign See <http://www.blindatusderechos.org/>. At the same time, the Socialist Party announced the creation of an Advisory group—integrated by Academics—to review Spain’s Constitution and to suggest future reforms, among others, e.g. the possibility to enhance guarantees related to economic rights.
rules that established a minimum harmonization (e.g. misleading advertising). Therefore, it is not surprising that the legislation in Member States against unfair competition presented significant differences, both in orientation and substantive system and treatment practices.  

In fact, such differences were propitious to distort competition in the internal market and hinder its proper functioning. Then, the aim of the Directive is to end with this state of affairs, although its scope however, is limited to trade practices by companies in their relations with consumers that directly harm their economic interests.


The deadline for transposing the Directive on Unfair Trade Practices implied that it must be incorporated into our legal system by 12 June 2007. The Directive offered the Spanish legislator the possibility of separating the domestic law against unfair competition in two branches, one linked to consumer protection and other related to business, depending on the ownership of the interests affected by business practices. That is, the Spanish legislature were forced to have one and the same regime against unfair commercial practices harming the economic interests of consumers and, in this sense, to waive the specific regulation of advertising in this area. And, in contrast, did not impose the Spanish legislature the obligation to regulate in different laws repression of unfair commercial practices in relation to consumers only adversely affect the interests of companies and in relation to competitors and companies.

Incorporation into Spanish law of this directive was made through the Law 29/2009, 30 December, on the modification of the legal regime of unfair competition and advertising to improve the protection of consumers. However, this law has led to a significant change in several laws: certainly, the Law 3/1991, of 10 January of Unfair Competition, was essentially affected, albeit some other norms were also modified: e.g. the revised text of the General Law for the Protection of Consumers and Users and other complementary laws, approved by Royal Decree 1/2007 of 16 November; Law 7/1996 of 15 January 15 on Retail Trade, and Law 34/1988 of 11 November, on Advertising.

This law was conceived as a mean to integrate harmoniously the goal of consumer protection into the market regulation, through the amendment of the Unfair Competition Act of 1991, as a way to ensure that this protection becomes most effective, but at the same time preventing the disintegration of the rules of the market.


59 SOJ, nº 315, 31 December 2009. This Law transposes also Directive 2006/114/EC of the European Parliament and the Council of December 12, 2006, concerning misleading and comparative advertising; at the same time, it takes into account the impact of another important rule of the European Union, such as Regulation (EC) No 864/2007 of Parliament and the Council of 11 July 2007 on the law applicable to contractual obligations (“Rome II”), deleting previous references to territorial scope contained in the former Spanish regulation.
Among the amendments that were made to the Unfair Competition Law it was to include a general clause (Art. 4.1) to clarify that, in relations between entrepreneurs or professionals with consumers, the disloyalty of conduct will be determined by the concurrence of two elements: the professional or behavior to be contrary to professional diligence required of it in their relationships with consumers, and that this is likely to significantly distort the economic behavior of the average consumer or an average member of the group that practice is directed. Furthermore, a unitary legal regime on the disloyalty of acts of deceit or aggressive, with the same level of correction required regardless of whether the recipients are consumers or entrepreneurs. Moreover, a full chapter is devoted to acts of unfair competition, affecting competitors, where it is considered likely to harm only the recipients when they are consumers and users. Such is the case of misleading omissions or practices that are unfair in all cases and whatever the circumstances in which they occur.

Moreover, the Consolidated Text of the General Law on Consumers and Users (CTGLCU) was modified in order to pinpoint that, according to the rule of Community law, business practices of employers aimed at consumers are governed only by the provisions of the Law on Unfair Competition Act and the CTGLCU, without imposing to entrepreneurs or professionals other obligations, requirements or prohibitions other than those provided in these provisions, when its only base is the protection of the legitimate economic interests of consumers. Moreover, it provides for the compatibility of this regime with the specific regulation dictated by other reasons than the protection of the legitimate economic interests of consumers, with specific rules that regulate business practices - transposing EU directives on protection of consumers and users - and, lastly, with the most protective provisions governing financial services or real estate.

Also, Law 29/2009 introduced in CTGLCU the reporting obligations to consumers in those commercial practices which include information on the characteristics of the good or service and its price, enabling the consumer or user to make a decision on hiring. Moreover, the Law enhanced contractual regulation of pricing information to adapt it more to the demands of standard information to be provided in commercial practices. Then, it obliges to provide to the consumer with a prior estimate in those services in which the final price could only be established in this way, a deposit slip when the execution of the service contracted requires for receipt of good, and the documentary proof of delivery of the product, in the event of non-compliance with the contract, as a way to ensure the exercise of the rights of consumers.

It must be noted that full (and late) transposition of the Directive (art. 6) was finally accomplished by Law 3/2014, 27 March, modifying the revised text of the General Law for the Defense of Consumers and Users (GLDCU)\(^{60}\), in respect of the first final provision, paragraph f) of Article 5.1 of the Law 3/1991, of January 10, on Unfair Competition.

3.5.2. The Codes of Conduct.

In addition, a new chapter to regulate codes of conduct is introduced by the Law 29/2009, with full respect for the competition rules, with the aim to contribute to raising the level of protection

\(^{60}\) With the same purpose, Law 3/2014, 27 March, corrects the “detected error” in the wording of Article 20 of the revised text of GLDCU in order to adapt Article 7, paragraph 4 of Directive 2005/29/EC, leading to the modification of articles 19 and 20 DGLCU. On this Law, initially transposing Directive 2011/83/EU, See below, 3.5.1,
of consumers and users, through their access to efficient systems of court redress. In this respect, it should be noted that previously there was no rule in Spain that recognize and regulate, generally and systematically, codes of conduct. In this regard, art. 37 of the Law on Unfair Competition provides that:

"Corporations, associations or trade organizations, professionals and consumers may draw, to be voluntarily assumed by employers or professional, codes of conduct on commercial practices with consumers, with the aim to increase the level of consumer protection in their development and ensuring the participation of consumer organizations."

Therefore, the development of codes of conduct is voluntary - both in terms of its content and its application - and it concerns only to companies that adhere to it freely. Moreover, it must be stated that the ability to create codes of conduct is attributed to groups, professional or consumer. This involves recognizing ability to develop codes to consumers who may propose accession voluntarily to entrepreneurs and professionals. Finally, it should be noted that codes of conduct adopted unilaterally by a company are rejected. In fact, they constitute only authentic codes of conduct those who contribute to consumer protection, and not those so-called codes of conduct conceived just as a mean to improve the image of professionals before their clients.

Moreover, the Law 29/2009 amends the Law of the Unfair Competition to include injunctions against unfair practices that harm the economic interests of consumers and -consistent with the regulation adopted on codes of conduct- actions against employers publicly adhered to codes of conduct that violate obligations freely assumed or incur in acts of unfair competition, and against those responsible for such codes where they encourage unfair acts. Also, the Law incorporates rules on the burden of proof in relation to the accuracy of factual claims made by businessmen or professionals.

3.5.3. Enforcement: Spanish Case Law related to Directive 2005/29/EC and Spanish legal norms related to it

The Spanish Courts and Tribunals have taken into account the standards introduced by the Directive 2005/29/EC, even at a time when there was no obligation concerning its enforcement. Certainly, this way was favored by the fact that the criteria contained in the Directive were in line with the solutions traditionally established in Spanish Law and applied by Spanish Courts. In this way, see Judgments of the Supreme Court of 17th October 2000, 21st June and 22nd November 2006, and 30 March 2007, stating that the judicial approach must take into account “the situation of average consumer”.

61 Although, there were provisions in Spanish Law recognizing and promoting its development in sectors like regulation of media, personal data processing or telecommunications. On these issues See FERNANDO MAGARZO, R. (2010), “Códigos de conducta”, Revista de Derecho de la Competencia y la Distribución, (7:91). Further, there has been new developments as for Bank debtors See Annex of the Royal Decree Law 6/2012, 9 March (SOJ, nº 60, 10 March 2012).


63 In this way, see Judgments of the Supreme Court of 17th October 2.000, 21st June and 22nd November 2.006, and 30 March 2.007, stating that the judicial approach must take into account “the situation of average consumer”.
applied in 2007 the content of the Directive, inasmuch as its provisions confirmed the trends on this issue affirmed previously by Spanish Courts, stating that Spanish rules:

"harmonizes with the rules of Directive 2005/29/EC on unfair commercial practices which, in art. 5.2 .b), draws on the average consumer whom it reaches or to whom the practice is directed, or the average member of the group, whether it is a commercial practice is directed to a group of consumers." 64

The openness of Spanish Courts to the regulation provided by the Directive was revealed in the Judgment nº 1097/2009 of the Supreme Court (2nd Chamber), 17th November 2009 65. In this case, the Court needed to test the supposedly bad practices of a Spanish teaching institution offering courses in Spain purporting to a british diploma issued by the «British College of Osteopathy Medicine». In its analysis the Supreme Court give special attention to the regulation provided by Directive; even, in order to point out the admissibility of the behavior of the teaching institution, the Spanish Supreme Court paid attention to the unfair practices described in the Annex of the Directive, excluding them in the case.

3.6. The Consumer rights directive 2011/83/EU

In February 2007, the Commission presented a Green Paper on the review of the Consumers’ acquis. In it he notes that the EU rules on consumer protection are fragmented basically in two ways. First, she notes that the current directives allow Member States to adopt more stringent rules in their national laws (minimum harmonization) and many Member States have chosen this option in order to ensure a higher level of consumer protection. Secondly, she points out that many issues are regulated inconsistently between directives or have been left open. To solve this problem, the solution adopted is to review the consumer acquis so that full harmonization is achieved. This would mean that no Member State could apply stricter rules than those laid down at Community level, unless expressly an exception is provided.

On the other hand, to solve the problems derived from fragmentation, which causes the same issues are regulated inconsistently between directives, the Commission opted for the mixed approach (Horizontal instrument combined, where necessary, with vertical action), which begins after the adoption of Directive 2005/29/EC on unfair commercial practices, which applies to all consumer contracts. It starts with the claim that there is a group of issues common to all directives forming part of the consumer acquis (basic definitions -consumer/ professional- the duration of the period of reflection and modalities for exercising the right of withdrawal are examples of issues that are important in the context of several directives). These common issues could be extracted from the existing directives and adjusted systematically in a horizontal instrument: the now Directive 2011/83/EU. In fact, this horizontal instrument should be complemented by various vertical actions, i.e. the review of specific directives in order to address the specific issues raised, whenever needed ("mixed approach").


In Spain, the preparatory work of the Directive was harshly criticized by some associations of consumers and users, because at its initial stage they considered that its provisions could harm the very protective legal provisions of consumers, recognized at the state level in Spanish Law (GLDCU). However, it must be taken into account that the pressure exerted by the main European consumer associations grouped in the European Consumers’ Organisation (BEUC), has served to not reduce very significantly the current level of consumer protection in Spain. Primarily, because, Directive 2011/83/EU has finally allowed each Member State to maintain its own list of unfair terms, and even extend to contractual terms negotiated individually; and, finally it keep the possibility of implementing, in Member States a greater consumer protection (e.g. right to bring the action to claim liability of the seller in more than two years of term, etc.)


In order to transpose the Directive 2011/83/EU, on 19 April 2013, the Spanish Government adopted the draft bill amending the Revised Text of the General Law for the Defence of Consumers and Users (GLDCU) and other complementary laws, approved by Royal Legislative Decree 1/2007, of 16 November. As it noted in the “Memory of regulatory impact” annexed to the draft bill, when dealing with the incorporation of a directive that directly affects the repeal and amendment of other directives, the transposition into Spanish domestic legislation currently envisaged in the revised text of the General Law for the Protection of Consumers and Users, adapting the legal system to the provisions of the new directive should be carried out by modifying the aforementioned revised text, through a new law, as the only viable alternative.

In fact, the draft was quickly approved by the Parliament (Cortes Generales) despite the proposed amendments -sustained by the presumed abuse of the powers of the State and invasion of Autonomous Communities’ powers- and notwithstanding the fact that it left without regulating relevant aspects e.g. permanence of a penalty clause in the event of early withdrawal or the questionable applicability of the signature requirement in contracts concluded by telephone.

Then, the Law 3/2014, 27 March, modifying the revised text of the General Law for the Defense of Consumers and Users (GLDCU). Among its main features, we must outline the following:

The approach of full harmonization inherent to the provisions of the Directive forced the Spanish Legislator to clarify the scope of the standard and its consistency with other legislation, particularly with sectoral regulation on Consumers’ protection. Then, to draft a new wording of Article 59.2 of the revised text was needed in order to clarify this issue and to preserve guarantees related to sectoral rules, based on the level of protection provided by general law, to grant greater protection to consumers and users, while respecting in any case the level of harmonization established by the provisions of European Union law. Otherwise, the criteria followed in the transposition were

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67 SOJ, nº 76, 28 March 2014.
preferably based on fidelity to the text of the directive and the principle of minimal reform of the current legislation.

Also, among the modifications necessary to transpose the directive it was, first of all, the proper notion of consumer, because Spanish Law includes as such legal persons. Also, the new law represents a strengthening of consumer information and user, through the expansion of enforceable contractual information requirements in contracts with consumers, in the case of distance contracts and off-premises contracts the employer have been fully harmonized by the directive. Thus, among the new contractual information obligations assumed by employers are those of informing consumers and users of the existence and the conditions of deposits or other financial guarantees, if any, have to pay or provide upon request of the employer including those for which an amount is blocked on the credit card or debit the consumer and user. They must also report the existence of the legal guarantee of conformity of goods, as well as the existence and conditions of after-sales services and commercial guarantees that grant, if any. In addition, contracts for the supply of digital content, they must inform the various forms of use thereof and any technical limitations, such as the protection through the management of digital rights or regional coding, as well as any interoperability with relevant equipment and programs known by the employer or that could reasonably be expected to be known in order to describe the information regarding the standard hardware and software with which the digital content is compatible, for instance the operating system, version necessary or certain items of physical media.

The law also establishes general provisions dealing with the performance and other aspects of the contracts between businesses and consumers, such as the supply of goods purchased, charges for the use of means of payment, transfer to the consumer and user risk of loss or damage of property, telephone communications and additional payments.

The legal changes required to transpose the directive also reached the Law 7/1996 of 15 January, of the Retail Trade. Then, the necessary modifications were included, while repealing Articles 39 to 48, in order to avoid the confusion generated by the existence of a duplicate system for distance selling contracts. The law also repeals paragraph 4 of Article 5 of Law 7/1998 of 13 April, on general conditions of contract and Royal Decree 1906/1999 of 17 December, on phone and electronic contracts, whose provisions are incompatible with the approach of maximum harmonization required by the Directive.

Furthermore, the Law amended the Law 1/2000, on Civil Procedure (art. 11), in order to solve the contradiction between the procedural legislation on Consumers' protection and on the entities to be considered entitled to bring an injunction and, in turn, is attributed *locus standi* to the Public Prosecutor to bring any action in defense of diffuse and collective interests of consumers 68.

In another vein, the law proceeds to comply with the Ruling of EUCJ of 14 June 2012, *Banco Español de Crédito* (C-61810), where the Court of Justice interpreted Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts, with regard to Article 83 of the revised text of the General Law for the Protection of Consumers and Users and other complementary laws, approved by

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68 Previously, a Memorandum of Understanding was signed on 15 March 2011 between the Ministry of Health and Consumer Protection and the Office of the Public Prosecutor, with the cooperation of the (advisory) Consumers’ State Council envisaging, among other tasks, to cooperate to promote the development of legal proceedings, which by its collective significance, merits the exercise of injunctions or criminal prosecution.
Royal Decree 1/2007 of 16 November. Specifically, the Court considered that Spain had not correctly transposed Article 6, paragraph 1 of Directive 93/13 / EEC.

Despite the heterogeneity of the regulation made, anyway the transposition of the Directive has been deemed satisfactory by Academics and Consumers' Associations.


Prior to the Law 3/2014, according to Consumers Associations, despite the clarity and concision of Spanish norms on Consumer Protection, casuistry in its application, led to the forced interpretation by Spanish Courts of these standards depending on the particular sector in which they were applied, and of course, to the submission of a huge number of complaints and claims in consumer associations. Further, violation of this policy by some retailers and manufacturers automatically became, in many cases, on consumer ignorance about his rights and not allowed them to prevent such unfair practices at the time of purchasing the product or contracting the service.

It is hoped, that this unsatisfactory situation could turn around in the next future, given the higher guarantees introduced by the new Law. However, it is early to check a presumed evolution in Spanish legal practice, and specially before the Courts and Tribunals. Nevertheless, some recent judicial decisions have taken into account both the Directive 2011/83/EU and the Law 3/2014 to

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sustain the improvement of the rights accorded to Consumer and the need to enforce them effectively.

3.7. The Settlement of Consumer Disputes

The consumer can turn to the courts for the effective protection of their rights and legitimate interests - a right whose ultimate foundation is the right to an effective remedy enshrined as a fundamental right in section 24.1 of the Spanish Constitution. However, the protection afforded by judges and courts is not the only mechanism available to that end, because in the Spanish legal system, notably in the field on Consumer Law, exist other resolution mechanisms such as arbitration and mediation procedures.

3.7.1. Injunction Procedure: The implementation of the Directive 2009/22/EC

As already been noted, Spain is one Member States were there exists systems of compensatory collective redress which have been already running for a number of years. Even, it must be said that the in Spanish Legal Order the scope of injunctions is much broader than concerned by the Directive -including, among others injunctions concerning the application of the Consumer Credit Directive-, although, in fact, the majority of injunctive actions registered have been initiated to stop only a limited number of illegal practices harming the collective interests of consumers.

As for the effectiveness of injunction procedures, some risks have been detected concerning, on one hand, financial costs, and, on the other, the length of procedures. However, in Spain injunctions are not really hampered by economic reasons because organizations defending collective interests are exempted from Court fees and can even apply for a subsidy under the general legal aid system: the right to legal aid covers lawyers’ and solicitors’ fees, publication of announcements or edicts, copies and certificates, and only advertisements in the mass media that are required when consumer organisations initiate collective claims for damages are not reimbursed. In return, most relevant are specificities linked to the procedures’ length as far as although the law provides as a general rule for the provisional execution of any sentence and there are no special rules for collective actions that contradict this general rule, normally the courts have decided not to allow execution because of the

71 In this way, See Supreme Court (First Chamber-Civil), Judgment 139/2015, 25 March 2015 (Rec. 138/2014); Supreme Court (First Chamber-Civil), Judgment 265/2015, 22 April 2015 (Rec. 2351/2012); Provincial Court of Salamanca, Judgment 143/2015, 21 May 2015 (Rec. 136/2015); Provincial Court of Madrid (section 106), Judgment 203/2015, 21 May 2015 (Rec. 200/2015); Provincial Court of Madrid (section 206), Judgment 194/2015, 26 May 2015 (Rec. 335/2014); Provincial Court of Badajoz (Section 36), Judgment 153/2015, 24 June 2015 (Rec. 186/2015).


73 Ibid., p. 5.

74 Ibid., p. 13.
provisional nature of these pronouncements, and the qualified entities are therefore obliged to wait until the final decision.\textsuperscript{75}

In spite of this, the most acute problem related to injunction procedures in Spanish Law is linked with the limited effect of judicial resolutions. At first, when a clause is declared unfair, the consequence is the clause becomes null and void with effects \textit{ex tunc} and only \textit{inter partes}, which involves reverting to the status quo \textit{ante} and the obligation to return the money illegally paid to the affected consumers in application of the unfair clause.\textsuperscript{76} Moreover, in some cases the courts ruled that the effects of the nullity should be extended to other companies using the same contract term.\textsuperscript{77} However, in those cases the possibility to provide \textit{erga omnes} effect to these resolutions lies on the efficiency of a system of publicity. In this respect, it must be remembered that since 1998 there is in Spain a Register of General Contract Conditions, where must be entered final judgments declaring an unfair term as a way to publicize them. However, the Register is voluntary in nature and not mandatory; in addition, it is not free of charge. Finally, another problem is its poor management: there are more than 70,000 deposited conditions (and only 18 judicial decisions!), so it is very difficult to inquiry. To solve these problems, some consumer associations have agreed to enroll in the Register all the judgments about Consumer procedures where they have been involved as parties.\textsuperscript{78} Another more recent initiative to promote the publicity of the system has been the creation in 2013 by the General Council of Notaries of the Body Control on Unfair Terms (OCCA).\textsuperscript{79}

Finally, as regards the sanctions imposed for non-compliance with injunction rulings there are wide flexible, ranging from 600 to 60,000 € per day of delay in implementing the court decision. Even, anyone who persistently refuses to comply with a court decision may face criminal sanctions in Spain, although this has never happened in an injunctions-related case.\textsuperscript{80}

\subsection*{3.7.2. Collective redress in Consumers' Protection in Spain}

As has been pointed out,\textsuperscript{81} In Spain the Law foresees means for collective redress intended to protect a series of individual interests (multi-party actions for damages) and collective redress to

\textsuperscript{75} Ibid.

\textsuperscript{76} Ibid., p. 14.

\textsuperscript{77} Ibid., p. 15.

\textsuperscript{78} E.g. Associations of Users of Banks, Saving Entities and Insurances (ADICAE).

\textsuperscript{79} Órgano de Control de Cláusulas Abusivas. For details about its work, See its website <http://www.occa.notariado.org/liferay/web/occa/inicio>.


protect collective consumer interests (injunctions). More specifically, the *acción colectiva para la defensa de derechos e intereses de los consumidores y usuarios* (collective action in defence of consumers and users’ rights and interests) is the first Spanish version of a collective redress mechanism, through which most relevant cases in consumer Law are currently dealt with. This scheme is usually deployed in large-scale consumer claims affecting a significant number of consumers, but it has a general application to many consumer contracts as well.

The Law 1/2000, 7 January on Civil Procedure deals with individual consumer disputes in Civil Courts. Nevertheless, there are other special rules affecting consumer individual claims: in one hand, the Royal Legislative Decree 1/2007, 16 November, amended by Law 3/2014, 27 March, that regulates the consumer’s right to compensation for damages caused by the consumption or use of products and provides for entitlement of consumer associations and organised groups to bring actions for the defence of consumers and users’ rights and interests, and, in the other hand, Law 7/1998, 13 April, on General Terms of Contracts, which allows consumers to accumulate injunctions, the action for the devolution of the amounts charged because of the standard terms, as well as the action for damages.

Then, as a result of this system the successful pursuit of an injunction may have some consequences on a collective action initiated by the affected consumers to claim damages resulting from the illegal practice, in addition to the normal effects of a successful injunction mentioned above. More specifically, as has been reported, it is possible in Spain to append to the injunction a request to pay back the amounts received from consumers as a result of an unlawful practice, and the ruling which declares a practice as illegal will also, in this case, set the damages to be paid by the trader. If the affected consumers have been identified, the court will determine the amount each of them must receive, although there are some procedural obstacles, which make it difficult in practice to combine both the injunction and the application for damages.

Nowadays, in Spain the most controversial issue related to collective actions concerns the restrictions imposed by the Legislation on data protection, which are deemed as an obstacle by Consumers’ Associations in collective proceedings with financial institutions.


There is an increasing trend to promote alternative means of settlement of disputes, as the developments promoted by the European Union clearly reveals. In this sense, and concerning

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82 See 3.7.1.


properly Consumers’ Protection, this way was taken by Spanish Legal System even at a time when those procedures were considered reluctantly by Spanish Legislator at a general level. In fact, many years ago, as a new way to solve the consumer conflicts, the Law 26/1984 outlined the Spanish Consumer Arbitration System, that was developed nine years later by a Royal Decree. The regulation of a speedy, flexible and almost free procedure was improved in 2008 by a new Royal Decree that introduced a possibility of arbitration by single organs, electronic and collective arbitrations.  

In this regard, the Council of Ministers adopted the April 17, 2015 the Draft Law on Alternative Dispute Resolution Consumer, that seeks to incorporate into Spanish law Directive 2013/11/EU, which aims to ensure consumers access to institutions of dispute resolution. 

supplemented by Royal Decree 980/2013, 13 December (On these developments See ESPLUGUES MOTA, C. (2013), “El régimen jurídico de la mediación civil y mercantil en conflictos trasfronterizos en España tras la Ley 5/2012, de 6 de julio”, Boletín Mexicano de Derecho Comparado, (136) . However, Consumer disputes are expressly excluded of such regulation.

86 On the different alternatives available in Spain (Arbitral Boards, ADR schemes, etc) See <http://ec.europa.eu/consumers/archive/redress_cons/docs/MS_fiches_Spain.pdf>.

87 Inasmuch at the draft bill is at a very initial stage –and with serious risks of failure due to the imminent dissolution of the Parliament –General elections will be held in Spain in November- it is unnecessary to provide details on their provisions (On the draft bill See MORENO BLESA, L.(2015), “La resolución alternativa de litigios en materia de consumo”, Actualidad Civil, (6)). Suffice it to say that previous consultations –e.g. before the Spanish Economic and Social Council (CES) addressed serious criticisms to the draft. See CES, Dictamen 5/2015, 13 de mayo de 2015. This criticism is shared by Consumers’ Associations: e.g. ADICAE considers that since the Directive 2013/11/UE has a minimal content and a lot of ambiguities and shortcomings, it proposes deep changes in Spanish Legislation to overcome these limitations and improve effectively the right to claim for consumers in the field of extrajudicial claims. See ADICAE (2014), Sistemas de resolución extrajudicial de conflictos con los consumidores. Los consumidores reclaman un cambio, Zaragoza; accesible at <http://blog.adicae.net/reclama-tus-derechos/files/2014/12/estudioadr.pdf>.
4. The Protection of Citizens’ Rights in the Digital Era

4.1. EU legislation protecting personal data

Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L281/31.


Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive) [2006] OJ L105/54. [annulled]

4.2. Transposition of the above EU instruments protecting or affecting economic rights:

The European Legislation has been transposed by:

- Organic Law 15/1999, 13 December, on Personal Data Protection 88
- Law 32/2010, 1 October, on Catalan Authority for Data Protection (Consolidated Text. Latest modification: 23 March 2012) 89
- Law 1/2014, 24 June, Public Transparency of Andalusia 91
- Law 11/2007, 22 June, regulating citizenship electronic access to public services (Consolidated Text. Latest modification: 17 September 2014) 92
- Law 25/2007, 18 October, on preservation of data linked to electronic communications and public networks (Latest reform: 10 de mayo de 2014). 93

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89 GCOJ, nº 5731, 8 October 2010.
90 BCOJ, nº 44, 4 March 2004.
91 JAQI, nº 124, 30 June 2014
92 SOJ nº. 150, 23 June 2007
93 SOJ nº 251, 19 October 2007
94 SOJ nº 166, 12 July 2002
Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, has been transposed by Law 25/2007, 18 October - and in its reforms- and in 2002 by Law 34/2002, 11 July, and its respective regulations for implementation.


-Royal Decree 899/2009, 22 May, approving the Charter rights of user of electronic communication services\(^97\).

-Royal Decree 424/2005, 15 April, approving Regulation on conditions to offer services on electronic communications, universal service and users protection\(^98\).

-Order CTE/771/2002, 26 March, fixing conditions to give services on telephonic consultation for subscribers numbers\(^99\).

-Order PRE/361/2002, 14 February, implementing users’ rights and additional pricing services of Title IV of Royal Decree 1736/1998, 31 July, approving the Regulation implementing Title III of the General Law on Telecommunications\(^100\).

4.3. Enforcement

The implementation and enforcement of the rules on data protection is entrusted to independent administrative agencies.

- Spanish Agency for Data Protection (Agencia Española de Protección de Datos) is an Agency with jurisdiction throughout the state. It has powers of inspection and sanction.

- With regional jurisdiction:
  - Catalan Agency on Data Protection
  - Basque Agency on Data Protection

More recently, the Law 1/2014, 24 June, on Public Transparency in Andalusia, has set up the Council on Transparency and Data Protection of Andalusia.

\(^95\) SOJ nº 17, 19 January 2008  
\(^96\) SOJ nº 106, 4 May 1993  
\(^97\) SOJ nº 131, 30 May 2009  
\(^98\) SOJ nº 102, 29 April 2005  
\(^99\) SOJ nº 81, 4 April 2002  
\(^100\) SOJ nº 46, 22 February 2002
The implementation of the Data Protection regulation has been peaceful. However, problems have been generated by the application of Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and the European Passengers Data Record. The Spanish Data Protection Agency has repeatedly expressed doubts about certain items and purposes of this Directive, and also on the European passenger data recording, adding to the opinion (6 May 2014) issued by the Working Group of the European Data Protection Agencies. The group believes that such measures may undermine the protection of the fundamental right to data protection, but its necessity and proportionality are not credited. On November 8 2006 the Agency had already issued a critical opinion on the restraint data communications in its report on the draft bill of the Law 25/2007, of October 18, the retention of data relating to electronic communications and public communications networks.

4.4. The right to be forgotten

The Spanish Constitution recognizes the right to privacy (Section 18) and provides for Law Limits on the use of information technologies as a way to ensure it. In this sense, first, through the Organic Law 5/1992 of 29 October, regulating the processing of personal data, subsequently repealed by Law 15/1999, of 13 December, on protection of Personal Data, has developed in Spain the "right to data protection."

As for the judicial protection, in their previous rulings on the matter, the Spanish Constitutional Court came to consider the processing of personal data as a specification of the right to privacy, however subsequently it interpreted that it is an independent right but obviously related to that\textsuperscript{101}. Thus although the right to privacy and the right to data protection has the same objective - to protect privacy - , the right to data protection adds an extra guarantee, as currently to ensure privacy must be recognized the individual power of disposal and control over their personal data.

More specifically, concerning the protection of the right to be forgotten in Spain, it must be remembered that since 2010, the Spanish Agency for Data Protection (AEPD) has been receptive to claims by individuals asking for the "erasure" of personal references in the net. In fact, in this way, many resolutions were adopted against Google Spain. In this regard, the AEPD found that those who manage search engines are subject to the rules on data protection, since they perform the processing of data they are responsible and act as intermediaries in the information society. The AEPD considered that it was entitled to order the withdrawal and prevent access to certain data by the managers of search engines when considering its location and dissemination may harm the fundamental right to data protection and dignity understood in a broad sense, including the mere will of the individual concerned when he wants such information is not known by others. The AEPD considered that this requirement can go directly to the operators of search engines, without deleting data or information on the page where it is initially housed and even when maintaining this information on this page is justified by statute

Those resolutions were systematically contested by Google Spain, who introduced a lot judicial actions before Spanish High Court (Audiencia Nacional). It is in this context—the petition of the preliminary ruling made by the Spanish judicial organ through its Order of 27 February 2012102—that, EUCJ ruled his Judgement of 13 May 2014, Google Spain and Google (C-131/12). According to the Court under the Data Protection Directive 95/46/EC, following a search made on the basis of a person’s name the operator of a search engine is obliged to remove from the list of results displayed links to web pages published by third parties and containing information relating to that person. Before removing the links the operator has to examine whether the subject of the data has the right to demand that the information in question relating to him personally should no longer be linked to his name. This is the case when the information about him appears to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which it was processed. However, a right to erasure is denied when the subject of the data played a role in public life: here the public’s interest in accessing all the information available about the subject prevails over the latter’s right to erasure103.

The impact of the decision of the EUCJ was very significant in Spanish Legal Order as well as in Case Law of Courts and Tribunals.

In fact, concerning the practice of the Spanish Agency on Data Protection (AEPD), confirmed by the Ruling of the European Court, it issued a Resolution providing the criteria to enforce it in Spain104.

As for the Case Law, it must be taken into account that even prior to the Ruling Google Spain, some Spanish Courts paid attention to the proceedings before the EUCJ, founding its resolution in favor of the right to be forgotten, among other arguments on the Opinion of GA. N. Jääskine, of 25 June 2013105. Of course, after the Ruling of the EUCJ, many Judicial Decisions—concerning previous resolutions of the Spanish Agency on Data Protection recognizing this right, against the opposition of Google—were adopted by Spanish Courts following the arguments of the European Court106.


103 EU Court press release No 70/14.


105 See Provincial Court of Barcelona (Section 14th), Judgment 486/2013, 11 October 2013 (Rec. 50/2013).

106 See, among many others, High National Court (Contentious Administrative Chamber, 1st Section), Judgment 29 December 2014 (Rec. 103/2010); High National Court (Contentious Administrative Chamber, 1st Section), Judgment 29 December 2014 (Rec. 725/2010); High National Court (Contentious Administrative Chamber, 1st Section), Judgment 44/2015, 12 January 2015 (Rec. 336/2013); High National Court (Contentious Administrative Chamber, 1st Section), Judgment 82/2015, 24 February 2015 (Rec. 493/2012);