

Policy Department  
Economic and Scientific Policy

**MISLEADING PRACTICES OF ‘DIRECTORY COMPANIES’  
IN THE CONTEXT OF CURRENT AND FUTURE  
INTERNAL MARKET LEGISLATION AIMED  
AT THE PROTECTION OF CONSUMERS AND SMEs**

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## KEY CONCLUSIONS

*Substantial numbers of enterprises in Member States are affected by the problem of ‘directory companies’ reported to apply misleading or unfair practices.*<sup>1</sup> The survey of stakeholders documented more than 13,000 complaints and enquiries from 16 Member States (MS) for the period 2003 to mid-2008. Interviews suggest that this is only the “tip of the iceberg”, and experiences from other areas indicate that only 1% to 5% of the affected targets are likely to file a complaint. The average damage to affected companies that pay an unintended registration equates to approximately 1,000 Euro per year (over a contract duration of 3 to 5 years). It is not possible to assess the overall damage due to data limitations. However, the number of complaints documented confirms that ‘directory companies’ reported to apply misleading practices pose a significant problem for SMEs, inflicting both financial and non-material damage. This is confirmed by the three quarters of the stakeholders responding to the survey that assesses the problem as being either very or fairly significant.

*Legal actions have been brought against ‘directory companies’ reported to apply misleading or unfair practices, although the number of lawsuits filed seems to be relatively low in comparison to the number of complaints.* Lawsuits are initiated mainly by stakeholder organisations, not by affected companies. From the interviews it appears that these lawsuits are costly and lengthy and do not bring immediate redress for affected companies, and are also no guarantee that ‘directory companies’ cease their practices. However, in some cases legal action seems to have led directly or indirectly to improvements in the practices of the defendant ‘directory companies’. In contrast, self-regulatory and other non-legislative measures do not seem to be effective. Self-regulatory mechanisms relevant to the directory and advertising industry do exist, but they are voluntary and not legally binding. ‘Directory companies’ that reportedly engage in misleading practices seem to disregard these mechanisms, and legal tools seem to be required to force compliance.

*Non-judicial redress mechanisms are barely available for SMEs, and those that exist have been rarely used in disputes with ‘directory companies’ operating cross-border.* Relevant mechanisms for business-to-business (B2B) disputes are reported from only a minority of Member States. Key impediments to apply ADR to disputes with ‘directory companies’ are (a) the need for voluntary participation, (b) the lack of trust of affected companies, and (c) the complexity of cross-border cases, combined with the lack of information of affected companies concerning ADR systems available in other MS. A European network for cross-border B2B disputes similar to the network of European Consumer Centres (ECC-Net) for business-to-consumer (B2C) disputes does not yet exist.

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<sup>1</sup> In this study the term ‘directory companies’ refers to companies publishing business directories that are subject to complaints of affected enterprises. Business directories are an essential element of economic life and most of the companies that publish them are likely to be reputable businesses. Even the fact that complaints against a company are documented does not mean that this is caused by misleading or unfair business practices. There is therefore no explicit or implicit underlying assumption of this study that all ‘directory companies’ subject to complaints are applying misleading or unfair business practices. Decisions by courts, competent authorities and national advertising regulatory organisations have documented that some companies have in the past applied business practices that are considered in these decisions to be misleading or unfair. To these decisions we refer in this study when we discuss “‘directory companies’ reported to apply misleading or unfair practices”. However, it has to be noted that the same practices have also led to opposite judicial decisions. It was not the mandate of this study to address the question whether specific business practices by ‘directory companies’ have indeed to be considered as misleading or not, or to assess the merits of specific complaints by affected enterprises. Both aspects relate to the specifics of the individual cases and were out of the scope of this analysis.

*MS authorities have been engaged in initiatives against ‘directory companies’ reported to apply misleading practices cross-border.* The cross-border aspect of the problem that requires cooperation between MS enforcement authorities poses the key obstacle to better enforcement, as no administrative enforcement cooperation network between MS exists regarding unfair commercial practices in B2B relationships. A major aspect is different approaches to and interpretations of the problem in MS. Different notions of what is “misleading” seems to be a major practical impediment in combating such practices of ‘directory companies’ in B2B relationships.

*The implementation of Directive 84/450/EC on Misleading and Comparative Advertising appears not to have introduced legal loopholes within the national legislations of the Member States analysed.* The data collected for this study indicates that the implementation of the new Directive 2006/114/EC has also not led to relevant amendments to the national legislations of the Member States: It mostly concerns the codification of existing substantive rules on misleading advertising. Loopholes in the application of these rules do not seem to be a major problem. However, advertising law remedies generally do not provide for relief in terms of the effects caused by the misleading practices (for example, nullification of the contract). Injured parties may be entitled to claim compensation for damages, but in the three countries considered in depth these claims are exceptional or even impossible.

*Specific legislation concerning ‘directory companies’ engaging in misleading practices does not seem to exist in most Member States for which relevant information could be obtained.* An exception is Austria, which has introduced specific legislation on this. Contractual remedies and even criminal remedies are available in all Member States that have been subject to detailed analysis. The existence of such remedies could be an argument for not introducing specific legislation.

*Directive 2005/29/EC does not exclude a system of national rules on unfair commercial practices that is equally applicable to consumers and enterprises.* Such a system, as implemented, for example in Austria, might be advantageous for victims of unfair practices of ‘directory companies’, because the blacklist of practices that are unfair under all circumstances would then be equally applicable. However, the country studies indicate that Member States are often reluctant to stretch the protection against unfair practices provided by Directive 2005/29/EC to enterprises, leading to different levels of protection in MS for victims of unfair practices of ‘directory companies’.

*To address misleading practices of ‘directory companies’ at EU level three options seem to be possible (no preference implied in order of listing):* (1) No legislative action at EU level, but strengthened enforcement cooperation; (2) Amending the Directive concerning Misleading and Comparative Advertising by including a “grey-” or “blacklist” of practices that are considered misleading; (3) Extending the scope of the Unfair Commercial Practices Directive to B2B, with the sub-option 3a) general extension of scope and sub-option 3b) extension only with respect to Annex I no. 21.

## EXECUTIVE SUMMARY

This study by Civic Consulting provides an overview of the extent of the problem of ‘directory companies’ reported to apply misleading practices. It describes judicial and non-judicial measures taken by affected enterprises and discusses initiatives by Member States aimed at tackling these practices. The study further presents an overview of the current EU legal framework and its national implementation. Finally, the study presents overall conclusions with a discussion of options for EU-level action.

The analysis of this study has been based on several resources. Stakeholders and competent authorities have been involved throughout the process of the data analysis by means of interviews and surveys. Several case studies were carried out for the report to document court cases and actions taken against ‘directory companies’ reported to apply misleading practices. A detailed legal analysis for three Member States was carried out (for Austria, the Netherlands and Spain). The country reports examine the transposition of the Directive concerning Misleading and Comparative Advertising and the Unfair Commercial Practices Directive into national legislation, and possible resulting loopholes, as well as jurisprudence and other measures taken by the respective Member States.

### *The extent of the problem*

This study has documented that ‘directory companies’ reported to apply misleading practices lead to a significant number of complaints in Member States. As only a minority of affected companies is likely to file a complaint, and no systematic register exists of those that do file a complaint, the actual scope of the problem is likely to be much larger than the data suggests.

Complaints filed against ‘directory companies’ fall into three categories: mailing form, methods used to extract payment, and quality of brand marketing. The total number of documented complaints and enquiries in the period 2003 to mid-2008 is 13,498. The complaint data indicates that some Member States record more complaints than others. The highest number of complaints and enquiries for the period 2003 to mid-2008 is registered in the UK (2,821), Belgium (2,738), the Netherlands (2,687) and the Czech Republic (1,331).

The complaints statistics show that the highest numbers of complaints are registered against three ‘directory companies’ operating cross-border, which account for a total of nearly half of all complaints. On the other hand, complaints data also indicates that there are other companies operating mainly in one country. In the survey 14 different ‘directory companies’ were identified for which at least 100 complaints and enquiries were reported, indicating that the problem does not relate to just a handful of companies.

According to survey results in the majority of Member States from which responses were received, all business sectors are exposed to practices of ‘directory companies’. Regarding the size of the company, stakeholders confirm that small businesses are particularly affected.

Due to data limitations it seems not to be possible to estimate the overall economic damage caused by ‘directory companies’ reported to apply misleading practices. However, the volume of complaints documented by this study confirms that such ‘directory companies’ pose a significant problem for SMEs, inflicting both financial and immaterial damage (stress, anxiety etc.). This is confirmed by three quarters of the stakeholders responding to the survey that assess the problem as being either very or fairly significant.

### *Redress for affected companies and actions taken*

Legal actions have been brought against ‘directory companies’ reported to apply misleading or unfair practices, although the number of lawsuits filed seems to be relatively low in comparison to the number of complaints. Lawsuits are initiated e.g. by organisations representing SMEs. However, even in cases of domestic ‘directory companies’ the cases are costly and lengthy and do not bring immediate redress.

Competent authorities are restricted in actions against traders registered in another Member State that are in breach of domestic laws. In these circumstances the authorities are required to call upon their counterparts in this Member State to investigate. However, since no damage occurs domestically the authorities in the other Member State may in some cases have limited incentive to proceed with the case. In addition, they could take a different view on the merits of the case or propose remedies that may not bring a satisfactory solution to the problems.

The legal actions that have taken place against some of the ‘directory companies’ demonstrate, however, that there is a legal framework in place to enable the process of legal redress for affected companies. This is also reflected in the country studies for Austria, the Netherlands and Spain.

In contrast, self-regulatory and other non-legislative measures do not seem to be effective. Organisations like the European Advertising Standards Alliance (EASA), the European Association of Directory and Database Publishers (EADP) and the Federation of European Direct and Interactive Marketing (FEDMA) have developed codes of conduct to self regulate advertising and the directory marketing industry. However, compliance to the codes is voluntary and not legally binding.

The results of the survey indicate that there are limited out-of-court redress mechanisms existing in Member States for companies affected by practices of ‘directory companies’. Only about a quarter of respondents specified that some form of non-judicial redress mechanisms was available in their country relevant for the problem.

Key impediments to apply ADR to disputes with ‘directory companies’ are the need for voluntary participation, the lack of trust of affected companies, and the complexity of cross-border cases, combined with the lack of information of affected companies concerning ADR systems available in other MS.

Survey results and interviews indicate that Member States have taken initiatives with regard to the problem posed by ‘directory companies’. These initiatives have been conducted mainly at the domestic level and to some extent at the bilateral level. Governmental authorities seem to have addressed the problem only rarely at the European level. Cooperation of MS authorities on a bilateral level was reported from a number of Member States. Initiatives of MS authorities at the domestic level seem to mainly consist of advice giving to affected companies and awareness-raising campaigns for potential victims.

The general view of government authorities that responded to the study was that they are restrained in taking effective action against ‘directory companies’ due to the cross-border aspect of the problem and to the legislative framework that limits government authorities’ interventions to malpractice against consumers. Different notions of what is “misleading” seem to be a major practical impediment in combating such practices of ‘directory companies’ in B2B relationships.

### *The EU legal framework and its national implementation*

No specific EU legislation exists concerning ‘directory companies’ in B2B relationships. Misleading and unfair commercial practices are currently regulated by two general European Directives. The first is the new codified Directive concerning Misleading and Comparative Advertising (Directive 2006/114/EC), which replaced the “old” Directive 84/450/EC (as revised by Directive 97/55/EC to include comparative advertising). The second is the Unfair Commercial Practices Directive (Directive 2005/29/EC).

#### a) Directive concerning Misleading and Comparative Advertising (Directive 2006/114/EC):

The transposition of the “old” Directive 84/450/EC on Misleading and Comparative Advertising had provided the Member States with means to combat misleading practices of ‘directory companies’. In Austria, the Netherlands and Spain the national laws implementing the Directive are considered helpful against ‘directory companies’ applying misleading practices. From the three country studies it therefore follows that the implementation of the “old” Directive and of the new codified Directive 2006/114/EC has not led to serious legal loopholes with respect to substantial and procedural law within these countries. This conclusion is supported by the results of the stakeholder survey.

However, advertising law remedies generally do not provide for relief in terms of the effects caused by the misleading practices (for example, nullification of the contract). Injured parties may be entitled to claim compensation for damages, but in the three countries considered these claims are exceptional and, under Spanish Law, even impossible.

Hardly any Member States have amended their legislation concerning misleading advertising after becoming aware of relevant practices of ‘directory companies’. From the results of the country studies and the stakeholder survey it can be concluded that most Member States for which relevant information could be obtained did not amend their national legislation when implementing Directive 84/450/EC on Misleading and Comparative Advertising to be more effective against ‘directory companies’ applying misleading practices. An exception to this general picture is Austria, where specific legislation concerning ‘directory companies’ exists.

Contractual remedies and even criminal remedies are available in all Member States. The existence of such remedies could be an argument for not introducing specific legislation.

#### b) Unfair Commercial Practices Directive (2005/29/EC)

The status of the national implementation of the Unfair Commercial Practices Directive (2005/29/EC) differs significantly between Member States. The Spanish implementation process of the Directive is still in its infancy. In the Netherlands, the issue of ‘directory companies’ was addressed in the implementation process, but this has not led to any changes in the proposal for the transposition of Directive 2005/29/EC. The Austrian implementation has led to a broad application of the Directive: The Statute against unfair competition (UWG) generally applies to B2C as well as B2B relations.

Indeed, the Unfair Commercial Practices Directive does not exclude a system of national rules on unfair commercial practices that is equally applicable to consumers and enterprises alike. Such a system, as implemented in Austria, might be advantageous for victims of unfair practices of ‘directory companies’, because the blacklist of practices that are unfair under all circumstances would then be equally applicable. However, most MS are reluctant to extend the protection against unfair practices provided by Directive 2005/29/EC to enterprises, leading to different levels of protection in different MS for victims of unfair practices of ‘directory companies’.

According to survey results, in most Member States from which stakeholders responses were received, no amendments of other national legislation seems to have been made concerning ‘directory companies’.

#### *Options for EU Level Action*

In the study three different options for action at EU level are presented (no preference implied in order of listing):

1. *No legislative action at EU-level, but strengthened enforcement cooperation:* It can be argued that it is not necessary to amend Directive 2006/114/EC or Directive 2005/29/EC, as unfair commercial practices by ‘directory companies’ are governed in principle sufficiently by the two Directives. An amendment of these rather recent Directives in order to solve a very specific problem could also be seen as creating undesirable ad hoc solutions on a European scale. According to this view, the main problem is not substantive law, but the lack of effective legal remedies and enforcement: Information campaigns (for example, targeting specifically newly founded SMEs) and enhanced cross-border coordination and enforcement, including a systematic complaints monitoring, could be considered in order to make better use of the existing substantive rules.
2. *Amending the Directive concerning Misleading and Comparative Advertising by including a “grey-” or “blacklist” of practices that are considered misleading:* A possible legislative option is to amend the new codified Directive 2006/114/EC. Even though certain practices by a ‘directory company’ must already be regarded as misleading under Article 1 of Directive 2006/114/EC this could be clarified by introducing a “grey list” of commercial practices – including certain practices by ‘directory companies’ – which are *prima facie* misleading, although they can be acceptable under certain circumstances. For some commercial practices even a “blacklist” could be considered, that is, a list of practices that are to be considered misleading in all circumstances. A “grey list” – or, for some commercial practices, even a “blacklist” – has the advantage of helping judges apply general clauses and ensure a certain level of harmonisation across Member States.
3. *Extending the scope of the Unfair Commercial Practices Directive to B2B, with the sub-option 3a) general extension of scope and sub-option 3b) extension only with respect to Annex I no. 21:* A revision of the Unfair Commercial Practices Directive aimed at including B2B transactions within its scope would also be a possibility for creating uniform law at European level. The most important argument for the extension of the scope of Directive 2005/29/EC is to be found in the effectiveness of the remedies, which, combined with Regulation 2006/2004 on Consumer Protection Cooperation, is more structured than the remedies under Directive 2006/114/EC. The system under Directive 2005/29/EC opens the possibility of administrative fines and cross-border cooperation, which are helpful in the protection of small and medium-sized enterprises against unfair practices of ‘directory companies’. Two different types of amendment to Directive 2005/29/EC are possible: (a) including B2B transactions in the scope of Directive; (b) extending only the scope of no. 21 (and possibly also no. 26) of Annex I of the Directive to B2B relationships.

# 1. INTRODUCTION

## *Objective of the study*

This study has been commissioned by the European Parliament to Civic Consulting to provide evidence concerning the problem of ‘directory companies’ reported to apply misleading practices in the context of current and future internal market legislation aimed at the protection of consumers and SMEs, as well as an analysis of related economic and legal aspects.

The analysis addresses the following issues:

- Overview of the magnitude and significance of the problem of ‘directory companies’ reported to apply misleading practices operating at European level;
- Overview of non-judicial redress mechanisms and initiatives by MS authorities;
- Assessment of the quality of transposition of the Directive concerning Misleading and Comparative Advertising (84/450/EC and 2006/114/EC) and relevant amendments to close legal loopholes;
- Assessment of the quality of transposition of the Unfair Commercial Practices Directive (2005/29/EC) and assessment of the need for further revisions;
- Evaluation of other relevant national legislation and non-legislative measures; and
- Possible legislative changes at EU level.

## *Structure of the study*

The structure of the report is as follows: Section 2 details the methodology employed for the study. Section 3 provides an overview of the extent of the problem of ‘directory companies’ reported to apply misleading practices. In section 4 judicial and non-judicial measures taken by affected companies are introduced, and initiatives by Member States are described. Section 5 provides an assessment of the current EU legal framework and its national implementation. In particular, it analyses the transposition of the Directive concerning Misleading and Comparative Advertising and the Unfair Commercial Practices Directive. Other relevant measures are examined as well. Section 6 discusses options for EU-level action.

The Annexes of the study provide in Annex 1 in-depth country analysis of the national legal framework for three Member States (Austria, The Netherlands and Spain). Furthermore, the survey questionnaire is provided (Annex 2), the list of respondents to the survey (Annex 3), the results of the surveys (Annex 4) as well as a list of petitions submitted to the European Parliament (Annex 5). The questions submitted to three selected companies that are subject to complaints and the statements subsequently received from two of them are listed in Annex 6 and Annex 7, including current registration forms provided by the companies. Finally, the bibliography is presented in Annex 8.

## *Acknowledgements*

Civic Consulting would like to express its gratitude to all its supporters. We would like to thank all competent authorities, European and national business organisations, chambers of commerce, business advice organisations and others that responded to our survey and were willing to discuss in depth the complex issues raised in this study. This analysis would not have been possible without these expert opinions and advice. Finally, we thank the European Parliament for the support provided throughout the study.

## 2. METHODOLOGY

The analysis of this study has been based on the following resources:

- Review of existing studies and reports;
- Expert and stakeholder interviews;
- Survey of EU-level and national business stakeholders, competent authorities and chambers of commerce in all Member States;
- In-depth country studies concerning three Member States (Austria, the Netherlands and Spain) to analyse the national legal framework; and
- Analysis of the legislative framework at EU-level.

*Interviews/meetings with stakeholders, competent authorities, 'directory companies' and SMEs affected by practices of directory companies*

Stakeholders and competent authorities have been involved throughout the process of the data analysis by means of interviews and surveys. Depending on availability, interviews were carried out face-to-face, by phone or in writing. The numbers of stakeholders interviewed is provided in the following table.

**Table 1: Total number of interviewed stakeholders**

Organisation	Number of interviews
European Business Associations	4
National Business Associations	2
Competent Authorities	5
Pressure groups and advice organisations	2
Companies subject to complaints*	2
SMEs affected by 'directory companies'	3
TOTAL	18

*\*Statements were requested and received in writing*

### *Survey*

A survey was developed and circulated in all Member States targeting European and national business associations and competent authorities, as well as other key stakeholders (see Annex 2). The questionnaires were sent out by email to the relevant organisations. A total of 40 responses were received from business associations, competent authorities, and other stakeholders (of which 37 responses from EU/EFTA countries). Table 2 describes the profile of the respondents.

**Table 2: Number of respondents to the survey**

<b>Respondents from EU MS/EFTA*</b>	<b>Questionnaires received</b>
Competent Authorities**	12
National Business Associations	15
European Business Associations	3
Other	7
<b>TOTAL</b>	<b>37</b>

*\*Three additional questionnaires were received from outside the EU/EFTA. These have been taken into account, but were not included in the quantitative analysis.*

*\*\* One questionnaire from a competent authority was not included in the data analysis as it was received only after the data analysis was completed.*

### *Case studies*

Several case studies were carried out for the report to document court cases and actions taken against ‘directory companies’ reported to apply misleading practices. Three case studies illustrate the experience of SMEs with ‘directory companies’. Case studies of a select number of companies subject to complaints were incorporated in the overall assessment of the problem.

### *Country reports*

A detailed legal analysis for three Member States was carried out for Austria, the Netherlands and Spain. The country reports examine the transposition of the Directive concerning Misleading and Comparative Advertising and the Unfair Commercial Practices Directive into national legislation, and possible resulting loopholes, as well as jurisprudence and other measures taken by the respective Member States.

### 3. EXTENT OF THE PROBLEM

*Do experts have reliable data providing an idea of the magnitude of the problem of ‘directory companies’ reported to apply misleading practices operating at European level and the amounts of damage inflicted by them so far to professionals and small companies?*

#### 3.1 Background

Since 2004 the European Parliament has received close to 400 petitions that relate to ‘directory companies’ reported to apply misleading practices. Of the 400 petitions, about 150 come from the UK, but petitions have also been received from most Member States and other European countries such as Croatia, Moldova, Norway and Serbia. Petitions also came from non-EU countries such as the USA (26), Canada (10), India (4), Japan (3), Taiwan, Argentina, New Zealand, Thailand and Lebanon.<sup>2</sup> Having some concerns for the consequences of these practices on the functioning of the EU internal market, the EP therefore decided to commission the present study to analyse related legal and economic aspects. The Terms of Reference of the study describe the problem as follows:

“Over the past years, a number of so-called ‘directory companies’ [...] have been operating cross-border in several EU Member states [...] targeting specifically professionals and small companies with hidden ‘registration contracts’. [...] Attempts to withdraw from the contract are usually rejected and amounts due are then rigorously collected through specialized debt collection agencies, leaving the victims with a substantial financial loss and possibly also legal costs. When spotted and closed down by national authorities, these companies have frequently managed to relocate and take up their [...] practices as before.”<sup>3</sup>

In this study the term ‘directory companies’ refers to companies publishing business directories that are subject to complaints of affected enterprises. Business directories are an essential element of economic life and most of the companies that publish them are likely to be reputable businesses. Even the fact that complaints against a company are documented does not mean that this is caused by misleading or unfair business practices. **There is therefore no explicit or implicit underlying assumption of this study that all ‘directory companies’ subject to complaints are applying misleading or unfair business practices.** Decisions by courts, competent authorities and national advertising regulatory organisations have documented that *some* companies have in the past applied business practices that are considered in these decisions to be misleading or unfair. To these decisions we refer in this study when we discuss “‘directory companies’ reported to apply misleading or unfair practices”. However, it has to be noted that the same practices have also led to opposite judicial decisions. It was not the mandate of this study to address the question whether specific business practices by ‘directory companies’ have indeed to be considered as misleading or not, or to assess the merits of specific complaints by affected enterprises. Both aspects relate to the specifics of the individual cases and were out of the scope of this analysis.

In the course of research two types of ‘directory company’ emerged that differ in terms of geographical scale of operations, as follows:

- *National-scale ‘directory companies’ that are registered and operating domestically;*

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<sup>2</sup> See Annex 5.

<sup>3</sup> See Terms of Reference of this study.

- *International-scale ‘directory companies’ that are registered in Europe or offshore and operating cross-border in several European countries and worldwide.*

In the light of complaints received by the European Parliament, this report will focus on the international-scale ‘directory companies’; however, where applicable, reference will be made to companies operating on a national scale.

It is believed that the problem of ‘directory companies’ reported to apply misleading or unfair practices has a longstanding history and has attracted a considerable level of attention from the media, politicians, government authorities and business organisations. However, to the great distress of affected businesses that fall into the SMEs category, to date no effective solution to prevent the problem has been found. In fact the problem of ‘directory companies’ remains very much a hidden one: there is limited data on the damage caused and profits made to assess its economic and social magnitude. Research data collected for the present study indicates that only a small percentage of affected businesses are likely to file a complaint.<sup>4</sup>

However, what is known is that the modus operandi of ‘directory companies’ that concerns using mailing forms is often viewed by recipients as misleading. The mailing forms are sent using different technologies such as ordinary mail, fax and the Internet.

Complaints filed against ‘directory companies’ fall into three categories: mailing form; methods used to extract payment; and quality of brand marketing.

1. *Mailing form:* Complaints about the misleading nature of mailing forms concern issues such as the content, layout, lack of information on a solicitation product, and use of a foreign language on forms. The content and the layout of the forms account for by far the highest number of complaints. These concern the lack of clarity and transparency on price and contractual obligations which, according to the complaints, mislead recipients to believe it is a free offer.<sup>5</sup> Recipients who signed such forms claimed that they realised they had entered a legally binding contract only upon receipt of the first invoice that comes after the cooling-off period specified under the terms and conditions. Hence in real terms complainants consider that they have no possibility of retracting contracts signed unintentionally. A second group of complaints relates to a lack of information on the product, that is, accurate data on distribution numbers and target audience. Recipients claim that mailing forms are sent without such information, which misleads them into believing it is not an advertising solicitation. The third group of related complaints concerns the foreign language of the forms, and is brought by recipients (especially in new Member States) whose mother tongue is other than the language of the forms (which are often sent in German, English, French or Spanish).<sup>6</sup> Complaints about the misleading nature of some of the mailing forms were upheld by national advertising regulatory organisations (SROs)<sup>7</sup> and courts in EU Member States.<sup>8</sup> However, there have been inconsistencies in ruling the mailing forms as misleading between Member States, which are also reflected in court decisions.<sup>9</sup>
2. *Methods used to extract payment:* Other complaints refer to the methods applied by ‘directory companies’ to collect payments of disputed fees.<sup>10</sup> In the cases documented

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<sup>4</sup> Interviews and survey.

<sup>5</sup> See petitions to the European Parliament.

<sup>6</sup> Directory Fraud Victim Group, Czech Republic (2008).

<sup>7</sup> EASA Euro Ad-Alert (2005); EASA Member Alert (2005).

<sup>8</sup> See case studies in this section.

<sup>9</sup> Stakeholder survey, interviews.

<sup>10</sup> Stakeholder interview.

in petitions to the European Parliament, ‘directory companies’ that were the subject of complaints failed to accept that a form was signed in error, and pursued financial demands. In case of non-payment, petitioners were penalised with additional costs, that is, late payment/administration and legal fees, and debt collectors were used to extract payment.<sup>11</sup>

3. *Quality of brand marketing*: Complaints about the quality of brand marketing concern the issue of circulation (that is, the target audience and distribution numbers). A UK Internet site pressure group and an initiative from the Czech Republic claim that there is very little evidence (i) of circulation of the disputed directory guides other than to victims of the ‘directory companies’, or (ii) of a genuine brand marketing campaign.<sup>12</sup>

An example for a typical complaint is provided in the following box:

### **Case study 1: An affected software company**

The software company is based in a new Member State and develops management software for small and medium-sized retailers and large retail chains. It is a medium-sized enterprise and employs around 250 people.

In February 2007 the software company received by post an entry form from a ‘directory company’, which offered to insert a company profile in its guide. The company manager pointed out that the upper content of the form in bold letters stated “updating is free of charge”, and the logo of the form (the Euro symbol encircled by stars) gave the impression that the form had an “official EC sanction”.<sup>13</sup> The entry form was signed by the company manager, and returned to the postal address of the ‘directory company’ based in an old Member State. About a month later (March 2007) the software company received a payment request for close to 1,000 Euro to cover the costs of insertion of company data in the directory. Only at this stage did the company study the form in depth and notice that small and dense print at the bottom of the form stated that it constituted a contractual order for a paid insertion of company data. By signing the form the software company agreed to enter an automatically renewing contract for a period of 3 years, with the right to cancel the contract within the seven-day cooling-off period. However, since the invoice arrived after the cooling-off period, the company was left with no possibility of cancelling the contract.

Upon receipt of the invoice the software company contacted the ‘directory company’ to inform it that it had signed the form in error. However, according to the software company, the ‘directory company’ took no account of the situation and pursued demands of payment and also threatened the company with additional legal fees of 300 Euro for late payment. Moreover the ‘directory company’ engaged a debt collector (with a postal address in the Netherlands). As a result, the company was left with an outstanding total bill of over 3,000 Euro. To date company’s expenditure in real terms is staff costs, that is, the cost of the office manager who spent time on the case. In addition, the company envisages having to pay solicitor’s costs to seek legal advice on the case.

Attempts to solve the dispute directly with the ‘directory company’ have brought no positive results (i.e. no cancellation of the contract). The software company could not find any local source of information relevant to the problem, and a primary source of advice turned out to be a UK Internet site. Following advice on this website the software company filed letters of complaint to various bodies, including the European Parliament.

## **3.2 Number of complaints documented in EU Member States**

When analysing data on complaints regarding ‘directory companies’ documented by the present study it has to be considered that only a small percentage of complaints are likely to be recorded. According to many interviews and survey respondents, complaints filed are only the “tip of an iceberg”.

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<sup>11</sup> Case studies of affected companies and EP petitions.

<sup>12</sup> [www.stopecg.org](http://www.stopecg.org); Directory Fraud Victim Group, Czech Republic (2008).

<sup>13</sup> The form states, however, in small print that the services of the company are not related to any organisation or institution of the European Union or Commission.

For example, research by the UK Office of Fair Trading indicates that only around 5% of consumer ‘scams’ are reported to the authorities,<sup>14</sup> and according to the Canadian Competition Bureau, only 1% of affected companies file a complaint.<sup>15</sup> A number of reasons are given for the low proportion of complaints:

- *Psychological reasons:* Guilt and feeling of embarrassment of being caught were mentioned as primary reasons. Only the most vocal are eager to admit and report the problem.
- *Lack of awareness of ‘directory companies’:* Affected companies may feel the offer signed in error is genuine and they are the only victim.<sup>16</sup>

The following case study of an affected hotel illustrates the difficulties created through a lack of awareness of the problem:

### **Case study 2: An affected small hotel**

The affected business is a small hotel in an old Member State that was founded in 2001 and is run by an elderly couple. In the summer of 2003, they received a form through regular mail by a ‘directory company’ from another old Member State that sought authorisation to use their business’s name in a guide. The owner of the hotel remembers that it was very difficult to read the small print due to the format, and he returned the completed form without reading it carefully. Soon after, the hotel received an invoice of close to 850 Euro, which took the owner by great surprise. He responded with a letter to the ‘directory company’ stating that it was not their intention to pay for an advertisement, and that they had only given authorisation to use their name in their guide. The ‘directory company’ kept on sending invoices despite his complaint. Since the hotel owner suspected there was something wrong, he did not pay the invoice, but he responded to all received invoices with a letter of response to the ‘directory company’. He also responded by mail to letters that he received from debt collection companies. The affected hotel owner recalls that the debt collecting companies also called 3 to 4 times to make them pay the sum. He noticed that the letters were arriving from different debt collecting companies and that the ‘directory company’ was also changing addresses. About the time he started to receive letters from the debt collectors, a package from the ‘directory company’ arrived with the printed directory. It contained a listing of their enterprise, but he found it rather strange that their hotel, which is one of the smallest of its type in their city, was the only one represented in a disproportionately large advertisement. He suspected that something must be fraudulent as much larger enterprises were listed only in a single line. With increasing suspicion, he did some Internet research. Once he obtained further information he became convinced that he did not have to pay the invoice, and proceeded to take further action. Using some of the standard letters and petitions available on a campaign website, he wrote a letter to the European Commission and sent letters to two MEPs. One of the MEPs responded with a long email, telling him about similar cases that she was aware of. The owner of the affected hotel also forwarded his petitions to the ‘directory company’. After these petitions to the Commission and the MEPs, he never received more letters, from either the debt collection companies or the ‘directory company’. The owner of the hotel has heard of other small companies that fell victim in similar cases, and he advised them not to pay. He stated that in the beginning of the process, he felt very much a victim, as he felt ‘robbed’ and was afraid to be taken to court if he would not pay the accruing fees. Yet when he realised through the Internet that he was not alone, he became convinced that he didn’t have to pay. Instead, he donated some money to a campaign website dedicated to fighting the practices of ‘directory companies’, to support their work, as he was very grateful for the information and advice they provided. He wants such ‘directory companies’ to be closed down. He states that it cost him a lot of time writing the letters and dealing with this issue, and has suffered from the negative psychological effects during this process.

Other reasons given in the interviews for the relatively low proportion of complaints are:

- *Lack of “know-how” of complaint filing processes:* Affected companies may have no knowledge of government authorities or non governmental organisations that register complaints and provide help;

<sup>14</sup> UK OFT Interview (2008).

<sup>15</sup> The Competition Bureau Canada, Survey (2008).

<sup>16</sup> Stakeholder interview.

- *Lack of a centralised database of complaints:* At the national level complaints are recorded ‘ad hoc’ in a non-systematic way by various governmental and non-governmental organisations. Similarly, at the European level complaints are lodged with a wide range of institutions and organisations and not recorded in a coherent way.

The data presented in the following table is based on complaints documented by organisations from 16 EU Member States and Norway that can be grouped in the following categories:

- *Government authorities:* Ministries of economy, trade inspection authority, consumer protection and competition agencies, consumer ombudsman;
- *Self-regulatory organisations:* EASA and the national SROs
- *Private organisations:* SME associations, chambers of commerce, anti-fraud organisations and lobby groups.

**Table 3: Number of reported complaints per Member State (2003-2008)**

<i>Country</i>	<i>Number of questionnaires received</i>	<i>Number of complaints reported</i>	<i>Percentage of total complaints reported</i>
UK	3	2,821*	20.9
Belgium	2	2,738	20.3
The Netherlands	1	2,687	19.9
Czech Republic	3	1,331	9.9
Austria	3	1,066	7.9
Spain	2	767	5.7
Germany	4	727	5.4
Greece	1	318	2.4
Ireland	2	231	1.7
France	2	74	0.5
Norway	1	45	0.3
Denmark	3	40	0.3
Luxembourg	1	40	0.3
Estonia	2	36	0.3
Hungary	2	31	0.2
Bulgaria	1	5	0.0
Sweden	1	0	0.0
<i>EU-level business associations</i>	3	541	4.0
<b>Total</b>	<b>37</b>	<b>13,498</b>	<b>100,0</b>

*Source: Civic Consulting survey (complaints data for 2008 until May to July only, depending on date of response of stakeholder).*

*\* Data from one UK stakeholder referred to both complaints and enquiries.*

The total number of documented complaints in the period 2003 to mid-2008 is 13,498 (see table above). This number does not include non-specific estimates provided by some stakeholders and is therefore a conservative estimate.<sup>17</sup> The complaint data indicates that some Member States record more complaints than others. The highest number of complaints and enquiries for the period 2003 to 2008 is registered in the UK (2,821), Belgium (2,738), the Netherlands (2,687) and the Czech Republic (1,331). It is difficult to compare these figures, as complaints handling and documentation differs between Member States. It is possible that differences between Member States in the number of complaints documented are a result of differences in the way business organisations and other stakeholders report complaints and create awareness among potential victims, rather than an indication of a pattern of activity of 'directory companies'. One argument that would point in this direction is that all mentioned countries from which a large number of complaints are reported have well-established organisations and pressure groups, which may lead to businesses becoming aware of the scope of the problem and filing complaints.<sup>18</sup> Another argument would be that major 'directory companies' that are subject to complaints seem to be active globally (as indicated e.g. by the petitions to the EP) and can be expected to pursue their activities in all countries where relevant address data is available.

The study could not verify whether and to what extent the number of complaints overlap. There is some indication that the records may be reproduced as the result of lodging some of the complaints to different organisations. For example, in the case of the Czech Republic, complaints against a 'directory company' were recorded by the Anti Fraud Directory Group, the Ministry of Trade and Industry and the national SRO (Rada pro Reklamu). There is also some indication that this may also be relevant for complaints regarding other 'directory companies'. However, it was not possible to analyse potential inconsistencies in the recorded complaint data, which would require analysis of the full documentation of submitted complaints and there would also be issues of confidentiality. Nonetheless, the problem of verification of complaints data underlines the importance of setting up a comprehensive database system at the domestic level of Member States and the wider EU level for monitoring and evaluation purposes.

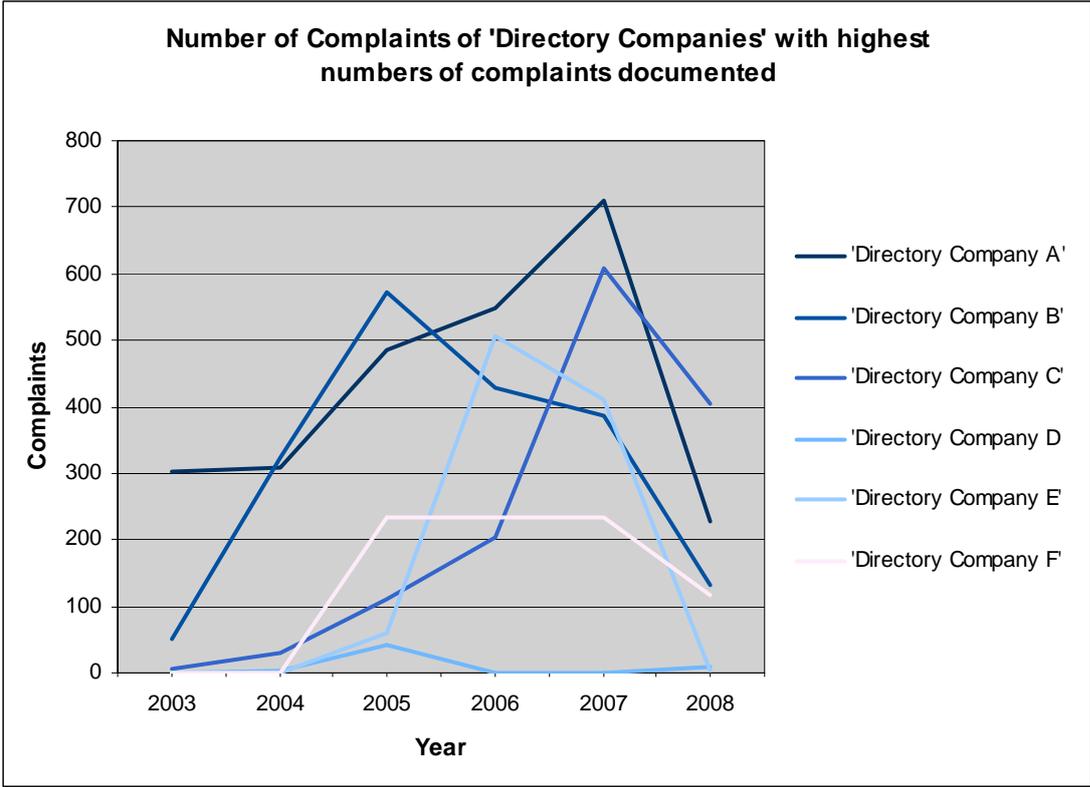
Figure 1 below indicates that in the period 2003-2007 the overall tendency points towards an increase in total complaints, if the data for 2008 is ignored, which covers only complaints registered before mid of the year. Again, it is impossible to say whether this increase is caused by a higher activity of such companies, by increased attention to the problem, or, as some 'directory companies' claim, by a campaign against them and resulting negative publicity. It is notable that the trend in petitions to the European Parliament is quite different, with a clear peak in 2006, when 90% of the petitions were received (see Annex 5).

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<sup>17</sup> For example, the Austrian Federal Chamber of Economy (*Wirtschaftskammer Österreich*) responded to the survey that "specific data or statistics on the number of complaints are not gathered in all chambers of economy in the different federal states. However, thousands of complaints were probably received in recent years at the chambers of economy and the Association against unfair competition (*Schutzverband gegen unlauteren Wettbewerb*)".

<sup>18</sup> In Belgium the initiatives were carried out by the government and UNIZO (the Flamish organisation for self-employment and SMEs). In the United Kingdom there is an Internet site Stop ECG ([www.stopecg.org](http://www.stopecg.org)). Also, the Office of Fair Trading and local trade inspections issue warnings. In the Netherlands there is a national fraud reporting centre SAF ([www.fraudmeldpunt.nl](http://www.fraudmeldpunt.nl)). In the Czech Republic there is a pressure group representing affected companies – the Directory Fraud Victim Group.

**Figure 1: Number of complaints concerning ‘directory companies’ by year and company**



Source: Civic Consulting survey (complaints data for 2008 until May to July only, depending on date of response of stakeholder)

The complaints statistics show that the highest numbers of complaints and enquiries are registered against three ‘directory companies’ operating cross-border, which account for a total of nearly half of all complaints. These are ‘directory company A’ (2,584 complaints: 19% of total complaints), ‘directory company B’ (1,923 complaints: 14% of total complaints) and ‘directory company C’ (1,361 complaints: 10% of total complaints). On the other hand, complaints data also indicates that there are other companies operating mainly in one country such as ‘directory company E’ (975 complaints from the Netherlands) and ‘directory company F’ (820 complaints from Belgium). In the survey 14 different ‘directory companies’ were identified for which at least 100 complaints and enquiries were reported, indicating that the problem does not relate to just a handful of companies.

### 3.3 Statements of companies that are subject to complaints

For this study, three companies that were subject to complaints documented through the survey and also subject to petitions by affected companies to the European Parliament were contacted to provide their view of the situation. They were asked a set of questions (see Annex 6), including the question: “some of the press releases and statements refer to your company as “misleading” – what is your response to this?”

Two of the companies provided detailed written answers to these questions (documented in Annex 7 of this study). The main arguments provided to the above question included:

- The first company states that their “order form is not misleading in any way. The form is in total adherence to the Directive 2006/1[1]4 of the European Parliament and Council [...]”. It is emphasised that “despite the consideration that we are a ‘misleading company’ it is not our intention to mislead anyone”.

The company regards itself as “victims of a defamatory campaign on the Internet, against which it is very difficult to defend ourselves”. The company stresses that it “has always provided the contracted service, both on paper as well as CD and the Internet”. Pointing out that since 2003, it has sent out 32 million letters to potential customers, “the percentage of complaints does not seem to be too high” (*European City Guide*, Spain);

- The second company states that it does not act in a misleading manner and that its mailing forms “are developed in close cooperation with lawyers”. The company points out that only since a damaging campaign on the Internet, there have been complaints on misleading advertising brought forward against them: “If a company voluntarily makes an order, and is content about the product but then stumbles upon this website (...) which describes him or her as being ‘mislead’, it is easily understandable that the customer will react with protests”. The company states that in the last 4 years, more than 25 million forms were mailed out, hence the number of complaints represent only a tiny fraction (*Construct Data Publishers*, Austria).<sup>19</sup>

It was not in the mandate of this study to analyse the commercial practices of individual companies, therefore the statements of the two companies have not been validated or directly contrasted with the perspective of complainant companies and/or relevant court decisions.

### **3.4 Size and sector of companies affected by ‘directory companies’**

According to survey results in the majority of Member States from which responses were received, all business sectors are exposed to practices of ‘directory companies’. Regarding the size of the company, stakeholders confirm that small businesses are particularly affected. There are several factors specific to the SME sector that are exploited by ‘directory companies’ reported to apply misleading practices. According to the interviewees, these include:

- *Type of brand marketing*: A business directory advertised by ‘directory companies’ appeals to majority of SMEs as a relatively simple way of brand marketing;
- *Human resources*: SMEs’ human resources are often stretched, and may rely on the skills of less experienced staff;
- *Lack of legal expertise*: Unlike large enterprises, SMEs have limited access to legal advice. In addition, seeking legal redress is financially not viable because legal costs may equal or exceed the value of the loss. According to one stakeholder organisation, the costs of the advertising considered to be misleading are fixed in a deliberate way to prevent business from seeking legal redress;
- *Lack of awareness of the problem*: The hidden nature of the problem means that most SMEs are not vigilant enough to take precautions in response to offers that claim to be “free of charge”;
- *Limited protection from cross-border unfair commercial practices*: SMEs and small businesses in particular are exposed to similar risks as consumers in relation to cross-border transactions. However, SMEs do not enjoy the same level of protection from enforcement authorities that have powers and duty to act when a consumer right is infringed cross-border. That leaves SMEs an easy target for practices of ‘directory

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<sup>19</sup> Translation by Civic Consulting.

companies' because the only mechanism of redress is through a legal action that is time-consuming, costly and may exceed the value of the loss.

An example of an affected small-sized company is provided in the following box:

### **Case study 3: An affected small sized enterprise**

In 2004, a small enterprise located in a new Member State participated in a local trade fair. Several months later, the company received via regular mail a form by a 'directory company' located in an old Member State inviting it to update its free entry in its directory. As the form referred to the business's participation in the exhibition a few months ago, the business owner assumed that the service offered was related to this exhibition. The business owner emphasised that the reference to the exhibition was crucial in his decision to sign and return the form in 2005. He also assumed that this listing was free of charge, as the form stated this on the top of the form. Yet he also concedes that he did not read the small print at the bottom of the form carefully. Four months later, he received an invoice from the 'directory company' demanding the payment of close to 1,000 Euro. The business owner was very surprised as he had not been aware of "buying something". He ignored the first invoice, yet with the arrival of the second invoice he did pay the amount out of fear of getting into trouble. Following the specification in the small print, three months before the order's expiry date the business owner sent a fax that demanded the cancellation of the contract. The 'directory company' responded within a week by mail stating that a cancellation of the order is possible only after the third publication period; that the company has duly listed the business on its website and that at this point, it is no longer possible to cancel the order. In 2006, the next invoice for the second publication year arrived that requested the payment of a similar amount. While the 'directory company' continued to send reminders for the annual payment, the company owner conducted some Internet research on this particular 'directory company'. He wrote a longer letter to the company, referring to a court ruling against this company. He stated also that he was misled by the form when he initially had completed it and demanded the cancellation of the contract. The 'directory company' responded that the court ruling was related to a specific form, while this business had received another form, hence the matter had no ramifications for the present case. The 'directory company' continued to send payment reminders until early 2007. In this last correspondence, the 'directory company' threatened to take legal action against the affected business based on their failure of payment. Yet the letter stated that the costs of a court procedure could be avoided if the business would immediately make a payment of 1,049 Euro. At this point, the affected business owner sent another letter to the 'directory company', and also sent a complaint letter to eight competent authorities and organisations. Since sending these letters, he has not heard again from the company. Regarding the payment of close to 1,000 Euro that he already made to the 'directory company', the owner of the small enterprise does not demand any reimbursement. Yet he emphasises that he has lost much more than the sum he already paid, due to the time and stress that this confrontation with the 'directory company' absorbed, especially considering that his business consists of only two people. The company owner stated that this kind of business practice destroys trust in the business relations within Europe, especially among small businesses. He no longer feels at ease to do business in the wider European market.

### **3.5 Estimated damage of affected companies**

It is difficult to assess accurately the financial damage to affected companies due to limited data on the matter, which is closely linked to the problem of reporting complaints. Analysis of survey results and petitions indicate that an average damage to affected companies that pay an unintended registration fee equates to a figure of approximately 1,000 Euro per year. This figure has to be multiplied by three to five because the disputed contracts run for a period of three to five years depending on the company. In case of a late payment, supplementary fees are added, the amount of which varies between companies.<sup>20</sup> Stakeholders estimated the proportion of companies that had already paid before filing a complaint between 0% to 100% (with the median of 15%). Affected companies and pressure groups also point out time costs encountered in attempts to solve disputes with 'directory companies', and possible legal costs to seek advice on the matter.

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<sup>20</sup> See EP petitions, Annex 5.

On the other hand, from the survey results and interviews it can be concluded that in many cases affected companies that make a complaint do not pay the registration fees demanded by 'directory companies' and no financial damage occurs. Research data suggest that 'directory companies' rarely pursue payment claims through courts.

In conclusion, due to data limitations it is not possible to estimate the overall economic damage caused by 'directory companies' that are reported to apply misleading or unfair practices. However, the number of complaints documented by this study confirms that 'directory companies' pose a significant problem for SMEs, inflicting both financial and immaterial damage (stress, anxiety etc.). This is confirmed by three quarters of the stakeholders responding to the survey that assesses the problem as being either very or fairly significant.

The data presented in the previous sections leads to the following conclusion:

1. ***Substantial numbers of enterprises in Member States are affected by the problem of 'directory companies' reported to apply misleading or unfair practices.*** The survey of stakeholders documented more than 13,000 complaints and enquiries from 16 Member States for the period 2003 to mid-2008. Interviews suggest that this is only the "tip of the iceberg", and experiences from other areas indicate that only 1% to 5% of the affected targets are likely to file a complaint. The average damage to affected companies that pay an unintended registration equates to approximately 1,000 Euro per year (over a contract duration of 3 to 5 years). It is not possible to assess the overall damage due to data limitations. However, the number of complaints documented confirms that 'directory companies' pose a significant problem for SMEs, inflicting both financial and non-material damage. This is confirmed by the three quarters of the stakeholders responding to the survey that assesses the problem as being either very or fairly significant.

## 4. REDRESS FOR AFFECTED COMPANIES AND ACTIONS TAKEN

### 4.1 Legal actions brought against ‘directory companies’

The survey data (see Annex 4) indicates that legal actions have been brought against ‘directory companies’ reported to apply misleading or unfair practices, although the number of lawsuits filed seems to be relatively low in comparison to the number of complaints. Lawsuits are initiated mainly by organisations representing SMEs. However, even in cases of domestic ‘directory companies’ the cases are costly and lengthy and do not bring immediate redress, as was the case of UNIZO (see following box).<sup>21</sup>

#### **Case study 4: UNIZO versus a national department of an international ‘directory company’**

In 2007 UNIZO filed a lawsuit against misleading advertising practices by a ‘directory company’ registered and operating in Belgium. According to UNIZO, the ‘directory company’ attempted to slow down the litigation process through jurisprudence, for example, the Belgian laws in reference to a language of a court hearing. The case is expected to be heard in a German-speaking court. No date has been set so far. However, while the case is still pending, the ‘directory company’ has continued its practice. This prompted UNIZO to file an additional case against it in the so-called Emergency Commercial Court. The latter found the ‘directory company’ guilty and ruled that, should the malpractice continue, a fine will be imposed for every form mailed. The ruling stopped the ‘directory company’ from operating in Belgium. However, the case is still pending and so far no redress has been obtained for affected companies that incurred financial loss.

Competent authorities are restricted in actions against traders registered in another Member State that are in breach of domestic laws. In these circumstances the authorities are required to call upon their counterparts in a relevant Member State to investigate. However, since no damage occurs domestically the authorities in the other Member State may in some cases have limited incentive to proceed with the case. In addition, they could take a different view on the merits of the case or propose remedies that may not bring a satisfactory solution to the problems. This is illustrated by the following case study:

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<sup>21</sup> UNIZO Interview (2008).

### **Case study 5: Spanish authorities versus an internationally operating ‘directory company’**

In response to complaints received from UK traders against an internationally operating ‘directory company’ based in Spain, the OFT established contacts with the Department of Industry, Commerce and Tourism of a Spanish province in whose jurisdiction the company was based.<sup>22</sup> The OFT provided the authorities with evidence of the activities of the ‘directory company’ and as a result an investigation was launched. Alongside the OFT evidence, the authorities reportedly received over 3,500 complaints from businesses and professionals in 40 European countries.<sup>23</sup> In 2003 a court in the province found the ‘directory company’ guilty of deceitful advertising and imposed a fine of 300,000 Euro and a temporary shutdown for one year.<sup>24</sup> The ‘directory company’ moved to an autonomous Spanish region where a different jurisdiction applies.<sup>25</sup> In the end, the fine was collected in 2007.<sup>26</sup> In addition negotiations between the ‘directory company’ and the authorities of the autonomous region where the company is currently based took place and led to an improvement of the company’s mailing form and the establishment of an ombudsman (see case study 8, below).<sup>27</sup> The OFT was advised by the authorities of the autonomous region to refer complainants to the ombudsman in order to seek resolution of the disputed mailings. However, complaints from businesses in several EU Member States have continued. According to the results of the Civic Consulting survey, more than 2,000 complaints and enquiries against this ‘directory company’ have been documented in EU countries in the years following the Spanish authorities’ intervention (that is, in the period 2004 to mid-2008).

Cross-border enforcement is also relevant in cases where a lawsuit is filed by an affected business against a company based abroad. In circumstances when the domestic court will pass judgment in favour of the affected business it has to be enforced cross-border. However, as was highlighted by a Ministry of Economy responding to the survey, courts across-borders reach different verdicts on the same practice.<sup>28</sup> Therefore, the uncertainty in the court outcome may undermine business trust in the credibility of the system, and discourage the process of seeking legal redress.

Cross-border complexity of the problem also applies in cases where local debt collectors are used, which increases the pressure on affected businesses, but also allows them to challenge enforcement of the payment in local courts. However, these courts may be not sufficiently prepared to judge in cross-border disputes, and by applying a certain degree of autonomy this might create inconsistencies, as was the case in the Czech Republic (see box below).

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<sup>22</sup> OFT Press Release (2003), OFT Questionnaire (2008).

<sup>23</sup> OFT Press Release (2003).

<sup>24</sup> OFT Press Release (2003).

<sup>25</sup> Interview with competent authority in Spain.

<sup>26</sup> Interview with competent authority in Spain.

<sup>27</sup> Commissioner Kuneva’s letter to MEP McCarthy, (2008).

<sup>28</sup> Stakeholder survey.

### Case study 6: Appeals against debt collection in Czech district courts<sup>29</sup>

In the Czech Republic debt collection is administered by district courts. Upon receipt of the payment order the debtor has the right to accept or deny payment within a 14-day period. In the case of a denial, additional 30 days are given to prepare the defence. According to the Czech Directory Fraud Victim Group this timescale is not appropriate to produce evidence. In addition, according to their view, district courts do not have expertise or a sufficient command of a foreign language to judge on issues that arise from mailings of ‘directory companies’. The Czech Directory Fraud Victim Group gives an example of a Czech enterprise appealing against settling payment with a ‘directory company’ on the basis that its mailing form was considered by the enterprise as misleading. According to the group, the ‘directory company’ provided a Czech translation of the mailing form that during the interpretation process lost not only its graphical resemblance of the form but, in order for the translation to be understood, also the ambiguity in the wording of the form. The consequence of using the evidence of a written translation made the judge conclude that the mailing was not misleading. The Czech Directory Fraud Victim Group claims that not all cases against debt collection of the ‘directory company’ were lost. However, the inconsistency in court rulings brings uncertainty to the victims who therefore may be forced to accept payment.

Another impediment lies in the difficulties of producing evidence of a misleading nature of advertising. The legal actions that have taken place against some of the ‘directory companies’ demonstrate, however, that there is a legal framework in place to enable the process of legal redress for affected companies. This is also reflected in the country studies for Austria, the Netherlands and Spain (see Annex 1). An overview of documented legal actions against ‘directory companies’ is provided below.

**Table 4: Selection of documented legal actions against directory companies**

<i>Country</i>	<i>Who brought action</i>	<i>Number of ‘directory companies’ against which an action was brought</i>
Austria	Austrian Advertising Council (ÖWR); Austrian Association for Protection against Unfair Competition (Schutzverband)	1
Belgium	Belgian Ministry of Economy, SMEs organisations and others	4
Czech Republic	The Czech Directory Fraud Victims Group	1
Denmark	Unknown	1
France	SNA (French Directory Publishers)	1
Germany	Exhibition Organisers and others	3
Spain	The Catalan Generalitat	1
<i>Total</i>		<i>12</i>

*Sources: Civic Consulting survey, interviews and EADP, ASAI News, UNIZO and others*

## 4.2 Self-regulatory and other non-legislative measures

There are two types of self-regulatory mechanism that have been applied to the problem of ‘directory companies’ by the following organisations:

- (i) National advertising regulatory organisations (SROs) grouped in the European Advertising Standards Alliance (EASA); and
- (ii) Organisations representing directory publishing and the direct marketing industry: European Association of Directory and Database Publishers (EADP) and Federation of European Direct and Interactive Marketing (FEDMA).

<sup>29</sup> Based on interview with the Czech Directory Fraud Victim Group (2008).

These organisations developed codes of conduct to self regulate advertising and the directory marketing industry and ensure that high standards are maintained. However, the codes are based on a voluntary notion and are not legally binding.<sup>30</sup> Hence self-regulation mechanisms can relate only to a business that is a member of the code, or to a non-member that voluntarily complies with the code and agrees with its sanctions. Below there are examples of specific actions undertaken by EASA and its SROs, and the sector organisations EADP and FEDMA to illustrate the problem self-regulation faces with respect to ‘directory companies’.

#### **4.2.1 EASA and its national advertising regulatory organisations (SROs)**

EASA was set up in 1992 with the aim to address issues arising with the creation of the single market, notably cross-border complaints on advertising. Since then, EASA coordinates the procedure of cross-border complaints on advertising. Cases are investigated locally in each respective country by EASA national members according to the country of origin principle. The intention is to ensure that cross-border complaints are dealt with swiftly. Cross-border complaints, relevant to the case of ‘directory companies’, are transferred to the appropriate self-regulatory body under the EASA Cross-border Complaints Procedures.<sup>31</sup> National complaints are adjudicated upon within two months of receipt of the complaints, whereas for cross-border complaints the benchmark is three months. When the complaint is upheld, an advertiser is asked to change or remove an advertisement. In the case of rogue traders that do not comply with the SRO decision, the complaint is transferred to the national enforcement authority. To help combat the problem of rogue traders, EASA established in 2005 the Rogue Trader Prevention Taskforce, which looks into improving ways of dealing with fraudulent practices and raising the awareness of consumers, business and authorities.<sup>32</sup> Also in response to advertising that is deliberately unethical or shows criminal activity and hence falls outside the scope of self-regulatory measures, EASA developed a system of Euro Ad-Alerts,<sup>33</sup> which notify interested parties of advertisers’ activities.<sup>34</sup> Euro Ad-alerts are disseminated to EASA SRO members, the advertising industry and media, and are available for consumer organisations and European institutions on the EASA website.

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<sup>30</sup> See, for example, the definition of a code of conduct specified by the Unfair Commercial Practices Directive (Directive 2005/29/EC): A code of conduct is “*an agreement or set of rules not imposed by law, regulation or administrative provision of a Members State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors*” (article 2 (f)).

<sup>31</sup> EASA Recommendation of Best Practice Complaints Handling ([www.easa-alliance.org](http://www.easa-alliance.org)).

<sup>32</sup> EASA Interview (2008).

<sup>33</sup> EASA Ad-Alert (2005), ASAI News (2007).

<sup>34</sup> EASA Cross Border Complaint System, Annual Report (2003) ([www.easa-alliance.org](http://www.easa-alliance.org)).

## Case study 7: National advertising regulatory organisations vs. ‘directory companies’

*SROs versus an international ‘directory company’ (Spain):* According to EASA Members Alert (2005) in the period between 1999 and 2005 SROs across Europe received hundreds of complaints against this ‘directory company’. The complaints were transferred to the Spanish self-regulatory organisation for advertising Autocontrol, as per EASA’s guidance on cross-border complaints’ procedures. In two cases (1999 and 2001) Autocontrol ruled the advertising of ‘directory company A’ as misleading. However, the contractual nature of the complaints led Autocontrol to conclude that it was beyond the sphere of self-regulation and hence it did not uphold these complaints. They were referred to the competent legal authorities.<sup>35</sup>

*SROs versus another international ‘directory company’ (Austria):* SROs across Europe, the USA and Asia have received complaints against a form mailed by this ‘directory company’. The complaints were transferred to the Austrian Advertising Council (ÖWR), which found the mailing forms misleading. ÖWR asked the advertiser to stop using the mailing in question. Also ÖWR ruled that any future ‘directory company’ advertising should state payment obligations clearly. However, according to ÖWR the ‘directory company’ did not comply with the decision. The case was referred to court by the *Schutzverband gegen unlauteren Wettbewerb* (Austrian Association against Unfair Competition)<sup>36</sup> and only then the ‘directory company’ agreed in a settlement in 2007, as the *Schutzverband* put it in a release: “to immediately refrain from such misleading communications and from insisting on any payment claims within the EU, the EEA and Switzerland in so far as any person has been misled and therefore placed their signature in error”.<sup>37</sup>

### 4.2.2 European Association of Directory and Database Publishers (EADP)

The EADP was founded in 1966 with the aim of self-regulating the directory and database publishing industry in response to a growing problem of unlawful publishers. Its membership includes large telephone directory publishers and B2B directory publishers producing directories tailored to individual professions. EADP developed a code of professional practice that is binding for its members. However, since membership is voluntarily and there is no legal impediment for non-members the system does not prevent non-members from dishonest practices. EADP receives complaints from traders in Europe and worldwide, but its reaction is limited to directing complaints to relevant authorities. Hence, EADP focuses its work on information sharing and awareness-raising. Actions taken by EADP versus ‘directory companies’ at the European level include participating jointly with EASA and FEDMA in implementing strategies to combat advertising scams across Europe, and working with PostEurop in the area of prevention of unlawful mailing. At the national level, EADP members undertook joint actions with other national stakeholder organisations, and filed lawsuits.<sup>38</sup>

This leads to the following conclusion:

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<sup>35</sup> Case study: Spain.

<sup>36</sup> Easa Euro Ad-Alert, ASAI News (2007).

<sup>37</sup> Schutzverband gegen unlauteren Wettbewerb (2007).

<sup>38</sup> EADP Interview (2008), and: EADP note “The issue of bogus and misleading directories: A very important threat for lawful directory and database publishers” (2008).

2. *Legal actions have been brought against ‘directory companies’ reported to apply misleading or unfair practices, although the number of lawsuits filed seems to be relatively low in comparison to the number of complaints.* Lawsuits are initiated mainly by stakeholder organisations, not by affected companies. From the interviews it appears that these lawsuits are costly and lengthy and do not bring immediate redress for affected companies, and are also no guarantee that ‘directory companies’ cease their practices. However, in some cases legal action seems to have led directly or indirectly to improvements in the practices of the defendant ‘directory companies’. In contrast, self-regulatory and other non-legislative measures do not seem to be effective. Self-regulatory mechanisms relevant to the directory and advertising industry do exist, but they are voluntary and not legally binding. ‘Directory companies’ that reportedly engage in misleading practices seem to disregard these mechanisms, and legal tools seem to be required to force compliance.

### 4.3 Non-judicial redress mechanisms for affected companies

*Could experts provide an overview of redress mechanisms existing in Member States affected by ‘directory companies’ operations and accessible for victims?*

The results of the survey indicate that there are limited out-of-court redress mechanisms existing in Member States for companies affected by practices of directory companies. Only about a quarter of respondents specified that some form of non-judicial redress mechanisms was available in their country for these cases, for example arbitration.

In B2B disputes, the main way to seek redress out-of-court is through voluntary mediation or arbitration. State enforcement authorities and regulators, although they register complaints, often do not have duties or powers to assist businesses in complaint handling, nor can they rule on redress. In some cases, competent government authorities, such as trade inspectorates, have enforcement powers to rule against unfair commercial practices. Although this generally does not encompass granting redress, it can be an important factor in paving the way for a settlement process. A decision of the authorities may be an indication to a trader who committed the unfair practice that the outcome of a court proceeding is less likely to be favourable. Similarly, self-regulators are important allies in pushing for redress, such as SROs in relation to advertising. An SRO’s decision on finding an advert misleading may form the basis for initiating claims for redress.

Alternative Dispute Resolution (ADR) has been promoted for years as a cost effective, and less time-consuming method of solving disputes in comparison to legal action. In some countries, for example the UK, parties are encouraged to use some form of mediation before the litigation process, otherwise a party may be prejudiced in relation to costs.<sup>39</sup> Principles of ADR in the area of consumer protection are provided in the EC Recommendations 98/257/EC<sup>40</sup> and 2001/310/EC<sup>41</sup>. Those include guarantees on independence, transparency, respect of the adversarial principle, efficiency, and the respect of law, liberty and representation.

<sup>39</sup> Lord Woolf, Access to Justice, Final Report (1996).

<sup>40</sup> Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.

<sup>41</sup> Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.

If one applies principles of ADR to the problem of ‘directory companies’ there are three areas of concern:

- Voluntary participation;
- Confidence; and
- Cross-border complexity.

The use of ADR is not mandatory and requires the voluntary agreement of the parties. On this basis in the case of ‘directory companies’, there is little evidence to suggest that ADR can succeed.

Analysis of the content of the petitions submitted to the European Parliament indicates that no form of ADR has been used in attempts to solve disputes between claimants and the ‘directory companies’. On the contrary, the ‘directory companies’ that were the subject of petitions often referred to other measures of enforcement, such as debt collectors. In addition, claimants were issued with letters warning that legal action will be taken to enforce payment. Non-judicial redress exercised in relation to the companies that are the subject of complaints was rarely mentioned and mainly related to settlements reached by stakeholder organisations (see above). A special case is a ‘directory company’ that introduced a customer ombudsman after a number of legal actions were brought (see next box).

### **Case study 8: The customer ombudsman of a ‘directory company’**

As the result of negotiations between an authority of a Member State and a ‘directory company’ an agreement was reached that the latter would establish a customer ombudsman that came into force from January 2005. According to a document published by the company, the ombudsman is a practising lawyer appointed by the company who acts independently, and is not in labour relations with the ‘directory company’ to guarantee his autonomy.<sup>42</sup> Claimants can submit a complaint to the ombudsman and its service is free of charge for the client. The ombudsman submits an annual report on the service to the ‘directory company’. The decision of the ombudsman is binding for the company, but not for the claimant. Upon request by Civic Consulting, no data was obtained from the ‘directory company’ on the number of complaints received. The Spanish SRO Autocontrol has a record of one claimant who filed a complaint to the ombudsman in order to recover his money, but the complaint was not upheld.<sup>43</sup>

The second important issue appears to be the lack of confidence of claimants in using ADR to pursue redress, as the business practices of some of the ‘directory companies’ are not likely to create trust in their willingness to accept the outcome of, for example mediation. Finally, another problem with the use of ADR in this case is the cross-border aspect of the disputes, since many of the companies are registered in Member States different from those of the affected companies. ADR systems vary significantly across countries and there is no harmonised quality assurance mechanism or way of access. This was the very reason for setting up the European Extra-Judicial Network (EEJ-Net) for cross-border B2C disputes, which was merged a few years ago with the network of European Consumer Centres. The centres advise consumers on available ADR schemes, provide legal advice and assist in complaint procedures. In the case of B2B cross-border disputes a similar network does not exist.<sup>44</sup>

<sup>42</sup> Regulations for the ombudsman of the company.

<sup>43</sup> Spanish SRO Autocontrol Questionnaire (2008).

<sup>44</sup> Existing networks such as the Enterprise Europe Network launched in 2008 by the European Commission differ significantly from the dispute-oriented profile of the ECC-Net. The Enterprise Europe Network combines and builds on the former Innovation Relay Centres and Euro Info Centers (established in 1995 and 1987 respectively) and focuses on information needs of SMEs and companies in Europe. SOLVIT, on the other hand, set up in 2002, is an on-line problem-solving network for citizens and businesses in which EU Member States

This leads to the following conclusion:

3. ***Non-judicial redress mechanisms are barely available for SMEs, and those that exist have been rarely used in disputes with ‘directory companies’ operating cross-border.*** Relevant mechanisms for B2B disputes are reported from only a minority of Member States. Key impediments to apply ADR to disputes with ‘directory companies’ are (a) the need for voluntary participation, (b) the lack of trust of affected companies, and (c) the complexity of cross-border cases, combined with the lack of information of affected companies concerning ADR systems available in other MS. A European network for cross-border B2B disputes similar to the ECC-Net (for cross-border B2C disputes) does not yet exist.

#### 4.4 Initiatives by Member States authorities

*Would experts have any indication of coordinated actions or exchanges by Member States authorities aimed at tackling misleading practices? What suggestions could be made for a working information exchange system between Member States?*

*Would experts have any indication of actions and/or coordinated initiatives by Member States authorities aimed at informing and warning potential victims of misleading practices of ‘directory companies’ or aimed at assisting those who have been victims of such practices?*

Survey results and interviews indicate that Member States have taken initiatives with regard to the problem posed by ‘directory companies’ that could be grouped in three categories:

- Awareness raising;
- Assistance to affected companies;
- Legal action.

These initiatives have been conducted mainly at the domestic level and to some extent at the bilateral level. Governmental authorities seem to have addressed the problem only rarely at the European level.

Cooperation of MS authorities on a bilateral level was reported from a number of Member States. Examples reported from authorities include:

- In the **Netherlands** the government supports a national reporting centre, the *Steunpunt Acquisitiefraude (SAF)*.<sup>45</sup> SAF is a non-governmental private foundation that was established in 2003 to support affected companies of misleading practices in the field of advertising contracts, listings on websites and Internet directories, and phantom invoices. SAF offers legal advice and assistance to affected companies. In addition, with client’s consent, SAF reports cases of misconduct to relevant authorities (for example, the prosecution office). SAF also participates in the government’s anti-fraud programmes. SAF’s complaints database has registered over 13,000 complaints since 2003.<sup>46</sup>

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work together to solve without legal proceedings problems caused by the misapplication of Internal Market law by public authorities.

<sup>45</sup> [www.fraudemeldpunt.nl](http://www.fraudemeldpunt.nl)

<sup>46</sup> SAF Interview (2008).

- In the **UK**, the Office of Fair Trading (OFT) registers complaints from UK businesses affected by the problem. The OFT provides information to affected companies explaining to whom they can complain to (where the OFT has identified such an organisation) in the country where the ‘directory company’ is based.<sup>47</sup>

Initiatives of MS authorities at the domestic level seem to mainly consist of advice giving to affected companies, and awareness-raising campaigns for potential victims. Legislative action was reported only from Austria, where a specific provision has been included in the Statute against unfair competition (UWG, see country study Austria in Annex 1). The majority of the actions at the domestic level appear to have been initiated by private organisations representing SMEs, and self-regulatory organisations such as EASA and its national advertising regulatory organisations (SROs, see above). These organisations have been active in giving advice, raising awareness among potentially affected companies, and alerting state enforcement authorities. Some of the organisations took legal action and sought redress. However, in general these initiatives have failed to prevent the problem since, as stakeholders point out, they require action from the government authorities that hold the necessary enforcement and legal instruments. Therefore, government authorities have come under scrutiny from pressure groups to engage in the problem and find appropriate solutions.<sup>48</sup>

The survey results indicate that a wide range of government authorities have been contacted by affected companies. These include trade inspection authorities, economic ministries of, competition and consumer protection agencies, and the office of the consumer ombudsman. The listed authorities in general limited their action to giving advice and in some cases in maintaining a complaints register. The authorities only rarely took legal action against ‘directory companies’ that were the subject of complaints.<sup>49</sup>

The general view of government authorities that responded to the study was that they are restrained in taking effective action against ‘directory companies’ due to:

- Cross-border aspect of the problem;
- Legislative framework that limits government authorities’ interventions in relation to B2B transactions.

The cross-border dimension restricts enforcement authorities from taking actions against companies based abroad and requires cooperation from counterparts in other countries in pursuing an appropriate action. In the cases of ‘directory companies’ based in the EU Member States and Switzerland, cooperation has been established but in some cases was hindered by different approaches adopted by authorities. For example, the Economic Ministry of a Member State highlighted:

“In several cases we have sought international cooperation with the countries where the companies are situated [...]. In some countries this has led to action by the competent authorities and in others mailings were considered not to be misleading. This shows how different authorities sometimes have completely different interpretation of the same phenomenon. The same practice has also led [to] opposite judicial decisions.”<sup>50</sup>

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<sup>47</sup> OFT interview (2008).

<sup>48</sup> Stakeholder interviews (2008).

<sup>49</sup> Stakeholder survey (2008).

<sup>50</sup> Stakeholder questionnaire (2008)

Similar cases were reported by other stakeholders, indicating that different notions of what is “misleading” seems to be a major impediment in combating misleading practices of ‘directory companies’.

A separate group of problems relates to the legal framework and was emphasised by several consumer protection authorities responding to the survey. These authorities are engaged in recording complaints and giving advice but fail to act, because the legislative framework limits their action to malpractice against consumers. In Spain, regional differences in the definition of “consumer” lead to different possibilities for intervention of consumer protection authorities. In Catalonia (where a ‘directory company’ subject to complaints was originally located) an enterprise may be considered as a consumer, for example when it acts like a consumer. Therefore, it was possible for the Catalan Consumer Agency to act against this ‘directory company’. In other regions of Spain it is considered that a consumer can only be a citizen and not an enterprise. In this case there is no legislative basis for taking administrative measures against ‘directory companies’ reported to apply misleading practices in B2B relations.<sup>51</sup>

At present, government authorities in many of the Member States do not seem to have appropriate mechanisms in place to monitor nor control the problem. This leaves business and in particular small traders vulnerable to unfair commercial practices of a cross-border nature. Furthermore, the existing legal framework governing consumer protection authorities appears to create a gap concerning the protection of small businesses, leading to a lower level of protection for small businesses compared to the level of protection of consumers.

This leads to the following conclusion:

4. ***MS authorities have been engaged in initiatives against ‘directory companies’ reported to apply misleading practices cross-border.*** The cross-border aspect of the problem that requires cooperation between MS enforcement authorities poses the key obstacle to better enforcement, as no administrative enforcement cooperation network between MS exists regarding unfair commercial practices in B2B relationships. A major aspect is different approaches to and interpretations of the problem in MS. Different notions of what is “misleading” seems to be a major practical impediment in combating such practices of ‘directory companies’ in B2B relationships.

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<sup>51</sup> Questionnaire and interviews authorities Spain.

## **5. ASSESSMENT OF THE EU LEGAL FRAMEWORK AND ITS NATIONAL IMPLEMENTATION**

### **5.1 The EU legal framework**

Misleading and unfair commercial practices are currently regulated by two general European Directives. The first is the new codified Directive concerning Misleading and Comparative Advertising (Directive 2006/114/EC), which replaced the “old” Directive 84/450/EC (as revised by Directive 97/55/EC to include comparative advertising). The second is the Unfair Commercial Practices Directive (Directive 2005/29/EC). In addition, specific directives apply (that is, the Cosmetics Directive and the Directive on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale for the ultimate consumer). No specific EU legislation exists concerning ‘directory companies’ in B2B relationships. The focus of this analysis is therefore the existing EU legal framework formed by the two general directives mentioned above, and their implementation into MS legislation.

The purpose of Directive 2006/114/EC is to protect against misleading advertising and the unfair consequences thereof and to stipulate the conditions under which comparative advertising is permitted (article 1). Since the implementation of the Unfair Commercial Practices Directive, Directive 2006/114/EC is applicable only to business-to-business (B2B) relations, not to business-to-consumer (B2C) relations; consumers cannot rely on this Directive for protection against misleading advertising. The Directive provides minimum harmonisation insofar as it concerns misleading advertising, and it provides maximum harmonisation insofar as it concerns comparative advertising. It is at the Member States’ discretion to introduce more far-reaching legislation on misleading advertising.

The purpose of the Unfair Commercial Practices Directive (2005/29/EC) is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ economic interests (article 1). Directive 2005/29/EC is applicable only to B2C relations, not to B2B relations. The directive provides for maximum harmonisation, and Member States may not therefore create either more or less protection for consumers. Annex I to Directive 2005/29/EC contains a blacklist of commercial practices that must be considered unfair under all circumstances. The blacklist includes certain practices that correspond to misleading practices of ‘directory companies’. For instance, no. 21 of Annex I prohibits the practice of “including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not”. A key issue is that, in principle, the Unfair Commercial Practices Directive protects only consumers, as it applies only to B2C relationships. As a consequence, companies – including small and medium-sized businesses that are a main target of ‘directory companies’ – are not likely to benefit directly from the provisions that explicitly condemn relevant practices (such as no. 21 of Annex I to Directive 2005/29/EC).

The following sections of the study present a synthesis based on the results from three country studies analysing the transposition of the Directive concerning Misleading and Comparative Advertising and the Unfair Commercial Practices Directive into national legislation, and possible resulting loopholes, as well as jurisprudence and other measures taken by the respective Member States (Austria, the Netherlands, Spain, see Annex 1); It also takes into account the results of interviews and a survey of stakeholders, and draws general conclusions concerning the extent to which the existing legal framework at EU level sufficiently protects

small and medium-sized enterprises against misleading practices of ‘directory companies’, or whether the framework needs to be amended.

## 5.2 Transposition of the Directive concerning Misleading and Comparative Advertising in Member States

*Can experts assess the quality of transposition of the old Directive 84/450/EC in Member states used as base by ‘directory companies’ so far? Are there relevant changes foreseen in the implementation process of the new Directive (2006/114/EC)?*

### 5.2.1 Quality of transposition

The transposition of the “old” Directive concerning Misleading and Comparative Advertising into national law provided new possibilities with respect to substantial and procedural rules and legal standing for committed parties to combat unfair practices of ‘directory companies’. However, from the country study **Austria** it follows that the Directive 84/450/EC for the most part could be considered as a codification of existing substantial law in the Member States. When Directive 84/450/EC was adopted, Austria was not yet a Member State of the EU. After Austria joined the EU in 1995 it was agreed – without further discussion – that there was no need to transform Directive 84/450/EC since Austrian law already met or even exceeded the (minimum) standard set out by Directive 84/450/EC. The Austria country study reports cases dating from the 1960s in which misleading advertising rules were already applied to unfair practices of ‘directory companies’ (thus long before the implementation of the “old” Directive 84/450/EC). What was likely the first case concerned a ‘directory company’ that distributed yellow pages along with a payment form. The company literally cut advertisements out of the official phone book and placed them on the back of payment forms. The Austrian Court ruled that such practice could easily mislead recipients into thinking that the payment form was an extension of their advertisement in the official phone book. Therefore, the practice violates § 1 UWG and / or § 2 UWG.<sup>52</sup> This general prohibition concerns misleading practices as a type of unfair competition, and appears to offer possibilities to combat relevant practices of ‘directory companies’. Austria is not an exception. In the **Netherlands**, the predecessor of the existing Article 6:194 of the Dutch Civil Code (BW) on misleading advertising is Article 1416a BW (old), which has been in force since 14 July 1980, thus long before the Directive concerning Misleading and Comparative Advertising originated. Given that the Directive concerning Misleading and Comparative Advertising merely requires minimum harmonisation, no further amendments were made as to article 1416a BW once the Directive came into force. The text of the new article 6:194 BW is therefore exactly the same as the unchanged text of article 1416a BW. However, it should be noted that in practice neither the old Article 1416 sub a. BW nor Article 6:194 BW so far is used as a basis for litigation, neither by ‘directory companies’ nor victims of misleading practices. The country study **Spain** contains an analysis of the applicability of the Advertising Law of 1988 that implemented Directive 84/450/EC into Spanish Law.

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<sup>52</sup> Section 2 of the *Gesetz gegen unlauteren Wettbewerb* (UWG) provides that “any party who in the course of business for competitive purposes makes potentially deceptive representations with regard to business matters, including but not limited to representations about the condition, origin, manufacturing method or pricing of individual goods or services or of the entire range offered, about price lists, the manner of procurement or the source of supply of goods, about the award of quality certificates, about the occasion or purpose of the sale or about the quantity of stock, may be sued for an order to cease and desist from making such representations, and, in the event that such party knew or was bound to know that such representations were likely to be misleading, may be sued for payment of damages.”

The country study concludes that unfair practices engaged by ‘directory companies’ amount to an unlawful practice under Article 3 sub b. of the Advertising Law, and in particular, a misleading advertising. This conclusion is supported by judgments in which several advertisements of a particular ‘directory company’ were deemed misleading because of their ambiguity.

As to procedural law and legal standing, Directive 84/450/EC has certainly influenced the law on misleading advertising in the Member States by stating that the Member States should ensure that adequate and effective means exist to combat misleading advertising. Such means, according to the Directive, should include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating misleading advertising might take legal action against such advertising. Furthermore, the Directive stated also that Member States should confer upon the courts or upon administrative authorities powers enabling them to order specific remedies, such as the cessation, prohibition or rectification of the misleading statements. Last but not least, the Directive introduced a reversion of the evidence rules. Member States should confer upon the courts of administrative authorities powers enabling them to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising and to consider factual claims as inaccurate if the evidence demanded was not furnished by or deemed insufficient by the court or the administrative authority. Like the Austrian and Dutch Law, Spanish Advertising Law offers these remedies for breach of the rules on misleading advertising (cessation, rectification, publication of the judgment, or of a corrective statement). The three countries also provide legal standing to persons or organisations regarded under national law as having a legitimate interest in combating misleading advertising. And it is generally accepted that the advertiser could be obliged to furnish evidence as to the accuracy of his or her factual claims in advertising. However, advertising law remedies generally do not provide for relief in terms of the effects caused by the misleading practices (for example, nullification of the contract). Injured parties may be entitled to claim compensation for damages, but in the three countries considered these claims are exceptional and, under Spanish Law, even impossible.

Generally speaking, the transposition of the “old” Directive 84/450/EC on Misleading and Comparative Advertising had provided the Member States with means to combat misleading practices of ‘directory companies’. In Austria, the Netherlands and Spain the national laws implementing the Directive are considered helpful against ‘directory companies’ applying misleading practices. From the three country studies it therefore follows that the implementation of the “old” Directive and of the new codified Directive 2006/114/EC has not led to serious legal loopholes with respect to substantial and procedural law within these countries. This conclusion is not contradicted by the results of the stakeholder survey.<sup>53</sup>

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<sup>53</sup> The results of the survey indicate that only eight stakeholders (20%) are of the opinion that the implementation of Directive 2006/114/EC has led to legal loopholes within their countries. The stakeholders concerned are from Belgium, Germany, Greece, Ireland, Czech Republic and the United Kingdom. However, there are also other stakeholders from the same countries who are of the opinion that the implementation of the Directive had not led to legal loopholes within their countries, which means that the results regarding these countries are ambiguous. Furthermore, six respondents stated that they did not know whether the implementation of Directive 2006/114/EC had led to legal loopholes within their countries, and another six respondents did not answer the question at all. A total of fourteen Stakeholders (41%) replied that, in their view, the implementation of the Directive did not create legal loopholes (see Annex 4, question B3).

## 5.2.2 Changes to be foreseen following the implementation of Directive 2006/114/EC

The country studies of **Austria** and the **Netherlands** show that no significant amendments will follow from the implementation of the Directive, in as far they concern changes in substantial law relevant to the misleading practices of ‘directory companies’. In **Spain**, the specifics of the new law implementing the new codified Directive are still confidential, and therefore no answer can be given to the question of whether relevant amendments to Spanish law are foreseen. As Directive 2006/114/EC concerning Misleading and Comparative Advertising brings, except for its scope, no new substantial law, it is not surprising that at the moment no changes are foreseen. From the responses to the stakeholder survey the same conclusion can be drawn. Even if amendments are made because of the new Directive, they will not be relevant to the practices of ‘directory companies’.<sup>54</sup>

The implementation of the new Directive concerning Misleading and Comparative Advertising will, however, make a difference concerning enforcement, because of its limitation to B2B relationships. The Dutch Authority responsible for the enforcement of consumer protection laws (*Consumentenautoriteit*) under the new law implementing the Unfair Commercial Practices Directive will be allowed to impose high fines of up to 450,000 Euro on companies breaching the rules of that law in B2C relationships. Therefore, a company may be given a high fine for breaking the rules on Unfair Commercial Practices in B2C relationships, whereas for breaking the rules on Misleading and Comparative Advertising the financial loss amounts to the damages – if any – caused to a competitor (B2B) for which it is liable.

In **Austria** Directive 2006/114/EC has been officially implemented, together with the Unfair Commercial Practices Directive by Federal Law Gazette I 79/2007. However, this so-called UWG Amendment 2007 basically only led to changes required by the Unfair Commercial Practices Directive. Neither the transformation of Directive 84/450/EC nor of Directive 2006/114/EC resulted in the introduction of a specific provision concerning ‘directory companies’ applying misleading practices. This has been also the case in the other two countries that have been the focus of this analysis.

This leads to the following conclusion:

**5. *The implementation of Directive 84/450/EC on Misleading and Comparative Advertising appears not to have introduced legal loopholes within the national legislations of the Member States analysed.*** The data collected for this study indicates that the implementation of the new Directive 2006/114/EC has also not led to relevant amendments to the national legislations of the Member States: It mostly concerns the codification of existing substantive rules on misleading advertising. Loopholes in the application of these rules do not seem to be a major problem. However, advertising law remedies generally do not provide for relief in terms of the effects caused by the misleading practices (for example, nullification of the contract). Injured parties may be entitled to claim compensation for damages, but in the three countries considered in depth these claims are exceptional or even impossible.

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<sup>54</sup> Nearly half of the stakeholders responding to the survey (47%) did not foresee relevant amendments being made during the implementation process of the new Directive on Misleading and Comparative Advertising, 26% did not know whether relevant amendments were foreseen, and 18% did not have an answer to this question (see Annex 4, question B5).

### 5.3 Amendments of MS legislation concerning misleading advertising to close legal loopholes

*Have these Member states subsequently (i.e. after the implementation of the old Directive 84/450/EC) amended their legislation concerning misleading advertising once operations by 'directory companies' have been disclosed, in order to close legal loopholes?*

#### 5.3.1 Specific MS legislation

From the results of the country studies and the stakeholder survey it can be concluded that most Member States for which relevant information could be obtained did not amend their national legislation when implementing Directive 84/450/EC on Misleading and Comparative Advertising to be more effective against 'directory companies' applying misleading practices. An exception to this general picture is **Austria**, where specific legislation concerning 'directory companies' exists. In Austria, even before specific legislation concerning 'directory companies' was introduced, legal loopholes in this respect do not seem to have existed. The Austrian Supreme Court (OGH) had applied the general clause of § 1 UWG (the statute against unfair competition) and the "small general clause" of § 2 UWG to outlaw misleading 'directory companies'. In spite of this, the Austrian legislature decided to introduce a specific provision prohibiting the commercial practices of such companies, which came into force on 1 April 2000. The aim of § 28a UWG is to outlaw any practice by 'directory companies' that either does not make entirely clear, or omits completely that the payment form is only an offer (see country study Austria, Annex 1).<sup>55</sup> § 28a UWG applies to B2B as well as to B2C relations, as consumers can also be the target of misleading practices of 'directory companies'. For example, the *Landesgericht Salzburg* dealt with a 'directory company' that targeted consumers whose relatives had recently died. The 'directory company' advertised an "Austrian register of deaths" (*österreichisches Sterberegister*), sent consumers the payment forms, and created the impression that the register was official and that registration was obligatory.

#### 5.3.2 Remedies available

In **Austria**, a violation of § 28a UWG is an administrative offence and can be punished by a fine of up to 2,900 Euro imposed by the District Administrative Authority. However, the administrative offence is subsidiary to criminal charges (§ 34 para. 2 UWG). Commercial practices of 'directory companies' might also constitute fraud under the Austrian Criminal Code (§ 146 *Strafgesetzbuch*, StGB). In addition to an administrative or criminal charge (and not subsidiary to them), violations of § 28a UWG can result in injunctions and – if the tortfeasor acted with negligence or fault – damages.<sup>56</sup> A fault-based claim for damages can be brought by anyone who suffered damage as a result of the violation of § 28a UWG (§ 34 para. 3 UWG).

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<sup>55</sup> Section 28a UWG states that "it shall be prohibited to advertise, in the scope of business and for the purpose of competition, for registration in directories, such as the yellow pages, telephone directory or similar lists, by way of a payment form, money order form, invoice, offer of correction or similar manner or to offer such registrations directly without unequivocally and also by clear graphical means pointing out that such advertisement is solely an offer for a contract."

<sup>56</sup> According to the OGH an injunction requires competition (*Wettbewerbsverhältnis*) between the violator of the UWG and the directly affected person or enterprise. This means that – according to jurisprudence – targets of misleading practices of 'directory companies' normally cannot bring a claim for an injunction. With regard to such companies, this does not seem to create a legal loophole as targets will be more interested in getting their money back and in withdrawing from the contract than in bringing an injunction.

Under Austrian civil law, there are further remedies available: under § 870 of the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB, General Civil Code) as well as under § 871 ABGB, the victims of ‘directory companies’ may rescind the contract. According to § 870 ABGB, a party of a contract can rescind the contract *inter alia* if it was prompted into the contract by deceit (*List*). In addition, the contractual partner of the ‘directory company’ applying misleading practices may rescind the contract under § 871 ABGB as he or she concluded the contract by mistake, the mistake related to the nature of the contract (*Geschäftsirrtum*) and was caused by the ‘directory company’. Such a contract might also be void under § 879 para. 1 ABGB stating that contracts violating laws or morality are void.

Such contractual remedies are also available under **Dutch** and **Spanish** law. It is interesting to note that, under Dutch contract law, proceedings have been initiated by victims of ‘directory companies’ reported to apply misleading practices only twice. Both of these cases were decided in favour of the victims, although on different grounds. In the first case the ‘directory company’ had to pay damages to the victim for the company had not lived up to the requirements of a good contractor. In the second case the ‘directory company’ had to reimburse the victim the amounts it had already paid because of undue payment, since the way the contract was concluded was contrary to good morals and therefore the contract was held null and void. ‘Directory companies’ in some cases have summoned their victims for breach of contract (if the victims cease to make contractual payments). They were, however, never successful in the Netherlands, for two reasons. First, Dutch judges have set high standards for proof by evidence, which makes it difficult for ‘directory companies’ to substantiate their case and prove that an agreement was concluded. Secondly, victims were successful in demonstrating vitiated consent by invoking an error or by invoking fraud, which results in annulment of the contract and makes the payments already made not due. Finally, it is interesting to note that, according to Dutch law, legislation meant to protect a defined group of people may, under certain circumstances, also be used to protect people that do not fall within that defined group. For example, the blacklist of contract clauses with unreasonably onerous general conditions, that, according to its strict wording, is only applicable regarding consumer contracts, has also been declared applicable in relation to contracts to which small businesses are a party. The same effect may apply for other legislation that strictly speaking is drafted for consumers, if the judiciary feels the need to extend the legislation to others. In this respect, it is relevant to note that the Draft Common Frame of Reference regarding European contract law has considered the introduction of a specific regime for small and medium-sized enterprises in the field of contract law.<sup>57</sup>

Finally, misleading practices of ‘directory companies’ could be held also punishable under the diverse Criminal Codes. For example, article 328 of the Dutch Criminal Code prohibits fraud.<sup>58</sup> In the Netherlands, only once has an owner of several ‘directory companies’ been sentenced to imprisonment for fraud.

The existence of a civil framework mentioned above has brought at least the Dutch legislator to the conclusion not to create specific legislation to deal with ‘directory companies’ applying misleading practices.

This leads to the following conclusion:

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<sup>57</sup> See Par. 27 of the Interim Outline Edition Principles, *Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*, published on [www.law-net.eu](http://www.law-net.eu).

<sup>58</sup> Article 328 of the Dutch Criminal Code states: “whoever, with the intention of undue preference, by assuming a false name or taking on a false quality, by using devious tricks, or by a tissue of lies, persuades someone to surrender any good, to provide data having monetary value in commerce, to incur debts or to undo an outstanding debt, will be, as guilty to fraud, be punished to imprisonment for a maximum of four years or a fine of the fifth category”.

6. *Specific legislation concerning ‘directory companies’ engaging in misleading practices does not seem to exist in most Member States for which relevant information could be obtained.* An exception is Austria, which has introduced specific legislation on this. Contractual remedies and even criminal remedies are available in all Member States that have been subject to detailed analysis. The existence of such remedies could be an argument for not introducing specific legislation.

## 5.4 Transposition of the Unfair Commercial Practices Directive

*Has the issue of ‘directory companies’ been addressed in the national implementation of Directive 2005/29/EC?*

The status of the national implementation of the Unfair Commercial Practices Directive (2005/29/EC) differs significantly between Member States. The **Spanish** implementation process of the Directive is still in its infancy. The drafts are confidential, and therefore it is unknown whether the issue of ‘directory companies’ has been addressed. The **Austrian** implementation has led to a broad application of the principles of Directive. As mentioned above, No. 21 of the Annex I of the Directive prohibits unfair commercial practices of ‘directory companies’. It states that the practice of “including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not” has to be considered as unfair in all circumstances. Annex I No. 21 of the Directive was adopted into the Austrian UWG literally, the sole – but very important – change being replacing the word “consumer” with “the target of the commercial practice” (*Umworbener*) since the Austrian UWG generally applies to B2C as well as B2B relations. As a result of the transposition of the Unfair Commercial Practices Directive, para. 2 was introduced in the above-mentioned specific provision of the Austrian UWG concerning ‘directory companies’ (§ 28a UWG). It states that § 28a para. 1 UWG does not affect no. 21 Annex I. Therefore, Annex I no. 21 UWG, § 28a UWG as well as §§ 1, 2 UWG are applicable concurrently. This is true for B2C as well as for B2B relations since the commercial practices listed in Annex I of the Directive 2005/29/EC have been transformed for B2C as well as B2B relations.

For companies as well as consumers, Annex I no. 21 UWG might be advantageous as its wording seems to have a slightly broader scope than that of § 28a UWG: it does not focus solely on directories. However, as mentioned above, cases not formally governed by § 28a UWG have already been outlawed before the UWG Amendment 2007 since they were prohibited under §§ 1, 2 UWG (old version). Therefore, with regard to ‘directory companies’ the main, and probably only, difference to the legal situation before the transposition of the Unfair Commercial Practices Directive is that Annex I no. 21 and § 1 para. 1 no. 2 UWG does not require that ‘directory companies’ act “in the scope of business and for the purpose of competition” and cases governed by § 1 para. 1 no. 1 UWG does not require competitive intentions any more. Consequently, in Austria, it is possible for businesses that are victims of unfair practices of ‘directory companies’ to invoke a provision that follows from Directive 2005/29/EC.

The issue of ‘directory companies’ was addressed in the implementation process in the **Netherlands**. However, this has not led to any changes in the proposal for the transposition of Directive 2005/29/EC.

Like the Directive, the proposal applies only to B2C relations, and the Minister of Justice was not willing to extend the protection against unfair practices of ‘directory companies’ to small and medium-sized enterprises.

This leads to the following conclusion:

7. *Directive 2005/29/EC does not exclude a system of national rules on unfair commercial practices that is equally applicable to consumers and enterprises.* Such a system, as implemented, for example in Austria, might be advantageous for victims of unfair practices of ‘directory companies’, because the blacklist of practices that are unfair under all circumstances would then be equally applicable. However, the country studies indicate that Member States are often reluctant to stretch the protection against unfair practices provided by Directive 2005/29/EC to enterprises, leading to different levels of protection in MS for victims of unfair practices of ‘directory companies’.

## 5.5 Amendments of MS legislation concerning unfair commercial practices to close legal loopholes

*Have Member States otherwise amended their legislation concerning unfair commercial practices once operations by ‘directory companies’ have been disclosed, in order to close legal loopholes?*

Since many Member States have only recently implemented Directive 2005/29/EC, or are still in the process of implementing it, there was barely time to introduce amendments other than those already considered during the transposition process (as discussed above).

## 5.6 Other relevant measures

*Have Member States amended other legislation (e.g. concerning fraud) or introduced self-regulatory measures once operations by ‘directory companies’ have been disclosed, in order to close legal loopholes?*

*How would experts assess the effectiveness of measures proposed by the Commission in COM(2007)724 (‘A Single Market for 21st Century Europe’), in particular the proposed ‘Small Business Act for Europe’ as instruments in tackling misleading operations of ‘directory companies’ in the future?*

### 5.6.1 Other national legislation

Article 326 of the **Dutch** Criminal Code concerning fraud will be modified. Although this modification is not being created because of the existence of misleading practices of ‘directory companies’, it might have as a positive side effect that it will be easier to prosecute these companies in criminal procedures. In **Spain** an amendment of legislation was approved whereby misleading advertising constitutes consumer fraud under article 18.4 of the new Act for the protection of consumers and other end users (LGDGU). This new legislation, however, applies only to B2C relationships. According to survey results, in most Member States from which stakeholders responses were received, no amendments of other legislation seems to have been made concerning ‘directory companies’.<sup>59</sup>

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<sup>59</sup> Stakeholders from Denmark, Greece and Luxemburg referred to possibilities that exist within existing national civil or criminal law. However, the explanation given in their answers indicate that these stakeholders appear to have meant that other national legislation could be applicable to misleading practices of ‘directory companies’,

### 5.6.2 Self regulatory and other non-legislative measures

The Netherlands country study refers to the fact that the **Dutch** Advertising Standards Committee (RCC) has implemented the rules on unfair commercial practices following from Directive 2005/29/EC in the Dutch Advertising Code (NRC). The RCC has made the rule equally applicable to B2B and B2C relations. However, as also detailed in the **Austria** country study, self-regulatory measures, such as advertising codes, will usually be less effective as a preventive measure against unfair practices of ‘directory companies’. A Swedish stakeholder referred in the survey to a major **Swedish** trade organisation, which on its website publishes a list of companies involved in illegal billing. This may be considered a non-legislative measure that may have a preventive effect.

### 5.6.3 Effectiveness of measures proposed by the Commission in COM(2007)724 (‘A Single Market for 21st Century Europe’)

It is difficult to assess the effectiveness of measures proposed by the Commission in COM(2007)724, as this is a fairly recent document and appears to be largely unknown to (national level) stakeholders. Roughly two thirds of stakeholders responding to the survey either did not answer or did not know the answer to this question. Only 6 out of 37 respondents considered the measures proposed by the Commission in COM(2007)724 (‘A Single Market for 21st Century Europe’) and in particular the proposed ‘Small Business Act for Europe’ as fairly or even very effective instruments against ‘directory companies’ in the future. Five Stakeholders considered these measures barely effective. In general, business stakeholders were rather sceptical concerning the effectiveness of measures proposed in the document as instruments in tackling misleading operations of ‘directory companies’ in the future.<sup>60</sup>

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rather than that the legislation was actually amended. Other stakeholders either responded ‘no’ or ‘don’t know/no answer’.

<sup>60</sup> Of the six positive assessments received, four were provided by Competent Authorities, and only two were provided by business associations (stating ‘fairly effective’). In contrast, four business associations considered the measures ‘hardly effective’, and nine other business organisations did not provide an opinion on the issue.

## 6. OVERALL CONCLUSIONS: OPTIONS FOR EU LEVEL ACTION

*Are there any specific measures concerning misleading advertising that experts would recommend to be included in any further revision of Directive 2006/114 EC by the European legislator, in order to strengthen the protection small businesses?*

*Would a revision of the UCP Directive aimed at including B2B transactions into its scope be useful in reducing the activities of ‘directory companies’? If yes, what practical amendments would be suggested to improve protection of small companies?*

This study has documented that practices applied by some ‘directory companies’ lead to a significant number of complaints in Member States. As only a minority of affected companies is likely to file a complaint, and no systematic register exists of those that do file a complaint, the actual scope of the problem is likely to be much larger than the data suggests. This is confirmed by the assessment of stakeholders: Three quarters of respondents consider this to be a very or fairly significant problem.

Misleading or unfair commercial practices are currently regulated by two general Directives (that is, Directive 2006/114/EC concerning Misleading and Comparative Advertising, and the Unfair Commercial Practices Directive 2005/29/EC). The implementation of the “old” Directive 84/450/EC on Misleading and Comparative Advertising appears not to have led to many legal loopholes within the national legislations of the Member States analysed in depth in this report. The implementation of the codified new Directive 2006/114/EC does not seem to change this picture. Hardly any Member States have amended their legislation concerning misleading advertising after becoming aware of relevant practices of ‘directory companies’. Specific regulation against misleading or unfair practices of ‘directory companies’ has been an exception.

The Unfair Commercial Practices Directive does not exclude a system of national rules on unfair commercial practices that is equally applicable to consumers and enterprises alike. However, most MS are reluctant to extend the protection against unfair practices provided by Directive 2005/29/EC to enterprises, leading to different levels of protection in different MS for victims of unfair practices of ‘directory companies’.

The analysis of EU and national legal frameworks has also indicated:

- There is a clear cross-border dimension of the problem, as different interpretations in Member States of what is considered misleading exist, and this can be exploited by ‘directory companies’;
- National legislative frameworks often limit the possibilities for government authorities in relation to B2B transactions, including concerning activities of ‘directory companies’;
- Remedies for victims of unfair practices are often provided by the national legal frameworks, but are of less relevance in practice, due to the litigation risks involved and reluctance of victims to use them; and
- Self-regulatory and other non-legislative measures, including the use of ADR mechanisms are considered to be of little relevance in the context of practices of ‘directory companies’.<sup>61</sup>

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<sup>61</sup> Self-regulatory mechanisms relevant to the directory and advertising industry do exist, but they are voluntary and not legally binding. ‘Directory companies’ that reportedly engage in misleading practices seem to disregard these mechanisms, and legal tools seem to be required to force compliance (see section 4.2). Key impediments to

In the following sub-sections different options for action at EU level are presented. Three options seem to be possible (no preference is implied in the order of listing):

1. No legislative action at EU-level, but strengthened enforcement cooperation;
2. Amending the Directive concerning Misleading and Comparative Advertising by including a “grey-” or “blacklist” of practices that are considered misleading; and
3. Extending the scope of the Unfair Commercial Practices Directive to B2B, with the sub-option 3a) general extension of scope and sub-option 3b) extension only with respect to Annex I no. 21.

## **6.1 Option 1: No legislative action at EU-level, but strengthened cooperation of MS**

It can be argued that it is not necessary to amend Directive 2006/114/EC or Directive 2005/29/EC, as unfair commercial practices by ‘directory companies’ are governed in principle sufficiently by the two Directives. An amendment of these rather recent Directives in order to solve a very specific problem could also be seen as creating undesirable ad hoc solutions on a European scale. In addition, according to this view, the main problem is not substantive law, but the lack of effective legal remedies and enforcement. Both Directives are rather vague as to who shall have a claim under national law if either one is violated. In addition, under, for example Austrian and Dutch law, where a variety of remedies are available, it seems that the remedies do not have much of a deterrent effect on ‘directory companies’ that engage in misleading practices. Even though the Austrian Supreme Court has decided 11 cases under § 28a UWG so far, there seem to have been “thousands of complaints” regarding such companies since this provision came into force in 2000. The situation is not different in the Netherlands, where a large number of complaints have been registered in spite of the available remedies. It appears that the cost of litigation, in addition to the fact that such companies are often not located in the country in which they operate, understandably deters the victims (but also other potential claimants) from bringing lawsuits. Furthermore, it seems that when lawsuits against ‘directory companies’ are successful, the companies in some cases relocate and/or change names and continue their practices in another country. As a consequence, court decisions are difficult to enforce.

For these reasons, information campaigns (for example, targeting specifically newly founded SMEs) and enhanced cross-border coordination and enforcement, including a systematic complaints monitoring, could be considered in order to make better use of the existing substantive rules. Also, coordinated actions between stakeholders could be encouraged: MS authorities, non-governmental organisations and other bodies could be encouraged to improve information exchange and cooperation aimed at prevention.

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apply ADR to disputes with ‘directory companies’ are (a) the need for voluntary participation, (b) the lack of trust of affected companies, and (c) the complexity of cross-border cases, combined with the lack of information of affected companies concerning ADR systems available in other MS. A European network for cross-border B2B disputes similar to the ECC-Net (for cross-border B2C disputes) does not yet exist (see section 4.3).

## 6.2 Option 2: Amending Directive 2006/114/EC concerning Misleading and Comparative Advertising by including a “grey” or “black” list of practices that are considered misleading

Even though increased information and coordination activities are certain to be welcomed by all stakeholders that consider ‘directory companies’ to be a problem, there are also reasons for considering legislative change. In this view it seems essential to have more uniform laws with regard to misleading practices of ‘directory companies’ to prevent such companies from simply moving to another jurisdiction if their practices are outlawed in one Member State.

A possible legislative option is to amend the new codified Directive 2006/114/EC. Even though certain practices by a ‘directory company’ must already be regarded as misleading under Article 1 of Directive 2006/114/EC this could be clarified by introducing a “grey list” of commercial practices – including certain practices by ‘directory companies’ – which are *prima facie* misleading, although they can be acceptable under certain circumstances. For some commercial practices even a “blacklist” could be considered, that is, a list of practices that are to be considered misleading in all circumstances. A similar approach of introducing either a “grey list” or a “blacklist” is suggested in the Green Paper on the Review of the Consumer Acquis with regard to the Directive on Unfair Terms in Consumer Contracts. General clauses have to be regarded as a positive legislative measure in that they ensure that laws do not become outdated easily and that they are flexible enough to consider the peculiarities of certain cases. However, a “grey list” – or for some commercial practices even a “blacklist” – has the advantage of helping judges apply general clauses and ensure a certain level of harmonisation across Member States. For example, provisions from Annex I of the Unfair Commercial Practices Directive (mainly provision no. 21, but also no. 26)<sup>62</sup> could be useful borrowing, for they describe clearly misleading practices as they have been used by some ‘directory companies’.<sup>63</sup>

An additional advantage of this clarification of misleading practices at EU level would relate to the question of applicable law. For example, Dutch victims targeted by ‘directory companies’ located in other Member States can rely only on the rules of International Private Law to establish in which country action may be sought by the victim, and which national law would then be applicable. The same is true for victims of a Dutch ‘directory company’ located in other EU Member States; they depend on the rules of International Private Law for establishing the country in which they may seek action, and for determining the applicable law. According to articles 2 and 5 of the Regulation on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters<sup>64</sup> it depends not only on the domicile of the defendant but also on the type of action based on contract or wrongful act whether a national judge has jurisdiction.

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<sup>62</sup> The provisions in Annex I of Directive 2005/29/EC are as follows: 21. Including in marketing material an invoice or similar document seeking payment, which gives the consumer the impression that he has already ordered the marketed product when he has not. 26. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC and 2002/58/EC.

<sup>63</sup> This amendment to Directive 2006/114/EC could be based on recital (8) of the Directive 2005/29/EC in which is said that “It is understood that there are other commercial practices which, although not harming consumers, may hurt competitors and business customers. The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition.”

<sup>64</sup> Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I”).

In determining the applicable law, the type of action is also of importance. Since there might be differences between the national laws of different Member States regarding the practices of ‘directory companies’, victims will remain in an uncertain position once they initiate proceedings. In particular for small businesses it is therefore preferable if certain misleading practices of ‘directory companies’ were deemed wrongful everywhere in Europe.

### **6.3 Options 3a and 3b: Extending the scope of Directive 2005/29/EC to B2B**

A revision of the Unfair Commercial Practices Directive aimed at including B2B transactions within its scope would also be a possibility for creating uniform law at European level. The most important argument for the extension of the scope of Directive 2005/29/EC is to be found in the effectiveness of the remedies, which, combined with Regulation 2006/2004 on Consumer Protection Cooperation, is more structured than the remedies under Directive 2006/114/EC. The system under Directive 2005/29/EC opens the possibility of administrative fines and cross-border cooperation, which are helpful in the protection of small and medium-sized enterprises against unfair practices of ‘directory companies’.

Such a revision of Directive 2005/29/EC could be done in several ways.

#### **6.3.1 Option 3a) Extending the overall scope of Directive 2005/29/EC to B2B**

Two different types of amendment to Directive 2005/29/EC are possible as preventive measures against activities of ‘directory companies’ applying misleading practices. Both are aimed at including B2B transactions in the scope of Directive 2005/29/EC.

1. Replace the term “consumer” in the Directive by another term that includes B2B transactions. The term “consumer” could be replaced everywhere in the Directive, for instance by the term “the target of the practice”, following the example of Austria.
2. Make the Directive equally applicable to B2B transactions.

#### **6.3.2 Option 3b) Adding a provision to the Directive stating that the Directive is equally applicable to B2B transactions, but only with respect to Annex I no. 21**

It can be argued that application of the whole system of the Directive 2005/29/EC to unfair practices of enterprises could lead to unforeseeable results and is not altogether necessary to reach the desired end. Provision no. 21 of Annex I of the Directive is applicable regarding the practices that are intended to be prevented. Therefore a more focused solution could be found in extending only the scope of no. 21 (and possibly also no. 26) of Annex I of the Directive to B2B relationships.<sup>65</sup> This would create uniform law and make available more effective remedies. Whether it provides a full solution for the problem remains to be seen, as ‘directory companies’ could relocate to non-EU countries, and other issues such as the lack of awareness of small enterprises concerning practices of ‘directory companies’, and the resulting lack of willingness to seek remedies would remain.

This leads to the following conclusion:

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<sup>65</sup> No. 26 of Annex I (“Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation”) could be relevant, if the contractual obligation is considered null and void.

8. *To address misleading practices of 'directory companies' at EU level three options seem to be possible* (no preference implied in order of listing): (1) No legislative action at EU level, but strengthened enforcement cooperation; (2) Amending the Directive concerning Misleading and Comparative Advertising by including a “grey-” or “blacklist” of practices that are considered misleading; (3) Extending the scope of the Unfair Commercial Practices Directive to B2B, with the sub-option 3a) general extension of scope and sub-option 3b) extension only with respect to Annex I no. 21.

## ANNEX 1: THE NATIONAL LEGAL FRAMEWORK IN SELECTED MEMBER STATES

### Austria

#### Transposition of the Misleading and Comparative Advertising Directive (84/450/EC and 2006/114/EC)

##### *Transposition of Directive 84/450/EC and Directive 2006/114/EC*

In Austria, legal matters governed by Directive 84/450/EC and Directive 2006/114/EC are regulated in the *Gesetz gegen unlauteren Wettbewerb* 1984 (UWG, Statute against unfair competition)<sup>66</sup>. This statute applies to business-to-consumer (B2C) as well as to business-to-business (B2B) relations. When Directive 84/450/EC was adopted, Austria was not yet a Member State of the EU. After Austria joined the EU in 1995 it was agreed – without further discussion – that there was no need to transform Directive 84/450/EC since Austrian law already met or even exceeded the (minimum) standard set out by Directive 84/450/EC.<sup>67</sup> Directive 97/55/EC<sup>68</sup> was implemented by Federal Law Gazette 1999/185<sup>69</sup>, only slightly modifying § 2 UWG, because an amendment to the UWG that took effect in 1988 had already regulated comparative advertising.<sup>70</sup> Directive 2006/114/EC has been officially implemented together with the Directive on Unfair Commercial Practices by Federal Law Gazette I 79/2007<sup>71</sup>. However, this so-called UWG Amendment 2007 basically only led to changes required by the Directive on Unfair Commercial Practices. Neither the transformation of Directive 84/450/EC nor of Directive 2006/114/EC resulted in the introduction of a specific provision concerning ‘directory companies’ applying misleading practices.

##### *Application of the UWG with regard to ‘directory companies’*

The Austrian Supreme court (*Oberster Gerichtshof*, OGH) had to deal with ‘directory companies’ already in the 1960s: what was likely the first case<sup>72</sup> concerned a ‘directory company’ which distributed yellow pages along with a payment form. The company literally cut advertisements out of the official phone book and placed them on the back of payment forms. The OGH ruled that such a practice could easily mislead recipients into thinking that the payment form was an extension of their advertisement in the official phone book. Therefore, the practice violates § 1 UWG and / or § 2 UWG.<sup>73</sup> Section 1 UWG (before the UWG Amendment 2007), which stated that “any party who in the course of business resorts to competitive practices which are contrary to public policy may be sued for a cease-and-desist order and payment of damages”.<sup>74</sup>

<sup>66</sup> *Bundesgesetzblatt* (BGBl., Federal Law Gazette) Nr. 448/1984.

<sup>67</sup> Cf. Gamerith (1999) p. 701.

<sup>68</sup> Directive 97/55/EC amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising. OJ L 290, 23.10.1997, pp 18-23.

<sup>69</sup> BGBl. I Nr. 185/1999.

<sup>70</sup> BGBl. Nr. 422/1988.

<sup>71</sup> BGBl. I Nr. 79/2007.

<sup>72</sup> OGH 7.4.1964, *Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht* (ÖBl) 1996, p. 63. For other early cases concerning 'directory companies' cf. e.g. OGH 7.4.1964, ÖBl 1964, 63; OGH 18.11.1969, ÖBl 1970, 70. Cf. also Kucsko (2001) p. 220.

<sup>73</sup> Cf. e.g. Duursma (2006) § 28a no. 3; *Wettbewerbsfibel* (2007) p.166. According to Feuchtinger (2004) p. 11, the OGH applied only § 1 UWG to misleading practices by ‘directory companies’.

<sup>74</sup> In this study, the translation provided by the Austrian Legal Information System (“RIS”), coordinated by the Austrian Federal Chancellery and available at <http://www.ris2.bka.gv.at/>, is used for the UWG before the reform 2007.

Section 2 UWG (before the UWG-Amendment 2007) stated that “any party who in the course of business for competitive purposes makes potentially deceptive representations with regard to business matters, including but not limited to representations about the condition, origin, manufacturing method or pricing of individual goods or services or of the entire range offered, about price lists, the manner of procurement or the source of supply of goods, about the award of quality certificates, about the occasion or purpose of the sale or about the quantity of stock, may be sued for an order to cease and desist from making such representations, and, in the event that such party knew or was bound to know that such representations were likely to be misleading, may be sued for payment of damages.”

All of the cases regarding ‘directory companies’ reported to apply misleading practices are rather similar. In general, there are three different approaches:

- The ‘directory company’ creates the impression that the payment form and materials supplied consist of compulsory registration in the commercial register (*Firmenbuch*) or trade register (*Gewerberegister*);
- The ‘directory company’ creates an impression that the payment form and materials supplied consist of the payment of an existing obligation;
- The ‘directory company’ creates the impression that the materials supplied consist of a correction of data, already contained in a register, free of charge;

### **Amendments of MS legislation concerning misleading advertising to close legal loopholes**

#### *Introduction of § 28a UWG*

Though there were no legal loopholes as the OGH applied the general clause of § 1 UWG and the “small general clause”<sup>75</sup> of § 2 UWG to outlaw misleading practices of ‘directory companies’, the Austrian legislature<sup>76</sup> decided to introduce a specific provision prohibiting the misleading practices of ‘directory companies’. This new provision, § 28a UWG, was introduced into the UWG by Federal Law Gazette I 1999/185. While this Law Gazette was primarily meant to implement Directive 97/55/EC (as well as the Directive 97/7/EC on distance selling), the introduction of § 28a UWG was an autonomous decision of the Austrian legislature. It came into force on April 1<sup>st</sup>, 2000.

The new provision was criticised by legal scholarship,<sup>77</sup> since § 28a UWG was regarded as an example of over-regulation.<sup>78</sup> As the OGH had already outlawed the misleading practices of ‘directory companies’ by regarding them as a violation of either § 1 and / or § 2 UWG (in the version before the amendment 2007), there seemed to be no need for a new provision. Some even questioned if § 28a UWG would narrow the ruling of the OGH with regard to ‘directory companies’,<sup>79</sup> as § 28a UWG focuses only on different registries but not, for example, on ‘directory companies’ whose practices involve subscriptions.<sup>80</sup>

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<sup>75</sup> Cf. e.g. Gamerith (2006) p. 12.

<sup>76</sup> It has been doubted what the motivation of the Austrian legislator for the introduction of § 28a UWG was, especially since the legislative materials cite a decision which does not deal with ‘directory companies’, cf. Kucsko (2001) p. 224. According to Feuchtinger (2004) p. 11, § 28a UWG is the result of an initiative of the Austrian Chamber of Commerce (for which he works).

<sup>77</sup> Kucsko (2001) p. 224 et sequ.

<sup>78</sup> Gamerith (1999) p. 701; Kucsko (2001) p. 224 et sequ.

<sup>79</sup> Kucsko (2001) p. 223; Gamerith (1999) p. 702.

<sup>80</sup> Kucsko (2001) p. 223.

However, § 1 and § 2 UWG are applicable concurrently with § 28a UWG, meaning that commercial practices by ‘directory companies’ not formally governed by § 28a UWG can still violate § 1 or § 2 UWG (after the UWG Amendment 2007: also § 1a UWG).<sup>81</sup>

### *Fact patterns of § 28a UWG*

Section 28a UWG states that “it shall be prohibited to advertise, in the scope of business and for the purpose of competition, for registration in directories, such as the yellow pages, telephone directory or similar lists, by way of a payment form, money order form, invoice, offer of correction or similar manner or to offer such registrations directly without unequivocally and also by clear graphical means pointing out that such advertisement is solely an offer for a contract.”

The aim of § 28a UWG is to outlaw any practice by a ‘directory company’ that either does not make entirely clear, or omits completely that the payment form is only an offer.<sup>82</sup> So far it seems that the OGH has applied § 28a UWG in eleven decisions.<sup>83</sup> In the first decisions involving § 28a UWG, the OGH applied a rather strict yardstick.<sup>84</sup> In contrast, the next two decisions negated the applicability of § 28a UWG, even though the facts were similar to those of the first cases.<sup>85</sup> However, the OGH then returned to its initial approach: it reversed its own prior rulings in which it stated that § 28a UWG does not apply if the target of the commercial practice could discover the real nature of the material sent to him or her if he or she studies it at some length.<sup>86</sup> Instead, the OGH has given consideration to the aim of § 28a UWG: it ruled that, to reduce unfair commercial practices effectively, it is necessary to apply a strict yardstick to determine whether a commercial practice is misleading. The OGH has specifically ruled that it is not sufficient to use the word “offer” only in small print standard contract terms or in other obscure ways.<sup>87</sup> The OGH also made clear that, for a commercial practice by a ‘directory company’ to avoid falling under § 28a UWG, the company must be explicit that the practice is only a private offer.<sup>88</sup>

As noted before, any fact pattern not formally governed by § 28a UWG can still violate § 1 UWG or be misleading under § 2 UWG.<sup>89</sup> One must also keep in mind that § 28a UWG applies to B2B as well as B2C relations and that consumers can also be the target of ‘directory companies’. For example, the *Landesgericht Salzburg* (LG, district court) dealt with a ‘directory companies’ that targeted consumers whose relatives had recently died. The ‘directory companies’ advertised an “Austrian register of deaths” (*österreichisches Sterberegister*), sent consumers the payment forms, and created the impression that the register was official and that registration was obligatory.<sup>90</sup>

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<sup>81</sup> Cf. e.g. Gamerith (2006) p. 23; Wettbewerbsfibel (2007) 168.

<sup>82</sup> This is the view of the Austrian legislature expressed in the explanatory remarks in the legislature materials, cf. Regierungsvorlage (RV.) 1999 Beilagen zu den stenographischen Protokollen des Nationalrates (BlgNR.) 20. Gesetzgebungsperiode (GP.) 39. The materials can be found at <http://www.parlinkom.gv.at>.

<sup>83</sup> OGH 13.3.2002, 4 Ob 1/02d; 24.9.2002, 4 Ob 175/02t; 5.11.2002, 4 Ob 198/02z; 17.12.2002, 4 Ob 287/02p; 21.1.2003, 4 Ob 267/02x; 25.3.2003, 4 Ob 303/02s; 18.11.2003, 4 Ob 173/03z; 4.5.2004, 4 Ob 60/04h; 16.3.2004, 4 Ob 26/04h; 24.11.2004, 3 Ob 253/04h; 20.4.2006, 4 Ob 27/06h. All decisions are available online at <http://www.ris2.bka.gv.at/>.

<sup>84</sup> OGH 13.3.2002, 4 Ob 1/02d; 24.9.2002, 4 Ob 175/02t; 5.11.2002, 4 Ob 198/02z; 17. In OGH 17.12.2002, 4 Ob 287/02p, the court refused to accept an extraordinary appeal (*außerordentliche Revisionsrekurs*).

<sup>85</sup> OGH 21.1.2003, 4 Ob 267/02x; 25.3.2003, 4 Ob 303/02s. With regard to the development of the jurisprudence of the OGH cf. also Feuchtinger (2004) pp. 12 et sequ.

<sup>86</sup> OGH 18.11.2003, 4 Ob 173/03z; confirmed in 16.3.2004, 4 Ob 26/04h; 4.5.2004, 4 Ob 60/04h; 20.4.2006, 4 Ob 27/06h.

<sup>87</sup> Cf. OGH 24.9.2002, 4 Ob 175/02t; 17.12.2002, 4 Ob 287/02p.

<sup>88</sup> Cf. OGH 5.11.2002, 4 Ob 198/02z; 30.3.2004, 4 Ob 3/04a; 16.3.2004, 4 Ob 26/04h.

<sup>89</sup> Cf. e.g. Gamerith (2006) p. 23; Wettbewerbsfibel (2007) p. 168.

<sup>90</sup> LG Salzburg, 27.12.2006, 2 Cg 231/06d.

### *Remedies for a violation of § 28a UWG*

*Administrative and criminal offences:* According to § 29 para. 2 UWG a violation of § 28a UWG is an administrative offence and can be punished by a fine of up to 2,900 Euro imposed by the District Administrative Authority (*Bezirksverwaltungsbehörde*). This administrative fee constitutes the major – some say the only – change introduced by § 28a UWG.<sup>91</sup> However, the administrative offence is subsidiary to criminal charges (§ 34 para. 2 UWG). Misleading practices of ‘directory companies’ might also constitute fraud under the Austrian Criminal Code (§ 146 Strafgesetzbuch, StGB). The Austrian *Schutzverband gegen unlauteren Wettbewerb*, an association that represents members of the Austrian Federal Economic Chamber (*Wirtschaftskammer, WKÖ*), files complaints with the district attorney (*Staatsanwaltschaft*) regarding ‘directory companies’ rather frequently. This association has also agreed with the Austrian Ministry of Justice that a copy of each complaint filed with the district attorney will be sent to the Ministry to ensure enforcement.<sup>92</sup> To date, there seem to have been no criminal decisions by the OGH regarding ‘directory companies’. However, in one decision the OGH stated *obiter dictum* that fraud on the part of such companies is not excused by their targets’ carelessness, failing to recognise the situation, or credulity.<sup>93</sup> This decision is regarded as a rather important step towards efficiently combating ‘directory companies’ applying misleading practices by means of criminal law.

*Injunctions<sup>94</sup> and damages:* In addition to an administrative or criminal charge (and not subsidiary to them), violations of § 28a UWG can result in injunctions and – if the tortfeasor acted with negligence or fault – damages (§ 34 para. 3 UWG). Accordingly, §§ 14-18 and 20-26 have to be applied to injunctions and damages for a violation of § 28a UWG (§ 34 para. 3 UWG).

The majority of legal scholars agree that the person or enterprise directly affected by a violation of the UWG can bring an injunction.<sup>95</sup> However, according to the OGH an injunction requires competition (*Wettbewerbsverhältnis*) between the violator of the UWG and the directly affected person or enterprise.<sup>96</sup> This means that – according to jurisprudence – targets of ‘directory companies’ cannot normally bring a claim for an injunction. With regard to such companies, this does not seem to create a legal loophole, as targets will be more interested in getting their money back and in withdrawing from the contract than in bringing an injunction.

Section 14 UWG regulates other people and organisations that can also bring a claim for an injunction: Under § 14 para. 1 UWG, in the cases set forth in §§ 1, 1a, 2, 2a, 3, 9a, 9c and 10, a claim for an injunction “may be filed by any entrepreneur who manufactures or markets goods or services of the same or a similar kind (competitor) or by associations to promote the economic interests of entrepreneurs, provided that such associations represent interests which are affected by the offence”. In addition, “in the cases set forth in Sections 1, 1a, 2, 9a and 9c, a suit for a cease-and-desist order may also be filed by the Federal Chamber of Labour, the Federal Economic Chamber, the Presidential Conference of the Austrian Chambers of Agriculture or by the Austrian Trade Union Federation.”

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<sup>91</sup> Gamerith (1999) p. 700.

<sup>92</sup> “Recht und Wettbewerb”, no. 171, May 2008, pp. 11. This journal is issued by the *Schutzverband*. Cf. also an interview with the managing director of the *Schutzverband* in an Austrian newspaper from 9.5.2008, available at <http://www.wirtschaftsblatt.at/home/schwerpunkt/dossiers/sicherheit/326506/index.do>.

<sup>93</sup> OGH 25.10.2007, 13 Os 127/07m.

<sup>94</sup> The official translation of the UWG before the amendment 2007 uses the term “order to cease and desist”.

<sup>95</sup> Gamerith (2006) p. 82; Wettbewerbsfibel (2007) p. 177; Duursma-Kepplinger (2006) § 14 n. 114; Koppensteiner (1997) § 34 no. 28.

<sup>96</sup> OGH 25.02.1997 4 Ob 2/97s; 14.3.2006, 4 Ob 225/05z.

In the cases of comparative or misleading advertising under § 1 para. 1 no. 2, para. 2 to 4, §§ 1a or 2 a claim for an injunction order may also be filed by the *Verein für Konsumenteninformation* (VKI, an Austrian consumer organisation).<sup>97</sup>

In addition, a fault-based claim for damages can be brought by anyone who suffered damage as a result of the violation of § 28a UWG (§ 34 para. 3 UWG).<sup>98</sup> The OGH has rightly decided that consumers also have a claim for damages if they suffer damage as result of a violation of the UWG.<sup>99</sup> This must also be true for businesses that are targets of ‘directory companies’ (without being competitors of such companies). Such a claim also encompasses lost profit (§ 16 para. 1 UWG). Organisations and competitors that only have standing under § 14 UWG cannot bring a claim for damages.

*Prohibition against profiting from a violation of the UWG:* The OGH has ruled that no violator of the UWG should be able to gain or keep the profits from such violations of the UWG: § 1 UWG is violated if a ‘directory company’ tries to gain benefit from tricking somebody into a contract that contains a commercial practice that violates § 28a UWG.<sup>100</sup> As a result, ‘directory companies’ violate § 1 UWG if they refuse to repay the money that their targets paid (mistakenly believing they were paying an obligation of an existing contract) or if they sue their targets for payment. This jurisprudence of the OGH is an appropriate complementation of injunctions that can have effects only in the future. Unlike claims for damages, these claims can be brought by the organisations listed in § 14 UWG as well and may have effects for future cases as well as for the case before court.

*Civil law remedies:* Under civil law, there are further remedies available: under § 870 of the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB, General Civil Code) as well as under § 871 ABGB, the victims of ‘directory companies’ applying misleading practices may rescind the contract. According to § 870 ABGB, a party of a contract can rescind the contract inter alia if he or she was prompted into the contract by deceit (*List*).<sup>101</sup> In addition, the contractual partner of the ‘directory company’ may rescind the contract under § 871 ABGB as he concluded the contract by mistake, the mistake regarded the nature of the contract (*Geschäftsirrtum*) and it was caused by the ‘directory company’.<sup>102</sup> Such a contract might also be void under § 879 para. 1 ABGB<sup>103</sup>, as the *Handelsgericht* Wien (HG Wien, commercial court Vienna)<sup>104</sup> ruled in one decision.

### **Transposition of the Directive on Unfair Commercial Practices (2005/29/EC)**

The issue of ‘directory companies’ applying misleading practices has not been explicitly addressed in the national implementation of Directive 2005/29/EC. However, the Directive has had some impact on Austrian law with regard to ‘directory companies’.

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<sup>97</sup> § 14 para. 2 UWG regulates, in transformation of the injunctions Directive (98/27/EC), which organizations have the right to bring a claim for an injunction in cases with effects consumers abroad. The OGH has ruled in a case concerning 'directory companies' that practices aimed at targets abroad but carried out by such Austrian companies might have effects for the Austrian market: Foreign companies might refrain from business with Austrian companies as a result of their bad experience with Austrian 'directory companies' applying misleading practices. The OGH therefore accepted a claim from the *Schutzverband* as the interests of the companies protected by it might be harmed (OGH 28.9.2006, 4 Ob 148/06b).

<sup>98</sup> Wettbewerbsfibel (2007) p. 187.

<sup>99</sup> OGH 24.2.1998, 4 Ob 53/98t). Against it Duursma-Kepplinger (2006) § 16 no. 7 et sequ.

<sup>100</sup> OGH 13.3.2002, 4 Ob 1/02d; 24.9.202; 4 Ob 198/02z; 24.11.2004, 3 Ob 253/04h.

<sup>101</sup> For the law of mistake in Austrian law in general cf. e.g. Bollenberger (2007) § 871 no. 1 et sequ.

<sup>102</sup> Feuchtinger (2004) pp. 16. For the law of mistake under Austrian law in general cf. e.g. Bollenberger (2007) § 871 no. 1 et sequ.

<sup>103</sup> § 879 para. 1 ABGB states that contracts violating laws or morality are void.

<sup>104</sup> HG Wien 7.7.2004, 1 R 37/04v 1 R 37/04v.

The most relevant provision of Directive 2005/29/EC concerning ‘directory companies’ is Annex I no. 21. However, in order to understand the impact of this provision on Austrian law, the transformation of Directive 2005/29/EC into UWG in general has to be taken into account.<sup>105</sup>

As mentioned before, Directive 2005/29/EC has been implemented into Austrian law by Federal Law Gazette I 79/2007 (UWG Amendment 2007).<sup>106</sup> It was transformed into the UWG, which before the amendment in 2007 applied to B2C as well as B2B relations. The Austrian legislator decided to implement Directive 2005/29/EC not within its limited personal scope but opted for maintaining the broader personal scope of the UWG. However, there are some exceptions:

*General clause (§ 1 UWG):* A difference between B2C and B2B relationships is made in § 1 para. 1 UWG, which regulates unfair commercial practices. According to § 1 para. 1 no. 1 UWG an injunction and a fault-based claim for damages may be available against a party who, in the course of business, applies an unfair commercial practice or another unfair act which is suitable to distort competition to the disadvantage of enterprises in not only a minor way.

§ 1 para. 1 no. 2 UWG regulates unfair commercial practices in B2C relations: An injunction and a fault-based claim for damages may be available against a party who, in the course of business, applies unfair commercial practices that are contrary to the requirements of professional diligence and that are sufficient to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed.

*Aggressive commercial practices (§ 1a UWG):* Aggressive commercial practices are regulated in § 1a UWG. Para 1 leg cit states that commercial practices shall be regarded as aggressive if – by harassment, coercion, including the use of physical force, or undue influence – they significantly impair or are likely to significantly impair the market participant’s freedom of choice or conduct with regard to the product, thereby causing or being likely to cause the participant to make a transactional decision that he otherwise would not have made. It applies to B2C as well as B2B relations. In addition, commercial practices mentioned in Annex I nos. 24 - 31 are to be considered aggressive (§ 1a para. 3 UWG). In contrast, § 1a para. 2 UWG applies only to B2C relations, stating that, in determining whether a commercial practice has to be considered as aggressive, account shall be taken of any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer – and not a market participant – wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader.

*Misleading commercial practices (§ 2 UWG):* Finally, § 2 UWG on misleading commercial practices applies to B2C as well as to B2B relations. However, with regard to misleading omissions, Art 7 no. 4 Directive 2005/29/EC – which lists the information that shall be regarded as material in the case of an invitation to purchase, if not already apparent from the context – has been implemented only with regard to B2C relations (§ 2 para. 6 UWG).

Annex 1 no. 21 UWG: No. 21 of the Annex I of the Directive on Unfair Commercial Practices prohibits unfair practices of ‘directory companies’. It states that the practice of “including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not” has to be considered as unfair in all circumstances.

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<sup>105</sup> Cf. e.g. Schuhmacher (2007) for the UWG amendment 2007 in general.

<sup>106</sup> The new law entered into force on 12.12.2007.

Annex I No. 21 Directive 2005/29/EC was adopted into Annex I no. 21 of the Austrian UWG literally, the only change being replacing the word “consumer” with “the target of the commercial practice” (*Umworbener*) since the Austrian UWG generally applies, as mentioned, to B2C as well as B2B relations.

As a result of the transposition of the Directive on Unfair Commercial Practices, para. 2 was introduced in § 28a UWG. It states that § 28a para. 1 UWG does not affect no. 21 Annex I. Therefore, Annex I no. 21 UWG, § 28a UWG as well as §§ 1, 2 UWG are applicable concurrently.<sup>107</sup> This is true for B2C as well as for B2B relations since the commercial practices listed in Annex I of the Directive 2005/29/EC have been transformed for B2C as well as B2B relations.

#### *Relationship between Annex I no. 21 UWG and § 1 UWG*

Some authors have questioned whether the requirements set out in § 1 UWG have to be met in order for the respective commercial practices listed in Annex 1 UWG to be misleading since the cases listed in Annex I are subsets of § 2 (misleading commercial practices) and § 1a (aggressive commercial practices) UWG.<sup>108</sup> This leads to a primary question: whether the requirements of § 1 UWG have to be fulfilled in order for § 2 and § 1a UWG to be applicable.

In one of its first decisions after the UWG Amendment 2007, the OGH addressed this question with regard to misleading commercial practices.<sup>109</sup> It stated that, in contrast to the legal position before the amendment 2007, § 2 UWG does not stipulate legal consequences for misleading commercial practices. Therefore, a misleading commercial practice as such would – according to the wording of the UWG – not lead to an injunction. As stated by the OGH, under the new system of the UWG, an injunction must be based on § 1 para. 1 UWG. Interpreting the statute by using plain wording would mean that a misleading commercial practice must also be suitable to deter competition to the disadvantage of enterprises in not only a minor way (§ 1 para. 1 no. 1 UWG), or it must be contrary to the requirements of professional diligence and be suitable to materially distort the economic behaviour of the average consumer whom it reaches or to whom it is addressed (§ 1 para. 1 no. 2 UWG).

The court then noted that Directive 2005/29/EC has a different approach, especially as recital 17 of the Directive makes it clear that Annex I contains (the only) commercial practices that can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The OGH then rightly stated that the UWG in the version of the amendment 2007 has to be interpreted in light of the Directive. This means, according to the ruling of the OGH, that § 2 UWG concretises § 1 para. 1 no. 2 UWG. If the fact patterns of § 2 UWG are given, this will generally also constitute a violation of professional diligence and a material distortion of the consumer’s economic behaviour. This must be even truer for commercial practices listed in Annex I. Finally, the OGH raised but did not answer the question of whether, in particular cases, the lack of a material distortion of a consumer, the lack of a violation of professional diligence or the lack of distortion of competition to the disadvantage of enterprises can be pleaded by the defendant.<sup>110</sup>

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<sup>107</sup> Wettbewerbsfibel (2007) p. 168, 170.

<sup>108</sup> Wiltschek/Majchrzak (2008) p. 9, 11.

<sup>109</sup> OGH 8.4.2008, 4 Ob 42/08t.

<sup>110</sup> For an interpretation of Annex I in this direction Wiltschek/Majchrzak (2008) p. 9, 11. Different, rightly, e.g. Köhler/Bornkamm (2008) Richtlinie no. 2; Micklitz (2006) p. 117.

This interpretation is also, in the view of the OGH, in accordance with the intentions of the Austrian legislature since the explanatory remarks in the legislative materials<sup>111</sup> state that the examination of whether a commercial practice is unfair has to be done in a reverse order.

This order of examination<sup>112</sup> requires that a commercial practice is generally considered unfair if it is listed in Annex I or violates §§ 1a or 2 UWG. The general clause in § 1 UWG will therefore be of importance only if a commercial practice is neither misleading nor aggressive.

One has to agree with the OGH that the interpretation of Annex I UWG has to be done in light of Directive 2005/29/EC. As a result, the commercial practices listed in Annex I must be considered as unfair under all circumstances, and no additional requirements can be imposed by national law. In Austrian literature it has been questioned whether the interpretation of the UWG has to be based on the Directive only as far as B2C relations are concerned, since only such relations are within the Directive's limited scope.<sup>113</sup> This question has to be answered negatively as the Austrian legislature opted to implement the Directive for B2C relations as well as B2B relations, all provisions based on the Directive have to be interpreted in its light.<sup>114</sup>

#### *Difference between Annex I no. 21 UWG and § 28a UWG*

As a violation of Annex I no. 21 UWG has to be regarded as unfair under all circumstances, it will often be the more advantageous remedy for the target of a 'directory company' compared with § 28a UWG. The latter requires that the 'misleading directory company' operates "in the scope of business and for the purpose of competition". In the course of the UWG Amendment 2007, the requirement "for the purpose of competition" has been removed from the wording of other provisions of the UWG, especially from the wording of § 1 and § 2 UWG, but not from § 28a UWG. The requirement "for the purpose of competition" is given if there is competition between the businesses in question (*Wettbewerbsverhältnis*) and the violator acted with competitive intentions (*Wettbewerbsabsicht*).<sup>115</sup> It is said that for B2B relations under § 1 para. 1 no. 1 UWG it is still relevant whether or not there is competition between the businesses involved; otherwise competition cannot be deterred to the disadvantage of enterprises.<sup>116</sup> For Annex I no. 21, however – as well as under § 1 para. 1 no. 2 UWG – that requirement does not exist. Therefore Annex I no. 21 UWG might be more advantageous for victims of 'directory companies' compared with § 28a UWG. However, jurisprudence will still require competition (*Wettbewerbsverhältnis*) for an injunction.

For companies as well as consumers, Annex I no. 21 UWG might be also advantageous as its wording seems to have a slightly broader scope than that of § 28a UWG: it does not focus solely on directories. However, as mentioned above, cases not formally governed by § 28a UWG have already been outlawed before the UWG Amendment 2007 since they were prohibited under §§ 1, 2 UWG (old version).

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<sup>111</sup> RV. 144 BlgNR. 23. GP. 2.

<sup>112</sup> The majority of opinions expressed in literature seems to agree upon this "reverse order" of examination, cf. e.g. Köhler/Bornkamm (2008) Richtlinie no. 2; for Austria e.g. Schuhmacher (2007) p. 558. The OGH has also already confirmed this order of examination, OGH 22.1.2008, 4 Ob 177/07v.

<sup>113</sup> Artmann (2008) p. 254, footnote 6.

<sup>114</sup> Cf. Faber (2001) 45 et sequ. for the same question with regard to the Directive on the sale of consumer goods.

<sup>115</sup> Gamerith (2006) p. 16 et sequ. Cf. also Koppensteiner (2005) p. 557.

<sup>116</sup> Schuhmacher (2007) p. 559; Wettbewerbsfibel (2007) p. 12 et sequ.

Therefore, with regard to ‘directory companies’ the main, and probably only, difference to the legal situation before the transposition of Directive 2005/29/EC is that Annex I no. 21 and § 1 para. 1 no. 2 UWG do not require that ‘directory companies’ act “in the scope of business and for the purpose of competition” and cases governed by § 1 para. 1 no. 1 UWG no longer require competitive intentions.

### *Remedies*

The remedies available for a violation of Annex I no. 21 UWG, as well as for §§ 1, 1a, 2 UWG after the amendment 2007, are the same as for a violation of § 28a UWG (see above).

### **Amendments of MS legislation concerning unfair commercial practices to close legal loopholes**

See UWG Amendment 2008 in the previous section.

### **Other measures**

#### ***Other national legislation***

No other legislation has been passed to prevent misleading practices of ‘directory companies’. However, as mentioned, criminal as well as civil law provisions might apply to such practices.

#### ***Self-regulatory and other non-legislative measures***

Self-regulatory measures do not seem to be a suitable means of preventing unfair commercial practices by ‘directory companies’. It seems unlikely that they would agree to adopt a code of conduct – and even more importantly – comply with it.

The Austrian Federal Economic Chamber (*Wirtschaftskammer, WKÖ*) appears to take measures to inform its members about unfair commercial practices by ‘directory companies’.<sup>117</sup> The Austrian Federal Economic Chamber also cooperates with the Austrian *Schutzverband gegen unlauteren Wettbewerb*. The *Schutzverband* is probably the most active association in combating ‘directory companies’ reported to apply misleading practices by bringing either legal action (the *Schutzverband* has a legal standing under §§ 34, 14 UWG) or by negotiation.<sup>118</sup>

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<sup>117</sup> Such information is available at the web site of the WKÖ, cf. <http://wko.at/rp/Internet/Schlagzeilen/erlagscheinwerbung.pdf>.

<sup>118</sup> A summary of cases currently pending can be found in the journal “Recht und Wettbewerb”, no. 171, May 2008, pp. 10.

## The Netherlands

The following section describes the situation in the Netherlands regarding the implementation of the Directive concerning Misleading and Comparative Advertising, and the relationship between the rules on misleading advertising and practices of ‘directory companies’.

### Transposition of the Misleading and Comparative Advertising Directive (84/450/EC and 2006/114/EC)

#### *Quality of transposition*

Directive 84/450/EC on Misleading and Comparative Advertising has been implemented into the Dutch Civil Code (BW). Its relevant Article 6:194 BW provides that: “a person who makes public or causes to be made public information regarding goods or services which he or she, or the person for whom he or she acts, offers in the conduct of a profession or business, acts unlawfully if this information is misleading in one or more of the following respects, for example as to [...]”. The article then lists several different types of information regarding which misleading information could be made public, for instance quantity, quality and price.

As to the quality of transposition of the Directive into this article, the following can be said. Article 6:194 BW’s<sup>119</sup> predecessor is article 1416a BW (old), which has been in force since 14 July 1980;<sup>120</sup> long before the Directive concerning Misleading and Comparative Advertising originated. Given that the Directive concerning Misleading and Comparative Advertising merely requires minimum harmonisation,<sup>121</sup> no further amendments were made as to article 1416a BW once the Directive came into force.<sup>122</sup> The text of the new article 6:194 BW is therefore exactly the same as the unchanged text of article 1416a BW.

The importance of article 6:194 BW is that it lists several cases of possibly misleading information, however in a non-exhaustive way. This appears to guarantee certainty regarding those cases, however it remains up to the judiciary to answer the question of whether the information is misleading or not.<sup>123</sup>

During the implementation process of the Directive on Unfair Commercial Practices (2005/29/EC) there were discussions about the definition of the element ‘misleading’ as provided by article 6:194 BW.<sup>124</sup> The Minister of Justice stated that article 6:194 BW and the concept of misleading information are considered workable in practice. The Minister also stated, that regularly judgments are based upon the concept of misleading information.<sup>125</sup>

The conclusion is that, generally speaking, the implementation of the Directive concerning Misleading and Comparative Advertising can be considered successful in the Netherlands. It is a fact though that article 6:194 BW leaves much up to the judiciary, since it is neither exhaustive nor far-reaching.

Nonetheless, a possible source for abuse of article 6:194 BW by ‘directory companies’ with misleading practices is that the article covers only information that is made publicly available.

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<sup>119</sup> *Stb.* 1991, 300.

<sup>120</sup> *Stb.* 1980, 304.

<sup>121</sup> Art. 8 Directive on Misleading and Comparative Advertising.

<sup>122</sup> Van Nispen (*Onrechtmatige Daad III*), afdeling 4, inl - aant. 1.

<sup>123</sup> Kabel & Ancion-Kors (Praktijkboek Reclamerecht I) IIA-20.

<sup>124</sup> *Kamerstukken II* 2006/2007, 30 928, nr. 6, p. 3.

<sup>125</sup> *Kamerstukken II* 2006/2007, 30 928, nr. 8, p. 7.

The concept of ‘public information’ is interpreted as meaning that the public at large has to be able to get acquainted with the information concerned, and that individual offers fall outside the scope of the article.<sup>126</sup> This requirement of the information being public does not follow from the Directive concerning Misleading and Comparative Advertising.<sup>127</sup>

The effect of the limitation to public information is that individual offers by ‘directory companies’ applying misleading practices will generally not be considered as information under the scope of article 6:194 BW.<sup>128</sup> This may be different when the companies work in a structural and professional manner. For example, when ‘directory companies’ use telephone scripts to approach their clients, it is not considered as making individual offers.<sup>129</sup> Therefore the information following from an approach by telephone script, or from another more structural or professional manner, will be within the scope of article 6:194 BW if the information is misleading.

However, it should be noted that in practice article 6:194 BW so far is rarely used as a basis for litigation, neither by ‘directory companies’ with misleading practices, nor by their victims. This is further addressed in the section below on the amendments of MS legislation concerning misleading advertising to close legal loopholes.

#### *Changes foreseen*

The proposal of law<sup>130</sup> implementing the Directive on Unfair Commercial Practices (2005/29/EC) is currently awaiting approval by the Eerste Kamer (Upper House of Parliament). The proposal includes amendments to the articles in the Civil Code considering misleading and comparative advertising, and consequently implements Directive 2006/114/EC.

In the proposal the only change to article 6:194 BW is that its scope will be limited to misleading information made public within business-to-business (B2B) relationships.<sup>131</sup> Regarding the content no other changes are made and, as a result of that, no significant changes will follow from the proposal, other than excluding business-to-consumer (B2C) relationships from the scope of article 6:194 BW.

The implementation of the new Directive (2006/114/EC) will, however, make a difference concerning enforcement. The Dutch authority responsible for the enforcement of consumer protection laws (Consumentenautoriteit)<sup>132</sup> will, under the new law implementing the Directive on Unfair Commercial Practices, be allowed to impose high fines of up to 450,000 Euro on companies breaching the rules of that law in B2C relationships.<sup>133</sup> Therefore a company may be imposed a high fine for breaking the rules on Unfair Commercial Practices in B2C relationships, whereas for breaking the rules on Misleading and Comparative Advertising the financial loss can merely consist of being held liable for damages caused to a competitor (B2B).<sup>134</sup>

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<sup>126</sup> Van Nispen (*Onrechtmatige Daad III*), art. 194, aant. 5.

<sup>127</sup> Rb. Utrecht 4 augustus 1998, *IER* 1999, 25, m.nt. Kabel.

<sup>128</sup> However, these individual offers could be regarded unlawful acts in the sense of article 6:162 BW.

<sup>129</sup> Rb. Rotterdam 19 oktober 2005, *NJF* 2006, 73.

<sup>130</sup> *Kamerstukken I* 2007/2008, 30 928, nr. A.

<sup>131</sup> *Kamerstukken I* 2007/2008, 30 928, nr. A, p. 8.

<sup>132</sup> Art. 2.1 Wet Handhaving Consumentenbescherming.

<sup>133</sup> *Kamerstukken I* 2007/2008, 30 928, nr. A, p. 8.

<sup>134</sup> Though prohibition or rectification is even more likely in civil procedures.

## Amendments of MS legislation concerning misleading advertising to close legal loopholes

### *No amendment of legislation*

The only amendments that have previously been made to article 6:194 BW followed from the implementation of Directive 97/55/EC, when the Directive on Misleading Advertising was extended to include Comparative Advertising. The amendments to article 6:194 BW were minor; only the last of the ten examples in which information was considered to be misleading was deleted, since comparative advertising was specifically regulated in article 6:194a BW.<sup>135</sup> Other than that, the text of article 6:194 BW is still the same as it was when it was first implemented in 1980.<sup>136</sup>

The Minister of Justice has received many questions over the years from several Members of Parliament regarding ‘directory companies’ applying misleading practices, and the need to change legislation. The Minister, however, consistently referred to the possibilities already offered by the Civil and Criminal Code, and to the solutions provided for by public-private partnership. The Minister never brought up a possible need to change the law.<sup>137</sup>

### *Remedies- evidence from case law*

From reviewing Dutch case law concerning ‘directory companies’ applying misleading practices, it becomes clear why the Minister of Justice does not see a need to change legislation for the reason of the existence of these companies. The following paragraphs demonstrate that there is already a fairly sound basic framework in Dutch legislation, to be relied upon by parties that are victims of ‘directory companies’.

Criminal procedure: Misleading practices of ‘directory companies’ have been held punishable under the Dutch Criminal Code (Sr). Article 328 Sr prohibits fraud, and states: “whoever, with the intention of undue preference, by assuming a false name or taking on a false quality, by using devious tricks, or by a tissue of lies, persuades someone to surrender any good, to provide data having monetary value in commerce, to incur debts or to undo an outstanding debt, will be, as guilty to fraud, be punished to imprisonment for a maximum of four years or a fine of the fifth category”. Only once has an owner of several ‘directory companies’ been sentenced to imprisonment for fraud.<sup>138</sup>

Reflex of consumer law: In Dutch law, legislation meant to protect a defined group of people may, under certain circumstances, also be used to protect people who do not fall within that defined group (‘reflex’).<sup>139</sup> For example, the blacklist with unreasonably onerous general conditions<sup>140</sup>, which according to its strict wording is applicable only to consumer contracts, has also been declared applicable in relation to contracts to which small businesses are a party.<sup>141</sup> The same effect may apply for other legislation that, strictly speaking, is drafted for consumers, if the judiciary feels the need to extend the legislation to others.<sup>142</sup>

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<sup>135</sup> *Kamerstukken II 2000/2001*, 27 619, nr. 2, p. 2.

<sup>136</sup> Art. 1416a BW, *Stb.* 1980, 304.

<sup>137</sup> *Kamerstukken II 2006/2007*, 28 684, nr. 102; *Kamerstukken II 2006/2007*, 30 928, nr. 8; *Kamerstukken II 2007/2008*, 31 311, nr. 1; *Aanhangsel Handelingen II 2001/2002*, nr. 1206; *Aanhangsel Handelingen II 2004/2005*, nr. 1044; *Aanhangsel Handelingen II 2005/2006*, nr. 67; *Aanhangsel Handelingen II 2006/2007*, nr. 1329; *Aanhangsel Handelingen II 2006/2007*, nr. 1332; *Aanhangsel Handelingen II 2007/2008*, nr. 1454.

<sup>138</sup> Hof Amsterdam 21 december 2007, *LJN BC1568*.

<sup>139</sup> HR 17 januari 1958, *NJ* 1961, 568.

<sup>140</sup> Art. 6:236 BW.

<sup>141</sup> Hof Leeuwarden 12 februari 2003, *NJ* 2003, 277.

<sup>142</sup> *Kamerstukken I 20007/2008*, 30 928, nr. E.

Civil procedure – initiated by victims: So far, only twice have victims of ‘directory companies’ with misleading practices initiated proceedings. Both of these cases were decided in favour of the victims, but each on different grounds, although it was the same court ruling the judgment. In the first case<sup>143</sup> the ‘directory company’ had to pay damages to the victim because the company had not lived up to the requirements of a good contractor.<sup>144</sup> In the second case<sup>145</sup> the ‘directory company’ had to reimburse the victim the amounts it had already been paid because of undue payment, since the way the contract was concluded was contrary to good morals and therefore the contract was held null and void.<sup>146</sup>

Civil procedure – initiated by ‘directory companies’: In some cases ‘directory companies’ summon affected companies for breach of contract (if the affected companies cease contractual payments). They were however never successful, due to two different reasons. First of all, judges have set high standards for proof by evidence, which makes it difficult for ‘directory companies’ to substantiate their case, and prove that an agreement was concluded.<sup>147</sup> Secondly, victims were successful<sup>148</sup> in demonstrating vitiated consent by invoking an error<sup>149</sup> or by invoking fraud<sup>150</sup>, which results in annulment of the contract and makes the payments already paid not due.

Civil procedure – appeal: There is only one higher civil court that ruled in a case concerning ‘directory companies’<sup>151</sup> applying misleading practices. The court found that the behaviour of the company involved could be qualified as civil fraud,<sup>152</sup> which resulted in annulment of the contract. The sums already paid had to be returned and, since the owner of the company had a leading role in the fraud, the owner was held liable for the amount due.<sup>153</sup>

Because of the sound civil framework already existing within Dutch legislation, it seems article 6:194 BW on misleading information was not necessary to be invoked by any of the parties involved. The sound civil framework appears to be a reason for the Minister of Justice not to create specific legislation to deal with ‘directory companies’ with misleading practices.

### **Transposition of the Directive on Unfair Commercial Practices (2005/29/EC)**

The issue of ‘directory companies’ with misleading practices has been addressed during the national implementation of Directive 2005/29/EC. However, this has not led to any changes in the proposal for Dutch legislation implementing the Directive on Unfair Commercial Practices. The proposal of law implementing the Directive is, like the Directive, only applicable in B2C relationships. More than once the question has been asked whether the proposal should be extended to B2B relationships, in light of the misleading practices of ‘directory companies’ targeting small businesses.<sup>154</sup> The answer has always been twofold.

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<sup>143</sup> Rb. Groningen 21 maart 2007, rolnr. HA ZA 05-328.

<sup>144</sup> Art. 7:403 BW.

<sup>145</sup> Rb. Groningen 11 juni 2008, *LJN* BD3924.

<sup>146</sup> Art. 3:40 BW.

<sup>147</sup> Rb. Zuthpen 21 maart 2007, zaaknr. 294727/07-147; Rb. Maastricht 6 juni 2007, *LJN* BC6117; Rb. ’s Hertogenbosch 20 november 2007, rolnr. 536/07; Rb. Breda 19 december 2007, zaaknr. 458410 CV EXPL 07-6245.

<sup>148</sup> Rb. Groningen 20 december 2006, *LJN* AZ6055; Rb. Utrecht 10 januari 2007, zaaknr. 473692-CU-06-5887; Rb. ’s Gravenhage 12 april 2007, *LJN* BA3375; Rb. ’s Hertogenbosch 24 april 2008, *LJN* BD0508.

<sup>149</sup> Art. 6:228 BW.

<sup>150</sup> Art. 3:44 lid 3 BW.

<sup>151</sup> Hof Amsterdam 19 juni 2008, *LJN* BD4795.

<sup>152</sup> Art. 3:44 lid 3 BW.

<sup>153</sup> Art. 6:162 BW.

<sup>154</sup> *Aanhangsel Handelingen II* 2007/2008, nr. 1454; *Kamerstukken II* 2006/2007, 30 928, nr. 8, p. 7.

First, the Dutch government considers the question as requiring an answer on a European level.<sup>155</sup> The proposal follows the Directive<sup>156</sup>, and during the formation of the Directive it has been explicitly decided that it should remain restricted to B2C relationships.<sup>157</sup> Therefore it should not be up to the Dutch legislator to decide on this matter.

Secondly, it is pointed out that there exists an overlap between the proposal of law on unfair commercial practices, and current Dutch criminal and civil law.<sup>158</sup> For small businesses there are several options – as mentioned in the answer to question 2 – to defend themselves once confronted with misleading practices of ‘directory companies’,<sup>159</sup> for example by stating vitiated consent.<sup>160</sup> Because of this framework there is no pressing need to extend the new legislation also to B2B relationships.

However, the government is not opposed to the possibility of the judiciary granting small businesses the same protection consumers receive under the new law on unfair commercial practices by accepting a reflex of consumer law.<sup>161</sup>

### **Amendments of MS legislation concerning unfair commercial practices to close legal loopholes**

The law implementing the Directive on Unfair Commercial Practices is not in force yet; it is currently under discussion in the Upper House of Parliament.

#### **Other measures**

##### *Other national legislation*

A present proposal amends the Dutch Criminal Code. Article 326 Sr concerning fraud will be modified, though this modification is not created because of the existence of ‘directory companies’.<sup>162</sup> It might however have as a positive side effect in that it will be easier to prosecute these ‘directory companies’ with misleading practices in criminal procedures.

##### *Self-regulatory and other non-legislative measures*

The Dutch Advertising Standards Committee (RCC)<sup>163</sup> applies the same rules to B2B and B2C relationships. In the Dutch Press Advertising Code (NRC)<sup>164</sup> the rules on unfair commercial practices following from the Directive on Unfair Commercial Practices have been implemented, and they are also applicable in B2B relationships.<sup>165</sup> The result is that the blacklist of Annex I of the Directive on Unfair Commercial Practices, which lays down commercial practices that are in all circumstances considered unfair, is, under the NRC, also applicable in B2B relationships. These new rules of the NRC have already been put into practice regarding ‘directory companies’.<sup>166</sup> It should be noted however that the sanctions the RCC may impose are limited to sanctions on publicity, and do not involve fines.

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<sup>155</sup> *Aanhangsel Handelingen II* 2007/2008, nr. 1454.

<sup>156</sup> *Kamerstukken II* 2006/2007, 30 928, nr. 8, p. 7.

<sup>157</sup> *Handelingen II* 2007/2008, nr. 14, p. 941.

<sup>158</sup> *Kamerstukken II* 2006/2007, 30 928, nr. 3, p. 9.

<sup>159</sup> *Kamerstukken II* 2006/2007, 30 928, nr. 8, p. 6.

<sup>160</sup> Art. 3:44 BW, art. 6:228 BW.

<sup>161</sup> *Kamerstukken I* 2007/2008, 30 928, nr. E, p. 7.

<sup>162</sup> *Kamerstukken II* 2007/2008, 31 369, nr. 7, p. 9.

<sup>163</sup> Reclame Code Commissie.

<sup>164</sup> Nederlandse Reclame Code.

<sup>165</sup> Art. 7, 8, 14 en bijlage 1 en 2 NRC.

<sup>166</sup> RCC 18 maart 2008, dossiernr. 08.0050; RCC 18 maart 2008, dossiernr. 08.0051.

### *Public-private partnership*

In the Netherlands there is a national reporting centre for misleading activities of ‘directory companies’, the SAF (Steunpunt Acquisitiefraude). SAF provides a website<sup>167</sup> with information concerning ‘directory companies’ with misleading practices and the possibilities for victims to report the harm that has been done to them. After they have become a member of the centre, SAF assists victims with legal advice, collects the reports, and works together with the Public Prosecutions Department in combating ‘directory companies’ applying misleading practices.<sup>168</sup>

SAF also takes part in AVO III<sup>169</sup>, which is an “action plan” of the NPC (Nationaal Platform Criminaliteitsbestrijding).<sup>170</sup> The NPC is a collaborative project of the government and the business community in which representatives of both of the aforementioned are present. The focus of the NPC is tackling crime to which the business community falls victim.<sup>171</sup> Combating misleading practices of ‘directory companies’ is now included in the action plan AVO III.

These two forms of public-private partnership are aimed at making companies aware of the fact that ‘directory companies’ exist and that caution is required when signing documents, and at reducing the activities of ‘directory companies’ with misleading practices.

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<sup>167</sup> [www.fraudemeldpunt.nl](http://www.fraudemeldpunt.nl)

<sup>168</sup> *Aanhangsel Handelingen II* 2005/2006, nr. 67.

<sup>169</sup> Actieplan Veilig Ondernemen deel 3.

<sup>170</sup> *Aanhangsel Handelingen II* 2006/2007, nr. 1332.

<sup>171</sup> [http://www.veiligheidbegintbijvoorkomen.nl/images/actieplan\\_veilig\\_ondernemen\\_deel3\\_tcm62-103134.pdf](http://www.veiligheidbegintbijvoorkomen.nl/images/actieplan_veilig_ondernemen_deel3_tcm62-103134.pdf)

## Spain

### Transposition of the Misleading and Comparative Advertising Directive (84/450/EC and 2006/114/EC)

The old Directive 84/450/EC has been transposed into Spanish law by the Advertising Law (Law 34/1988, *General de Publicidad*<sup>172</sup>, from here on Advertising Law). In particular, misleading advertising is regulated in articles 3 b), 4 and 5 of the Advertising Law.

Pursuant to article 2 of the Advertising Law, “advertising” means any form of communication 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. In view of this definition, there is no doubt that the practice engaged by ‘directory companies’ consisting of promotion by mail free-of-charge entry into a business catalogue is advertising for the purpose of this law. In this regard, it should be noted that on one hand, it is well established that this is a broad definition covering also so-called “direct advertising”<sup>173</sup> (for instance, direct-email advertising)<sup>174</sup> and, on that the other hand, the practice engaged by ‘directory companies’ is aimed at promoting the supply of goods or services and, specifically, their business catalogue.

Article 3 b) of the Advertising Law considers misleading advertising to be unlawful. The definition of “misleading advertising” provided by article 4 Advertising Law is nearly the same definition supported in article 2.2 of Directive 84/450/EC. In particular, it is defined as “any advertising which in any way, including its presentation is likely to lead the persons to whom it is addressed or whom it reaches to an error and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor”. The main difference lies in the fact that the notion of “misleading advertising” provided by article 4 Advertising Law explicitly comprises misleading omissions, defined as “any advertising which omits material information about activities, goods or services when this omission deceives or is likely to deceive the persons to whom it is addressed”.

Article 6 of Directive 2005/29/EC clearly stated that even if the information contained in the ad is factually correct, it may be regarded as misleading and, of course, articles 3 b) and 4 of the Advertising Law shall be read in accordance with Directive 2005/29/EC, as some recent Spanish judgments have noted.<sup>175</sup> In line with this approach, it is case law and dominant scholars’ opinion that ambiguous claims may amount to a misleading advertising practice.<sup>176</sup> As a matter of fact, some judgments suggest that ambiguous or equivocal claims or messages may lead in themselves to a false representation of the information contained in the ad.<sup>177</sup>

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<sup>172</sup> BOE núm. 275, de 15 de noviembre [RCL 1988, 2279].

<sup>173</sup> Lema C. (1986), p. 850, Lema C. (1995), pp. 5374-5375, Tato A (1994) p. 573 y ss. y p. 575 y Massaguer J. (1999), p. 61.

<sup>174</sup> SAP *Madrid* 24-XI-2006 (JUR 2006\15004).

<sup>175</sup> SAP *Barcelona* 26-XI-2007 (JUR 2008\110027), SAP *Salamanca* 20-XII-2007 (JUR 2007\193504).

<sup>176</sup> Massaguer J. (1999), pp. 222. In Spanish case law, see SJMER *Málaga* 30-X-2007 (JUR 2007\32360); AAP *Madrid* 25-V-1999 (AC 1999\2354), AAP *Madrid* 29-VI-2000 (AC 2000\2088); SAP *Albacete* 31-III-2005 (JUR 2005\99979).

<sup>177</sup> See SJMER *Málaga* 30-X-2007 (JUR 2007\32360), finding the advertising misleading because it was ambiguous and therefore amounts *per se* an unlawful advertisement practice; AAP *Madrid* 25-V-1999 (AC 1999\2354), AAP *Madrid* 29-VI-2000 (AC 2000\2088), both finding that the preliminary injunction was issued because of its ambiguous, equivocal and misleading nature of the ad.

Moreover, it is worth noting that the Superior Court of Justice of Catalonia has found in several judgments<sup>178</sup> that the advertisements sent by a ‘directory company’ were misleading precisely because of their ambiguity, applying a Catalan regulation for the protection of the consumers and internal commerce in relation with article 3 b) and 4 of Advertising Law, as we shall see below. The same conclusion was reached, even if their resolutions were not binding for courts, by Section Four Autocontrol’s Jury, a self-regulatory organisation for advertising in Spain, in other cases.

It should be noted that article 4 of the Advertising Law paragraph two deems misleading omissions unlawful. As some courts have observed, misleading practices may be an active behaviour (for example, using or spreading false or inaccurate information) or a passive one (for example, omitting material information about activities, goods or services).<sup>179</sup> In this sense, ambiguity may be understood as a failure of information about a relevant feature of the product or service promoted.<sup>180</sup> Therefore, the practices engaged by ‘directory companies’ may amount to a misleading omission as well.

The relevant recipient of the advertising of the article 4 of the Advertising Law is defined in the article 2 of the Advertising Law as any person to whom it is addressed or whom it reaches. It is immaterial whether it is a consumer or not. Therefore, the notion of recipient of article 4 of Advertising Law includes also traders or professionals.<sup>181</sup> As a matter of fact, Spanish case law has never questioned this conclusion.<sup>182</sup>

Advertising that may deceive the average recipient is deemed misleading only insofar as it is likely to affect its economic behaviour. In accordance with Spanish case law, this requirement is satisfied when the error or false representation caused or that it is likely to cause regards matters that are critical to a person’s decision in market deals.<sup>183</sup> It is irrelevant whether the advertising injures or is likely to injure a competitor as well.<sup>184</sup> It should be remembered, however, that presently this requirement should be read in accordance with article 6 of Directive 2005/29/EC, and hence understood as the advertisement that it is likely to cause an average recipient to take a transactional decision that he would not have taken otherwise. In any event, the effect on economic behaviour is one of the factors expressly listed by article 5.3 Advertising Law, which should be taken into account in determining whether the advertising is misleading.

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<sup>178</sup> STSJ *Catalunya* 12-II-2003 (JUR 2003\153755), STSJ *Catalunya* 1-IX-2004 (JUR 2004\282993), STSJ *Catalunya* 16-II-2007 (JUR 2007\152701), affirmed by ATS 7-XI-2007 (JUR 2007\361941).

<sup>179</sup> STS 23-V-2005 (JUR), SAP *Barcelona* 12-IX-2007 (AC 2007\2054), SAP *Málaga* 7-IX-2006 (JUR 2007\77659), SAP *Baleares* 28-VII-2005 (AC 2005\2387), SAP *Barcelona* 17-XII-2003 (JUR 2004\30186), *Cádiz* 15-XI-2003 (JUR 2004\64135), SAP *Bizkaia* 8-II-2001 (JUR 2001\298188), SAP *Barcelona* 15-XI-2000 (JUR 2001\61938), SAP *Barcelona* 26 -I- 2000 (AC 2000\688), SJMER *Madrid* 9-XII-2006 (AC 2006\342), SJMER *Cantabria* 30-VI-2005 (AC 2005\1771), SJMER *Baleares* 25-V-2007 (JUR 2008\62338).

<sup>180</sup> In this sense, SAP *Córdoba* 20-XI-2007 (AC 2007\1027) finds the advertising examined to be a misleading omission because of its equivocal meaning.

<sup>181</sup> Lema C. (2002), pp. 78-82, Busto, J.M. (2005), p. 163.

<sup>182</sup> For instance, although applying art. 7 of the Unfair Competition law, see SAP *Huelva* 20-III-2006 (JUR 2006\190697), that considers misleading advertisement addressed to professionals.

<sup>183</sup> SAP *Salamanca* 20-XII-2007 (JUR 2007\193504), SAP *Madrid* 28-VI-2007 (AC 2007\357630), SAP *Barcelona* 4-V-2005 (AC 2005\1124), SAP *Barcelona* de 14-I-2003 (JUR 2004\14172), SAP *Barcelona* 7-V-2001 (AC 2001\1040), SAP *Barcelona* 4-XII-2003 (JUR 2004\38334), SJMER *Baleares* 25-V-2007 (JUR 2008\62338), SJMER *Madrid* 9-XII-2006 (AC 2006\342), SJMER *Alicante* 26-III- 2008 (JUR 2008\121245), AAP *Barcelona* 14-IV- 2000 (AC 2000\1665). See also Massaguer J. (1999), pp. 229-231.

<sup>184</sup> Massaguer J (1999), p. 217, Lema C. (2002) pp. 146. For Spanish case law, see. SAP *Madrid* 26-X-2004 (AC 2005\175).

For all the reasons explained above, the practices engaged by ‘directory companies’ amount to an unlawful advertising practice under article 3 b) of the Advertising Law, and in particular, to a misleading advertising (“*publicidad engañosa*”) under article 4 of the Advertising Law. Once again, this conclusion is especially supported by several judgments of the Superior Court of Justice of Catalonia, as mentioned above.<sup>185</sup>

### ***Remedies***

Under the Advertising Law, an action against misleading advertising may be brought by the following parties (v. art. 29.3 in relation with art. 31 of the Advertising Law)<sup>186</sup>: (i) *Instituto Nacional de Consumo* (National Institute of Consumer Affairs) and the corresponding Autonomous Communities and municipal authorities or entities that are competent in consumer protection; (ii) consumer associations that comply with the requirements laid out in Spanish regulations for the protection of the consumers; (iii) entities established in other Member States of the European Community that have a statutory function in relation to the protection of consumers’ collective interests, which are qualified by its inclusion in the list published in the Official Journal of the European Communities; (iv) a Public Prosecutor; (v) any person who has a right or legitimate interest.

The remedies provided by article 31 of the Advertising Law are the following: i) cessation of misleading advertising ii) rectification of the misleading advertising, (iii) publication of the judgment and (iv) publication of a corrective statement.<sup>187</sup>

It should be noted, however, that under the Advertising Law the injured party is neither entitled to obtain compensation of damages nor a relief consisting of removal of the effects *caused* by a misleading advertisement (for example, nullify the contract). Therefore, the contract signed by the injured party as a result of the misleading conduct engaged by a ‘directory company’ will remain in force.

Anyone of the above-mentioned parties is entitled to obtain interim relief, which is governed by general regulations contained in Spanish Civil Proceeding Law<sup>188</sup>. The interim relief to be adopted would be that ensuring the complete effectiveness of the final judgment on the proceedings on the merits. In particular, interim injunctions could consist of: (i) cessation of the misleading advertising, (ii) withholding and storing of the misleading ads, (iii) guarantee of any compensation for damage and loss, among others.

In order for the interim injunctions to be granted, the claimant has to demonstrate that (i) there is a risk of serious and irreparable prejudice if the measures requested are not adopted (*periculum in mora*), and (ii) that the relevant actions are *prima facie* likely to constitute an unlawful advertisement practices (*fumus boni iuris*). Spanish courts tend to construe the requirements afforded for granting interim injunctions in a very strict manner. This notwithstanding, Spanish courts have not adopted a negative attitude towards the issuance of preliminary injunctions in general.

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<sup>185</sup> STSJ *Catalunya* 12-II-2003 (JUR 2003\153755), STSJ *Catalunya* 1-IX-2004 (JUR 2004\282993), STSJ *Catalunya* 16-II-2007 (JUR 2007\152701), affirmed by ATS 7-XI-2007 (JUR 2007\361941).

<sup>186</sup> Massaguer J. (2003) pp. 464-472.

<sup>187</sup> Massaguer J. (2003) pp. 458-464.

<sup>188</sup> *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civi*.

## **Amendments of MS legislation concerning misleading advertising to close legal loopholes**

After the implementation of the old Directive 84/450/EC, the Spanish Advertising Law has been amended by the Law 39/2002 of 28 October to transpose several Directives for the protection of consumers.<sup>189</sup> In particular, article 25 of the Advertising Law was amended and a new article 29 was introduced in order to transpose the collective cessation action set in Directive 98/27/CE of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

In accordance with what the preamble of Advertising Law declared – following what the Community has said – the main objective of those amendments was to provide effective means to protect collective interests of consumers and to guarantee the effectiveness of the national measures of transposition in combating unlawful practices that produce their effects in a Member State other than that in which they originate.

In addition, article 6 of the Advertising Law was also amended in order to transpose the Comparative Advertising Directive into the Spanish legislation and thus for other reasons than to close hypothetical or possible legal loopholes related to operations engaged by 'directory companies'.

### **Transposition of the Directive on Unfair Commercial Practices (2005/29/EC)**

Directive 2005/29/EC is still not transposed into Spanish Law. There are just two drafts related to its transposition. One is managed by the Ministry of Justice and the other by the Ministry of Consumer Affairs. It is still not known which draft will be the definitive one. Furthermore, their content is currently confidential. It is not possible at this point to know whether the issue of 'directory companies' applying misleading practices has been addressed in the national implementation of Directive 2005/29/EC.

## **Amendments of MS legislation concerning unfair commercial practices to close legal loopholes**

The Spanish Unfair Competition Law<sup>190</sup> has been not amended in order to close hypothetical or possible legal loopholes regarding operations engaged by 'directory companies'. However, misleading advertising is forbidden by article 7 of the Unfair Competition Law, and there are also strong arguments to maintain that the practices engaged in by 'directory companies' amount to an unfair competition practice under that article, namely misleading practices ("*acto de engaño*"). The notion of misleading advertising under article 7 of the Unfair Competition Law is nearly the same notion supported by Spanish case law and scholars' opinion under articles 4 and 5 of the Advertising Law.

This notwithstanding, Spanish Unfair Competition Law is applicable only when the effects of the practice were produced on Spanish territory (v. article 4 of Unfair Competition Law). The practices engaged by some 'directory companies' appear to be cross-border operations. In particular, they send the controversial advertisement by email to non-Spanish residents. Therefore, in this case at hand, the territory where the effects of the misleading advertising are felt could be interpreted to be the place where the recipients received the emails, in which case the Unfair Competition Law would not be applicable.

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<sup>189</sup> *Ley 39/2002, de 28 de octubre, de transposición al ordenamiento jurídico español de diversas directivas comunitarias en materia de protección de los intereses de los consumidores y usuarios* (BOE núm. 259, de 28-10-2002, pp. 37922-37933).

<sup>190</sup> *Ley 3/1991 de 10 de enero, sobre Competencia Desleal*.

## Other measures

### *Other national legislation*

Misleading advertising amounts to a consumer fraud under article 18.4 of the new *Real Decreto Legislativo 1/2007*<sup>191</sup> (from here on, “the new LGDCU”). This new regulation has been approved in order to improve the protection of consumers and it rewrites Law 26/1984<sup>192</sup>, and Spanish regulations of transposition of certain Directives, listed in the schedule annexed in Directive 98/17/CE, that lay down rules with regard to the protection of consumer interests.<sup>193</sup> Issues of particular concern for this study introduced by the new LGDCU are likely to be injunctions regulated in Chapter I (v. articles 53 to 56) and the arbitral system of consumer affairs (*Sistema Arbitral de Consumo*) regulated in Chapter II of the new LGDCU (v. articles 57 and 58). Regarding injunctions, these consist of an action to obtain a judgment sentencing the defendant to cease his or her misconduct and prohibiting him or her to reiterate it in the future (v. article 53 of the new LGDCU). The action may be brought by qualified consumer associations as well as the National Institute of Consumer Affairs (*Instituto Nacional de Consumo*), the corresponding autonomous communities, or municipal authorities or entities that are competent in consumer protection, and a public prosecutor as well (v. article 18.5 and article 54. 3 of the new LGDCU). With regard to the arbitral system, this is an extrajudicial dispute resolution system established to resolve disputes between consumers and traders. The submission to this arbitration system is, of course, voluntary (v. art 58 of the new LGDCU).

In any event, it should be noted that the new LGDCU is applicable only to B2C relationships (v. article 2 of the LGDCU), and the notion of a consumer is defined in article 3, as “any natural or legal person who acts for purposes which are outside his trade, business or profession”, following the notion of consumer set in several Community Directives. Therefore, assuming that recipients of the practices engaged by ‘directory companies’ are traders or professionals it is unclear whether the new LGDCU could be applicable for two reasons.

First, by contrast with the Law 26/1984, which was also applicable to traders or professionals when they acquired, used or enjoyed goods or services as a final consumer,<sup>194</sup> it is not clear whether the new LGDCU may be applicable in this case or not, primarily due to the more restrictive notion of consumer contained in the above-mentioned article 3 the new LGDCU.<sup>195</sup> There is so far neither Spanish case law nor scholar opinions on the scope of the notion of consumer of article 3 of the new LGDCU.

Secondly, even when assuming that the new LGDC is also applicable to traders or professionals when they acquired, used or enjoyed goods or services as a final consumer, it is arguable that recipients of the misleading advertisement sent by ‘directory companies’ do not use or in any other way take advantage or enjoyed the good or services (in the case at hand, the inclusion of their names and details in a commercial guide) for purposes relating to his or her trade, business, craft or profession.

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<sup>191</sup> *Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias.*

<sup>192</sup> *Ley 26/1984, de 19 de Julio, General para la defensa de los Consumidores y Usuario.*

<sup>193</sup> It should be noted, however, that Advertising Law has not been included nevertheless in the new LGDCU because its subject matter includes B2B relationships and its content is going to go through as a result of Directive 2005/29/EC on Unfair Commercial Practices (v. Preamble II of the new LGDCU).

<sup>194</sup> See article 1.2 of the derogated *Ley 26/1984, de 19 de Julio, General para la defensa de los Consumidores y Usuarios*. This conclusion is supported by Bercovitz A. (1992), pp. 29-30.

<sup>195</sup> SAP Bizcaya 25-III-2008 (JUR 2008\163547).

Even if we consider the more broad notion of consumer of the derogated article 1 Law 26/1984, recipients who take advantage or enjoyed the good or services for purposes relating to his or her trade, business, craft or profession have been not considered consumers.<sup>196</sup> This notwithstanding, in at least in one judgment ruled by Superior Court of Justice of Catalonia (*Tribunal Superior de Justicia de Catalunya*), although applying a Catalan regulation for the protection of the consumers and internal commerce, the court expressly found that the recipients of the misleading brochure sent by a ‘directory company’ were a consumer final recipient. The main reason given by the court for supporting this conclusion was that the recipients did not act for purposes relating to their trade, business, craft or profession when they placed their details in the commercial directory, or acquired the directory.<sup>197</sup>

#### *Autonomous community regulations for the protection of the consumers*

Misleading advertising is prohibited and punished by Autonomous Community regulations for the protection of the consumers and internal commerce. In this regard, relevant for this study are the following three resolutions ruled by the Industry, Commerce and Tourism of the Catalonia Government declaring that the advertising made by a ‘directory company’ located there was misleading and imposing several sanctions:

- The first Resolution was ruled on 28 March 2001 and imposed on the ‘directory company’ a fine of 22,899 Euro for infringing articles 3 g), 9 13 b) and 14 of Law 1/1990<sup>198</sup>, in relation with articles 2, 3 b), 4 and 5 of the Advertising Law. This resolution has been affirmed by Superior Court of Justice of Catalonia.<sup>199</sup>
- The second Resolution was ruled on 31 May 2002 and imposed on the ‘directory company’ a fine of 27,045 Euro for infringing article 3 g) of Law 1/1990. This resolution has been affirmed by the Superior Court of Justice of Catalonia<sup>200</sup> and then and, finally, by the Spanish Supreme Court.<sup>201</sup>
- Finally, the last Resolution was issued on 9 September 2003, and imposed on the ‘directory company’ a fine of 300,000 Euro and ordered the closing of the business for one year, for infringing articles 3 g) in relation with article 10.1 c) Law 1/1990, and also in relation with articles 3 b) and 4 of the Advertising Law. This resolution has been affirmed by Superior Court of Justice of Catalonia.<sup>202</sup>

It should be noted, however, that before the approval of the new LGDCU, and by virtue of its final disposition number one, the notion of consumer set in the Autonomous Community regulations for the protection of the consumers must be understood in the same way as the notion laid down in the article 3 of the new LGDCU. Therefore, the same reservations expressed above regarding the applicability (enforcement) of the new LGDCU to misleading advertisements by ‘directory companies’ are applicable to those Autonomous Community regulations.

#### ***Self regulatory and other non-legislative measures***

As mentioned above, Autocontrol is a self-regulatory organisation for advertising in Spain and, as of 1995, a member of the European Advertising Standards Alliance (EASA).

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<sup>196</sup> See article 1.3 of the derogated *Ley 26/1984* and Bercovitz A. (1992), pp. 30-37.

<sup>197</sup> STSJ *Catalunya* 12-II-2003 (JUR 2003\153755).

<sup>198</sup> *Ley 1/1990 de 8 de enero, de Disciplina de Mercado y Defensa de los Consumidores y Usuarios en Cataluña*

<sup>199</sup> STSJ *Catalunya* 12-II-2003 (JUR 2003\153755).

<sup>200</sup> STSJ *Catalunya* 1-IX-2004 (JUR 2004\282993).

<sup>201</sup> ATS 7-XI-2007 (JUR 2007\361941).

<sup>202</sup> STSJ *Catalunya* 16-II-2007 (JUR 2007\152701).

Therefore, it participates in the EASA cross-border resolution complaint system, which allows all persons of the European Union to submit a complaint to the competent self-regulatory organisation for advertising abroad by means of the self-regulatory organisation of his or her own country.

Autocontrol's Jury has ruled three resolutions concerning practices engaged by 'directory companies'. In one of them Autocontrol's Jury found the advertising sent by the 'directory company' to be misleading. However, because of the contractual nature of the practices engaged by the company, Autocontrol's Jury concluded, as in the second resolution, that those practices exceed the sphere of action of the self-regulation system. In particular, Autocontrol's Jury understood that the subject matter of the complaint was principally contracts and for that reason did not uphold either complaint.

This notwithstanding, in the third and more recent Resolution concerning similar practices engaged by another 'directory company', Section Four of Autocontrol's Jury upheld the complaint and declared that the advertising was misleading and infringed rule 14 of the Code of Advertising Conduct (v. Resolution of 15 September 2005).

In any case, it should be stressed that Autocontrol's resolutions are, of course, not binding for companies that are not members of the organisation. Therefore, non-members are not bound to comply with its resolutions.

**ANNEX 2: SURVEY QUESTIONNAIRE**

**STUDY ON  
“MISLEADING DIRECTORY COMPANIES” IN THE CONTEXT OF CURRENT AND  
FUTURE MARKET LEGISLATION AIMED AT THE PROTECTION OF CONSUMERS  
AND SMES  
SURVEY OF STAKEHOLDERS<sup>1</sup>**

**Please fill in questionnaire no later than  
11 July 2008**

*(and return this questionnaire by email in Word format to [ep-study@civic-consulting.de](mailto:ep-study@civic-consulting.de)  
Please do not pdf the questionnaire)*

The European Parliament has received numerous petitions concerning the practices of so-called “Misleading Directory Companies”.<sup>2</sup> DG Internal Policies of the Union in the European Parliament has therefore commissioned a study to assess the scope and impact of business practices of “Misleading Directory Companies”, to analyse the legal situation and to reach conclusions concerning possible legal action that could be taken at the Community level. The information you will provide through this questionnaire will be used in this study.

If you have any further questions, do not hesitate to contact:

Civic Consulting ([ep-study@civic-consulting.de](mailto:ep-study@civic-consulting.de))  
Phone: +49 30 2196 2287 Fax: +49 30 2196 2298

**1. Please identify yourself:**

a. Please identify the name of your organisation:

*Please specify*

b. Please identify the type of your organisation:

*Please select from the dropdown menu  
If other, please specify*

c. Please identify the country in which you are located:

*Please specify*

d. Questionnaire completed by:

*Name, position, contact details*

<sup>1</sup> Most questions are specifically targeted at national stakeholders regarding the situation in their country. EU level stakeholders should answer the questions focusing on EU level aspects.

<sup>2</sup> The Terms of Reference of this study summarise the problem as it appears from the petitions: “Over the past years, a number of so-called 'Directory companies' have been operating cross-border in several EU Member States applying misleading and fraudulent business practices and targeting specifically professionals and small companies with hidden 'registration contracts'. When spotted and closed down by national authorities, these companies have frequently managed to relocate and take up their fraudulent practices as before.”

**A. EXTENT OF THE PROBLEM**

- 2. Please provide in this section available data on complaints from affected companies (including freelance professionals) that you have received concerning ‘Misleading Directory Companies’. Please specify first your data sources.**

*Please specify*

- a. How many companies have complained to you about ‘Misleading Directory Companies’ during the years 2003-2008? Please list your data into the table according to the ‘Misleading Directory Company’ causing the complaint.

<b>Name of the ‘Misleading Directory Company’</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008 Jan-May</b>
<i>Misleading Company 1</i>						
<i>Misleading Company 2</i>						
<i>Misleading Company 3</i>						
<i>Misleading Company 4</i>						
<i>Misleading Company 5</i>						
<i>Misleading Company 6</i>						
<i>Misleading Company 7</i>						
<i>Misleading Company 8</i>						
<i>Misleading Company 9</i>						
<i>Misleading Company 10</i>						
<b>Total</b>						

*Comments*

- b. Which business sectors are most affected according to the number of complaints that you received?

*Please select from the dropdown menu  
If specific sectors, please list the sectors most affected*

- c. What is the size of the companies that are most affected by ‘Misleading Directory Companies’?

- Large enterprises
- Medium enterprises
- Small enterprises
- Freelance professionals

*Comments*

- d. How many of the affected companies complaining to you had already paid for the directory listing by a 'Misleading Directory Company' at the time of filing their complaint?

*Percentage of the affected companies that have already paid*  
*Comments*

- e. Based on the complaints received, what is the average overall damage of the affected companies?

*Average overall damage in Euro*  
*Comments*

- f. Have any of these affected companies have taken legal action against a 'Misleading Directory Company'?

*Please select from the dropdown menu*  
*If yes, please specify the number of companies that have taken legal action and the legal basis for doing so*

- g. How would you assess the significance of the problem of 'Misleading Directory Companies' in your country?

*Please select from the dropdown menu*  
*Comments*

- h. Please list organisations, experts or sources who could provide further data on this issue.

*Please provide name, position, contact details*

## B. LEGAL ASPECTS

### National Implementation of the Misleading and Comparative Advertising Directive (84/450/EC and 2006/114/EC)

National transpositions of the old *Misleading and Comparative Advertising Directive* (84/450/EC) that was revised by Directive 97/55/EC to include comparative advertising, appears to have left legal loopholes that were exploited by 'Misleading Directory Companies'. The new codified *Directive Concerning Misleading and Comparative Advertising* (2006/114/EC) has reduced the scope of application to business-to-business relations (B2B).

3. Has the transposition of the old Directive 84/450/EC in your country created legal loopholes that are used by 'Misleading Directory Companies'?

*Please select from the dropdown menu*  
*If yes, please specify*

4. Has your country subsequently (i.e. after the implementation of the old Directive 84/450/EC) amended its legislation concerning misleading advertising once operations by 'Misleading Directory Companies' have been disclosed, in order to close legal loopholes?

*Please select from the dropdown menu*  
*If yes, please specify*

5. Are there relevant changes foreseen in the legislation concerning misleading advertising in the implementation process of the new Directive (2006/114/EC) in your country?

*Please select from the dropdown menu*  
*If yes, please specify*

6. Are there any specific measures concerning misleading advertising that you would recommend to be included into any further revision of Directive 2006/114 EC by the European legislator, in order to strengthen the protection of companies against the practices of 'Misleading Directory Companies'?

*Please select from the dropdown menu*  
*If yes, please specify*

### **National Implementation of the Directive on Unfair Commercial Practices (UCP)**

The *Directive on Unfair Commercial Practices (2005/29/EC)* regulates in particular commercial practices and aspects of misleading advertising in business-to-consumer (B2C) relations. Business-to-business (B2B) transactions are currently not covered by the UCP Directive.

- 7. Has the issue of ‘Misleading Directory Companies’ been addressed in the national implementation of Directive 2005/29/EC?**

*Please select from the dropdown menu*  
*If yes, please specify*

- 8. Has your country otherwise amended its legislation concerning unfair commercial practices once operations by 'Misleading Directory Companies' have been disclosed, in order to close legal loopholes?**

*Please select from the dropdown menu*  
*If yes, please specify*

- 9. Would you prefer a revision of Directive 2005/29/EC aimed at including B2B transactions into the scope of the unfair commercial practices to reduce the activities of ‘Misleading Directory Companies’?**

*Please select from the dropdown menu*  
*If yes, what amendments would you suggest ?*

### **Other national legislation**

- 10. Has your country amended other legislation (e.g. concerning fraud) or introduced self-regulatory measures once operations by 'Misleading Directory Companies' have been disclosed, in order to close legal loopholes?**

*Please select from the dropdown menu*  
*If yes, please specify*

- 11. How would you assess the effectiveness of measures proposed by the Commission in COM(2007) ('A Single Market for 21<sup>st</sup> Century Europe'), in particular the proposed 'Small Business Act for Europe' as instruments in tackling the operations of 'Misleading Directory Companies' in the future?<sup>3</sup>**

*Please select from the dropdown menu*  
*Comments*

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<sup>3</sup> The document is available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007\\_0724en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0724en01.pdf)

## C. REDRESS MECHANISMS AND ACTIONS TAKEN

- 12. Are there any non-judicial redress mechanisms in your country for victims of ‘Misleading Directory Companies’?**

*Please select from the dropdown menu*  
*If yes, please specify*

- 13. Have you taken any actions aimed at informing and warning potential victims?**

*Please select from the dropdown menu*  
*If yes, please specify*

- 14. Have you taken any actions aimed at assisting those companies affected?**

*Please select from the dropdown menu*  
*If yes, please specify*

- 15. Have you taken any legal actions against ‘Misleading Directory Companies’?**

*Please select from the dropdown menu*  
*If yes, please specify*

- 16. Have you taken any other measures in relation to ‘Misleading Directory Companies’?**

*Please select from the dropdown menu*  
*If yes, please specify*

- 17. Are there any coordinated actions or information exchange between your organisation and organisations/authorities in other EU countries aimed at tackling these misleading practices?**

*Please select from the dropdown menu*  
*If yes, please specify*

- 18. What suggestions would you make for a working information exchange between authorities in your country and in the authorities in other EU countries?**

*Please specify*

## ANNEX 3 - RESPONDENTS TO THE SURVEY

### Stakeholders, which provided completed questionnaires

<b>Member State/EFTA competent authorities</b>	<b>Location</b>
Ministry of Economic Affairs and Communication	Estonia
Authority for Consumer Protection	Hungary
FPS Economy - DG Enforcement & Mediation	Belgium
Catalan Consumer Agency	Spain
Public Administrative Authority in Valencia	Spain
Consumer Ombudsman	Denmark
Consumer Ombudsman	Norway (member of EFTA)
Consumer Policy Unit at the Ministry of Integration	Sweden
Ministry of Industry and Trade	Czech Republic
Ministry of Development	Greece
Office of Fair Trading	UK
Competition Authority	Hungary

<b>EU level business associations</b>	<b>Location</b>
EADP - European Association of Directory and Database Publishers	Belgium
FEDMA - Federation of European Direct and Interactive Marketing	Belgium
EASA - European Advertising Standards Alliance	Belgium
UEAPME - Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises	Belgium

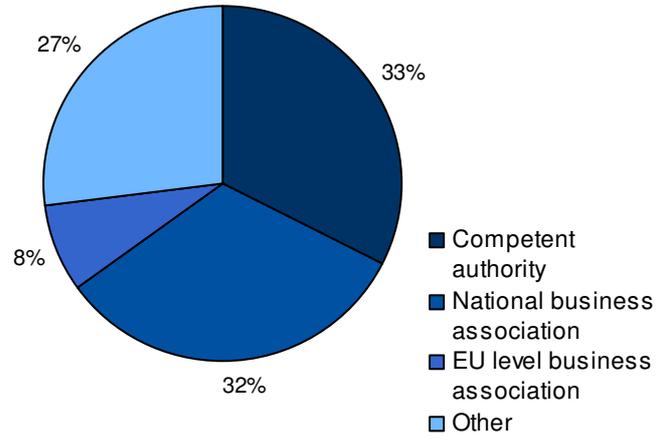
<b>Member State business associations and other type of stakeholders</b>	<b>Location</b>
Advertising Standards Authority for Ireland	Ireland
Advertising Standards Authority for UK	UK
Asociación para la Autorregulación de la Comunicación Comercial (AUTOCONTROL)	Spain
Audalis Schick Struss & Kollegen - Rechtsanwälte	Germany
Chamber of Commerce	Denmark
Chamber of Commerce	Luxembourg
Deutscher Schutzverband gegen Wirtschaftskriminalität e.V., Bad Homburg	Germany
Directory Fraud Victim Group	Czech Republic
Chamber of Commerce and Industry	Estonia
German Confederation of Skilled Crafts (ZDH)	Germany
Individual Company	Bulgaria
Irish Small & Medium Enterprises Association	Ireland
Meyer-Köring (Rechtsanwälte)	Germany
Permanent Assembly of French Craft Chambers APCM	France

Rada pro reklamu - RPR (Advertising Standards Council)	Czech Republic
SNA (Syndicat National des Editeurs d'Annuaire)	France
Stichting Aanpak Financieel-Economische Criminaliteit in Nederland (SAFECIN)	The Netherlands
The Danish Federation of Small and Medium Sized Enterprises, DFSME	Denmark
UNIZO	Belgium
Wirtschaftskammer Österreich WKÖ	Austria
Website <a href="http://www.stopeccg.org">www.stopeccg.org</a>	UK

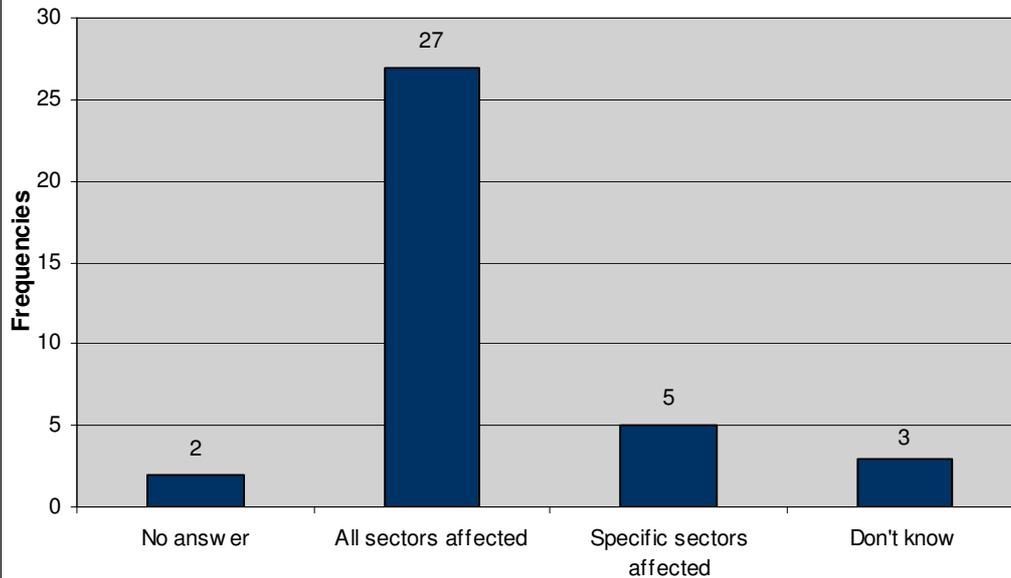
<b>Stakeholders outside the EU/EFTA (not included in the quantitative data analysis)</b>	<b>Location</b>
Association of Trades and Crafts Zadar - National Business Association	Croatia
Chamber of Economy - National Business Association	Croatia
Competetion Bureau Canada - Canadian Competent Authority	Canada

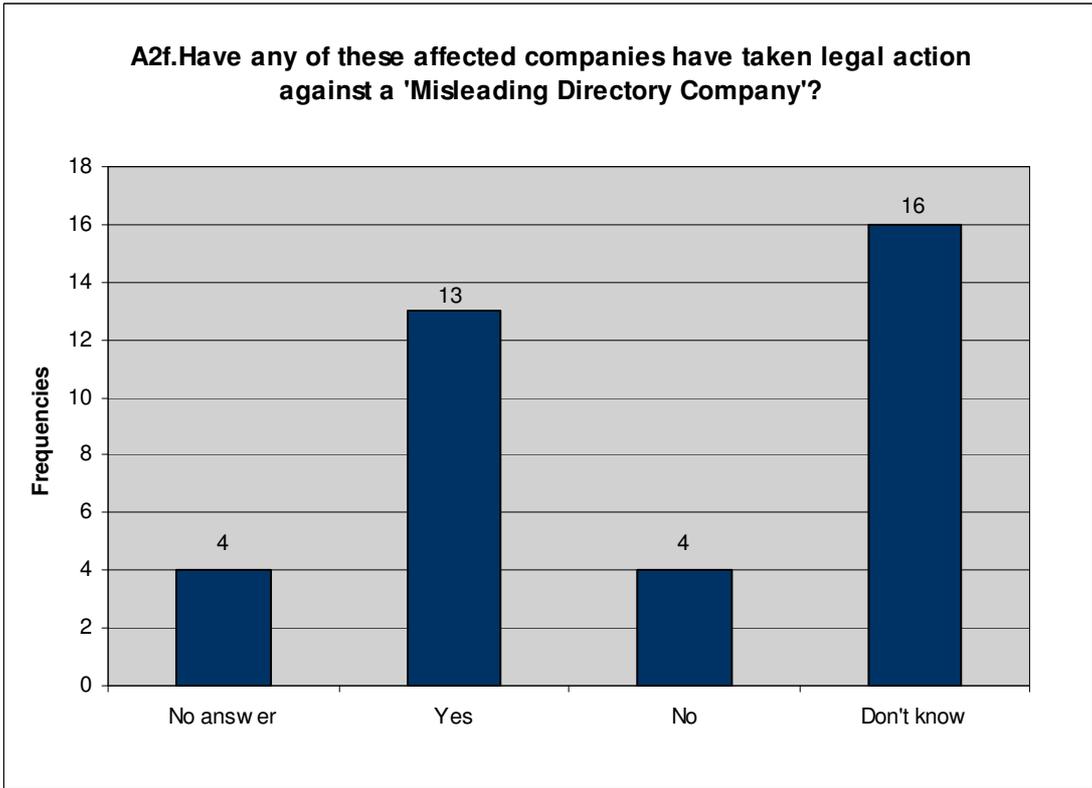
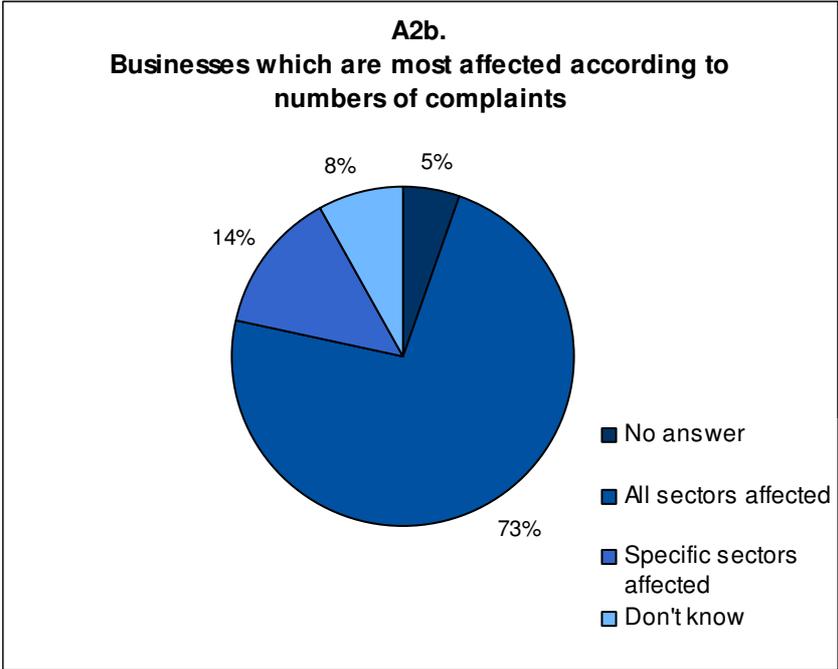
**ANNEX 4: RESULTS OF SURVEY**

**A1b. Please identify the type of your organisation**

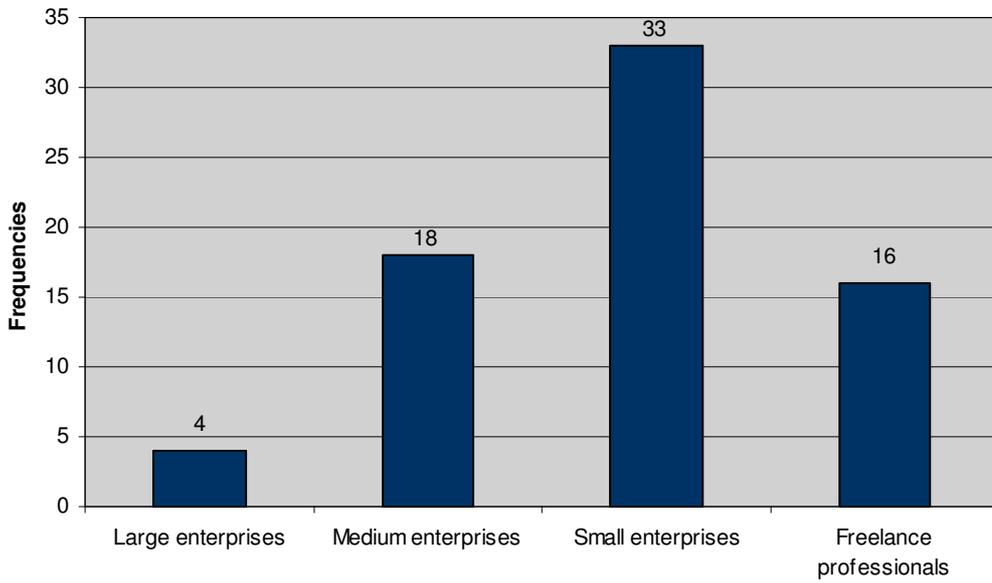


**A2b. Which business sectors are most affected according to the number of complaints that you received?**

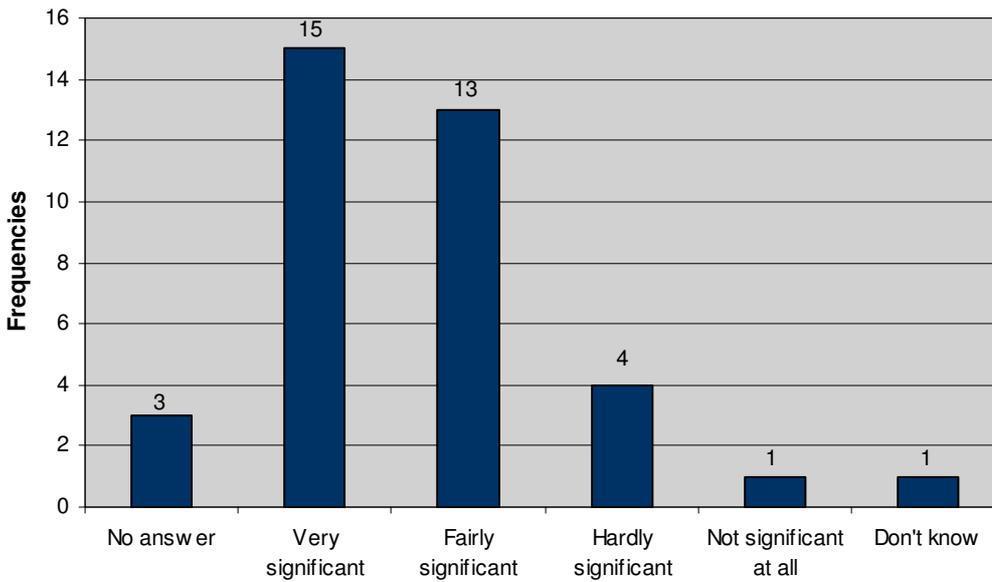




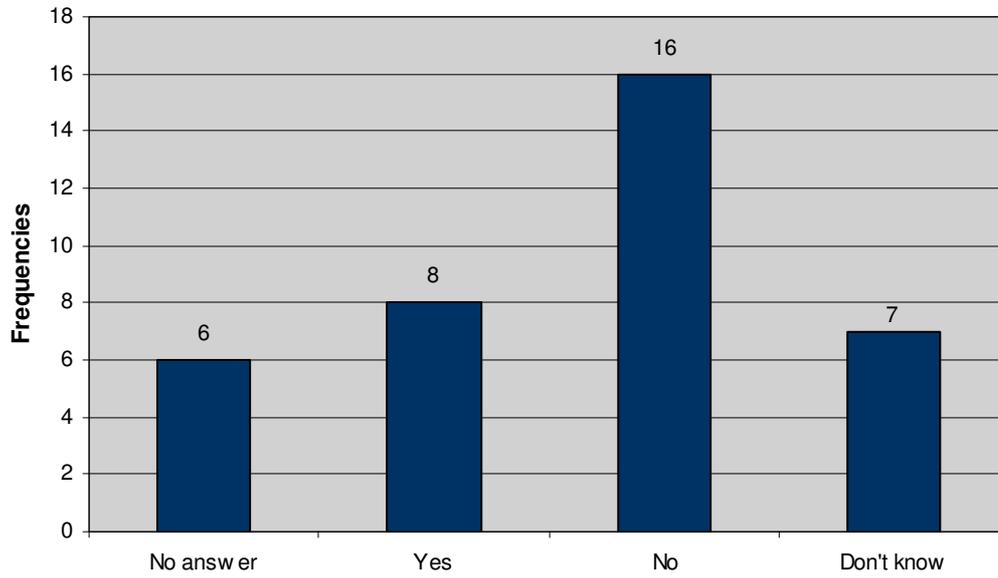
**A2c. What is the size of the companies that are most affected by 'Misleading Directory Companies'?**



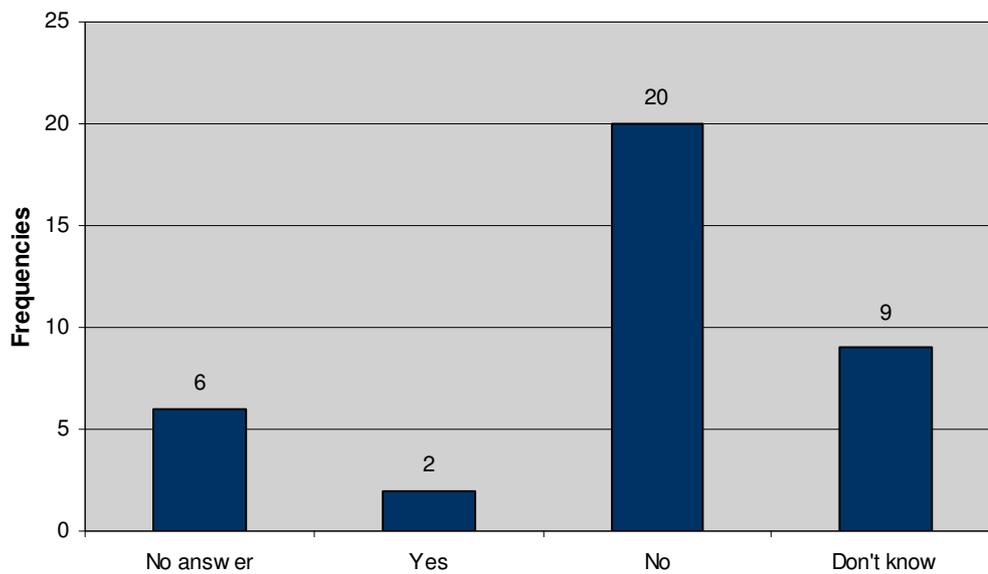
**A2g. How would you assess the significance of the problem of 'Misleading Directory Companies' in your country?**



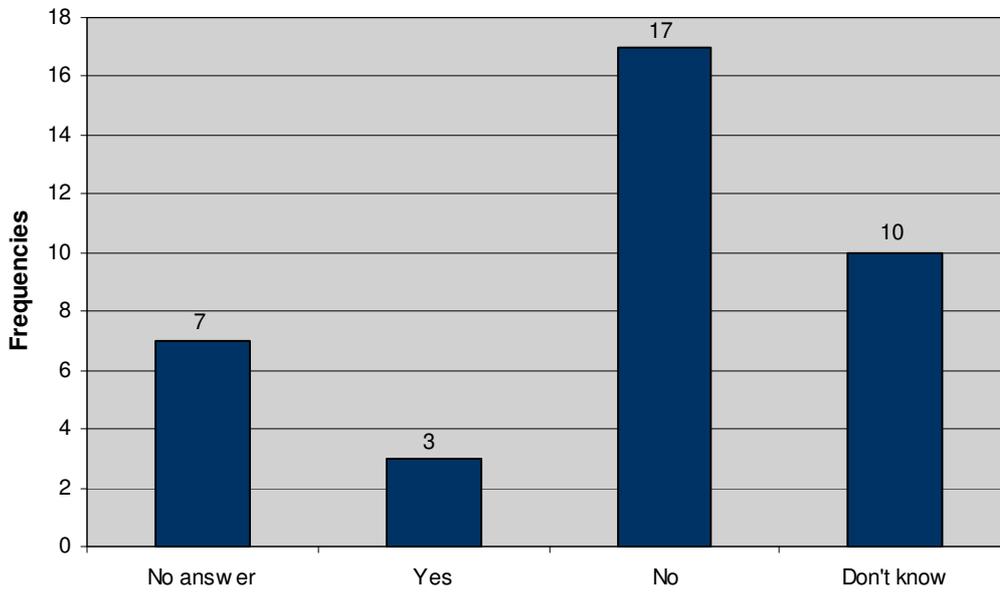
**B3. Has the transposition of the old Directive 84/450/EC in your country created legal loopholes that are used by 'Misleading Directory Companies'?**



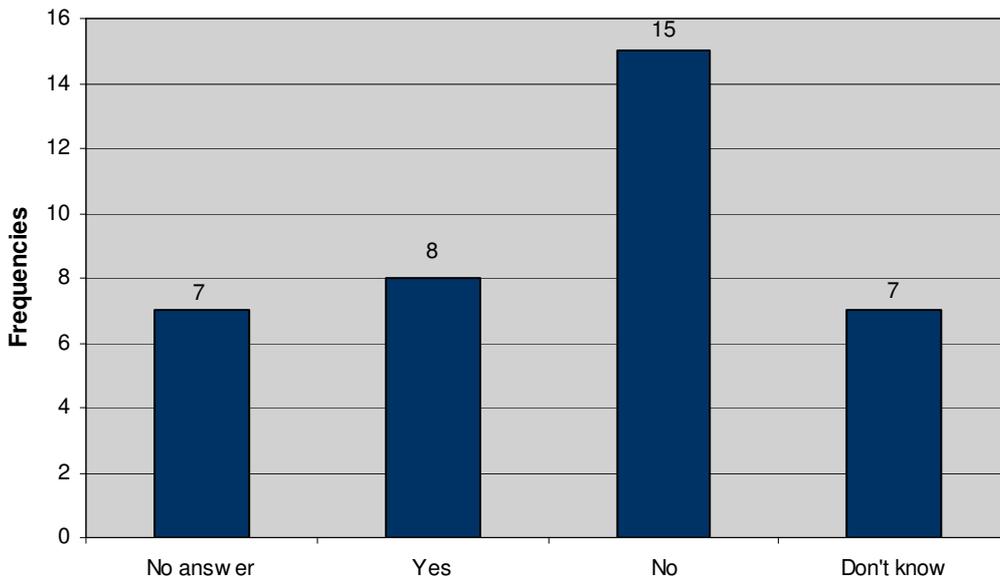
**B4. Has your country subsequently (i.e. after the implementation of the old Directive 84/450/EC) amended its legislation concerning misleading advertising once operations by 'Misleading Directory Companies' have been disclosed, in order to close legal loopholes?**



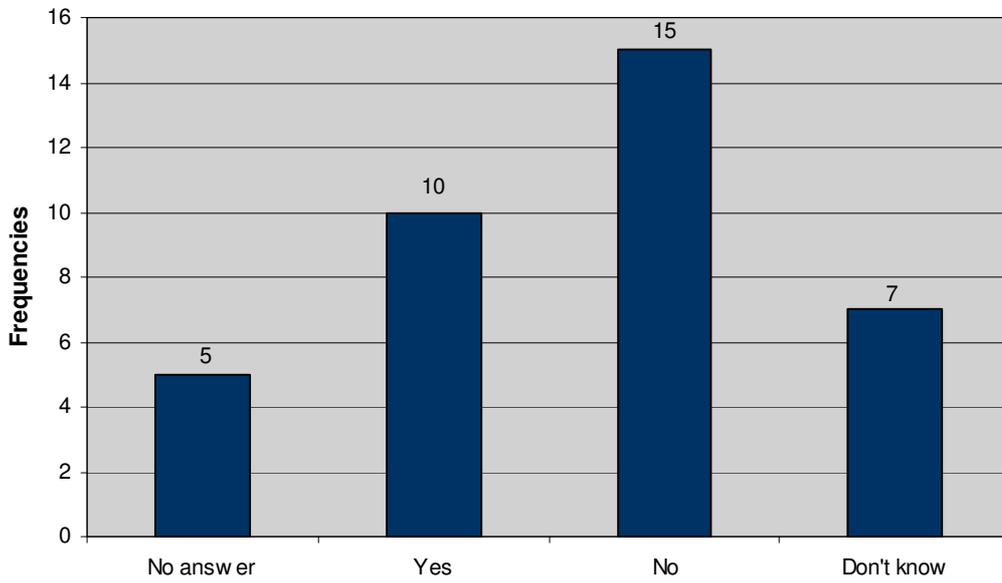
**B5. Are there relevant changes foreseen in the legislation concerning misleading advertising in the implementation process of the new Directive (2006/114/EC) in your country?**



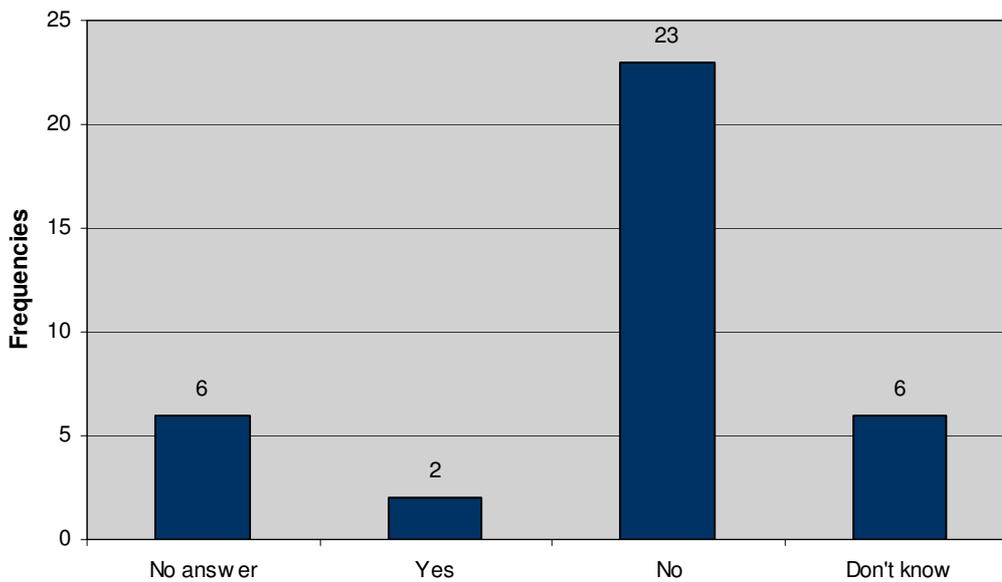
**B6. Are there any specific measures concerning misleading advertising that you would recommend to be included into any further revision of Directive 2006/114/EC by the European legislator?**



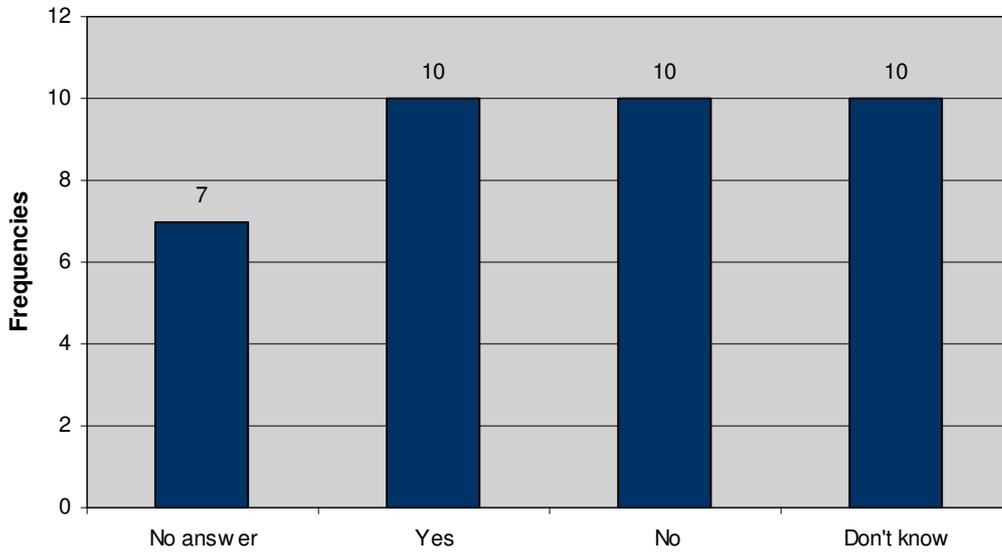
**B7. Has the issue of 'Misleading Directory Companies' been addressed in the national implementation of Directive 2005/29/EC?**



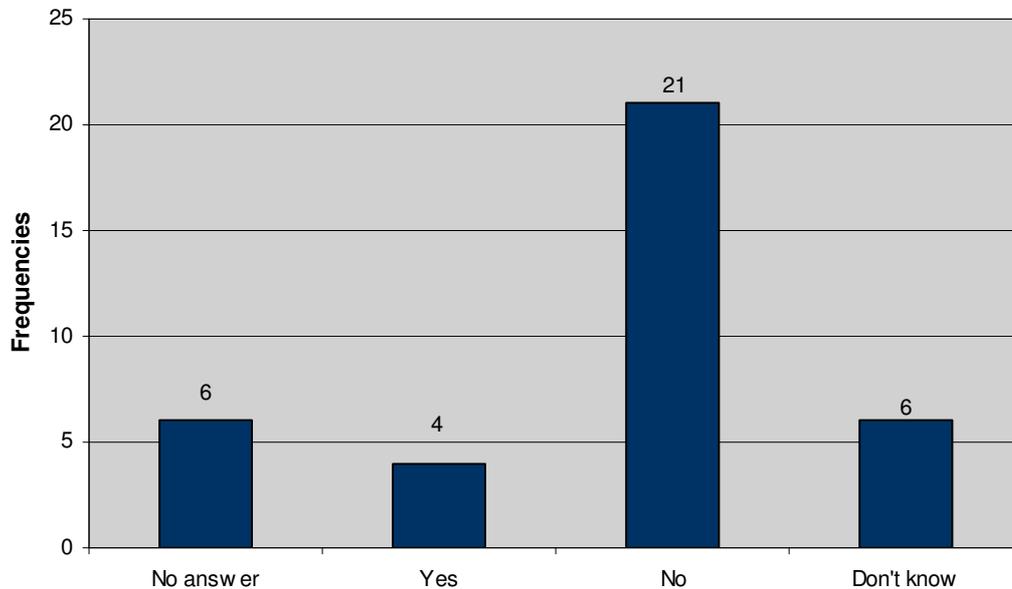
**B8. Has your country otherwise amended its legislation concerning unfair commercial practices once operations by 'Misleading Directory Companies' have been disclosed**



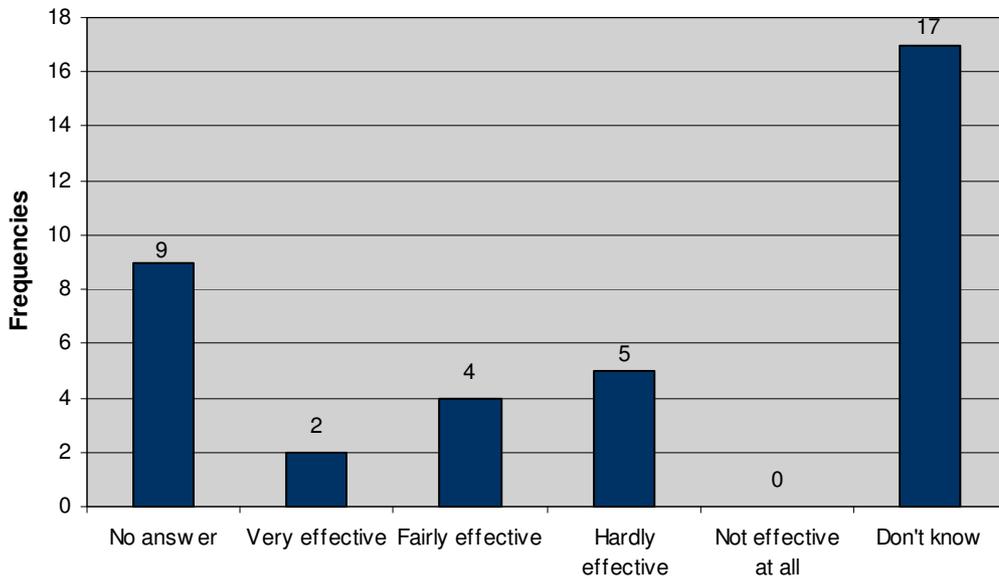
**B9. Would you prefer a revision of Directive 2005/19/EC aimed at including B2B transactions into the scope of the unfair commercial practices to reduce the activities of 'Misleading Directory Companies'?**



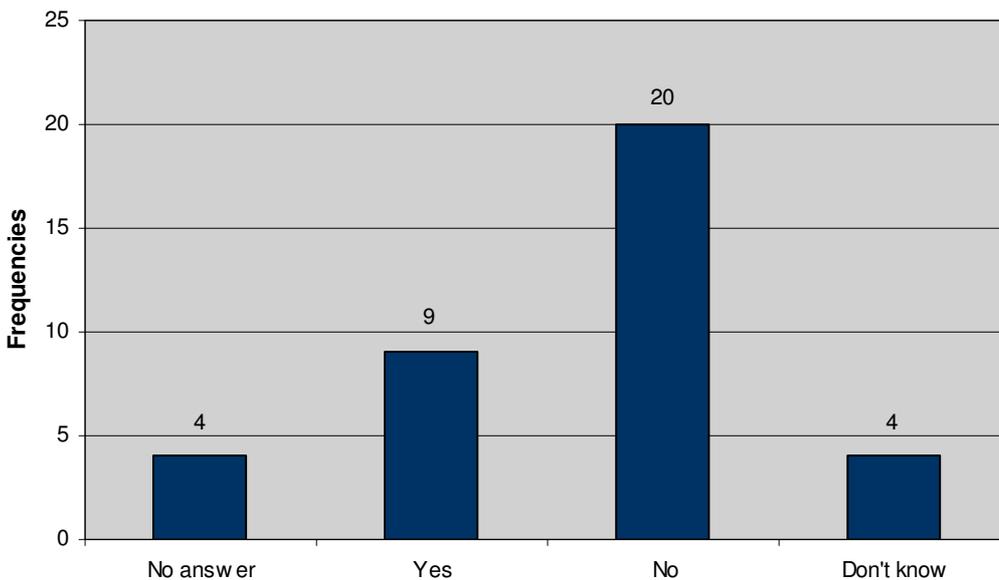
**B10. Has your country amended other legislation (e.g. concerning fraud) or introduced self-regulatory measures once operations by 'Misleading Directory Companies' have been disclosed**



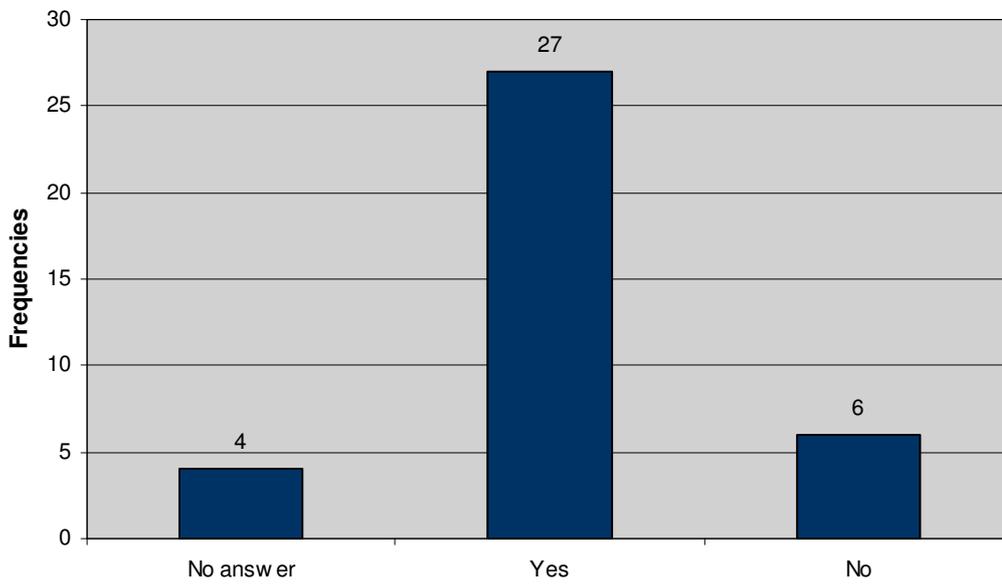
**B11. How would you assess the effectiveness of measures proposed by the Commission in COM(2007) ('A Single Market for 21st Century Europe'), in particular the proposed 'Small Business Act for Europe' as instruments in tackling the operations of 'Misleading Directory Companies' in the future?**



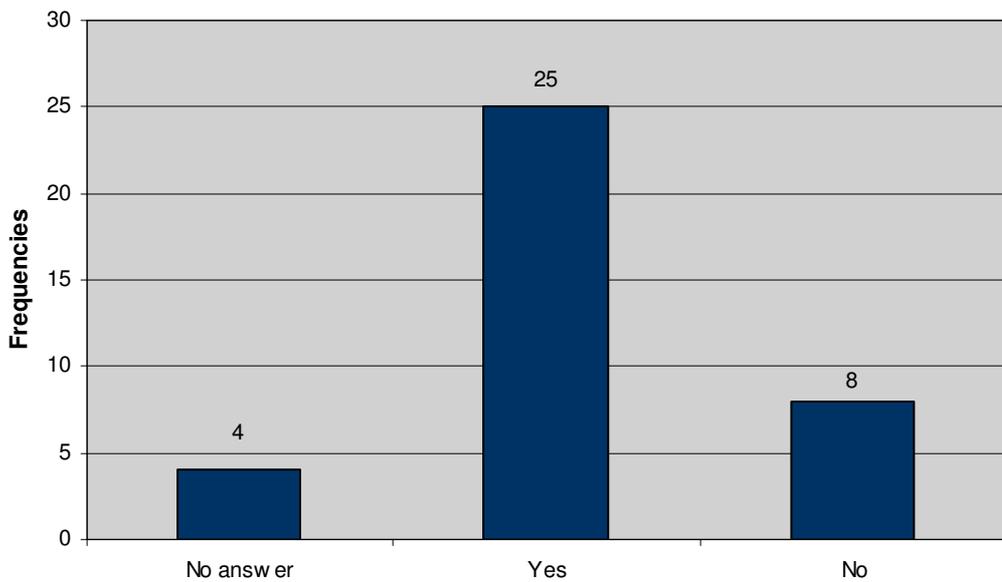
**C12. Are there any non-judicial redress mechanisms in your country for victims of 'Misleading Directory Companies'?**



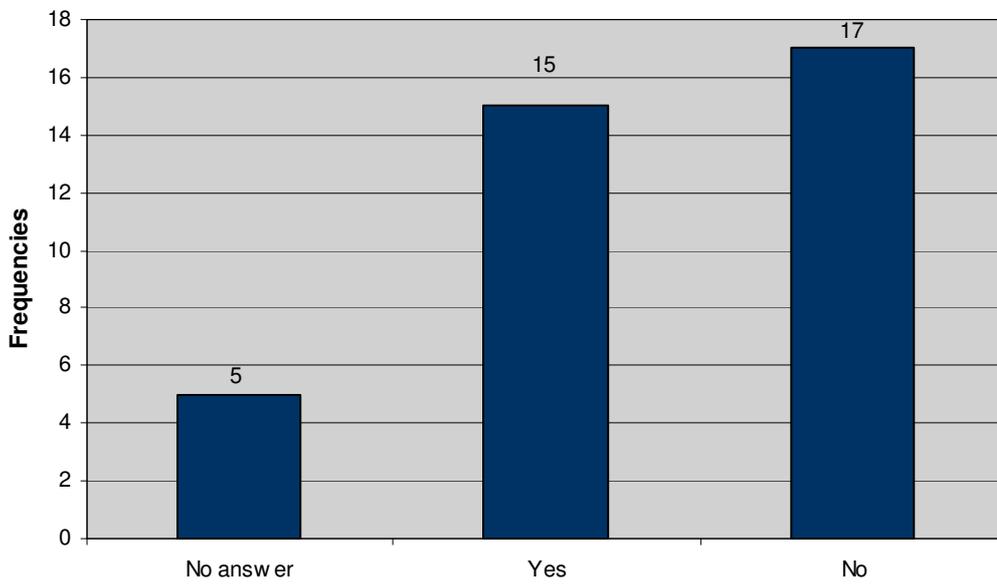
**C13. Have you taken any actions aimed at informing and warning potential victims? ?**



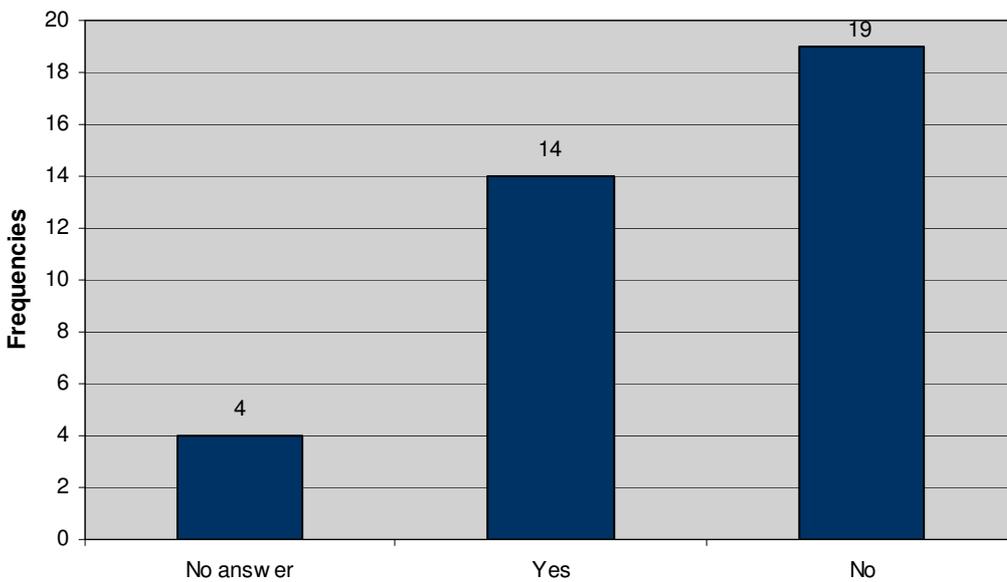
**C14. Have you taken any actions aimed at assisting those companies affected? Have you taken any actions aimed at assisting those companies affected?**



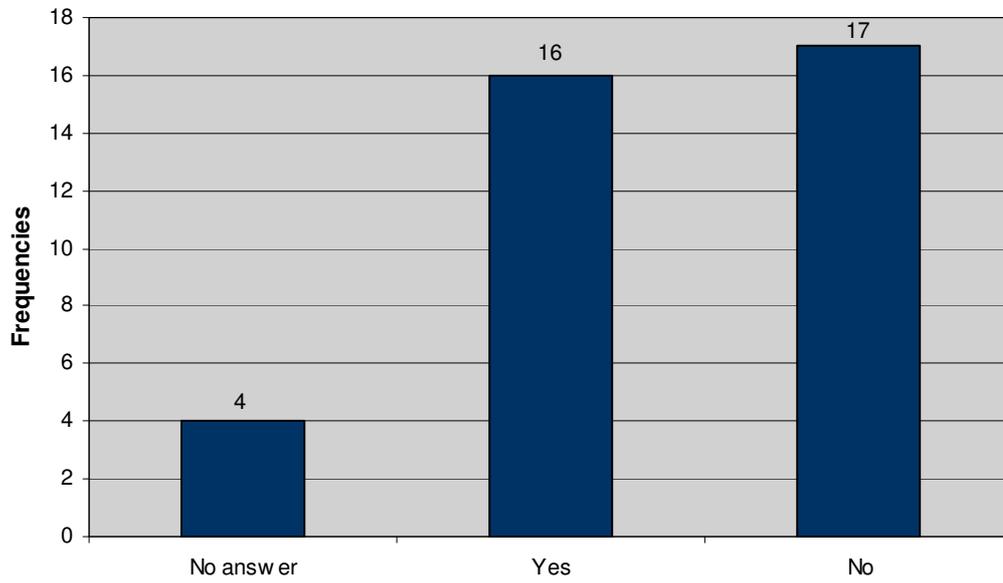
**C15. Have you taken any legal actions against 'Misleading Directory Companies'?**

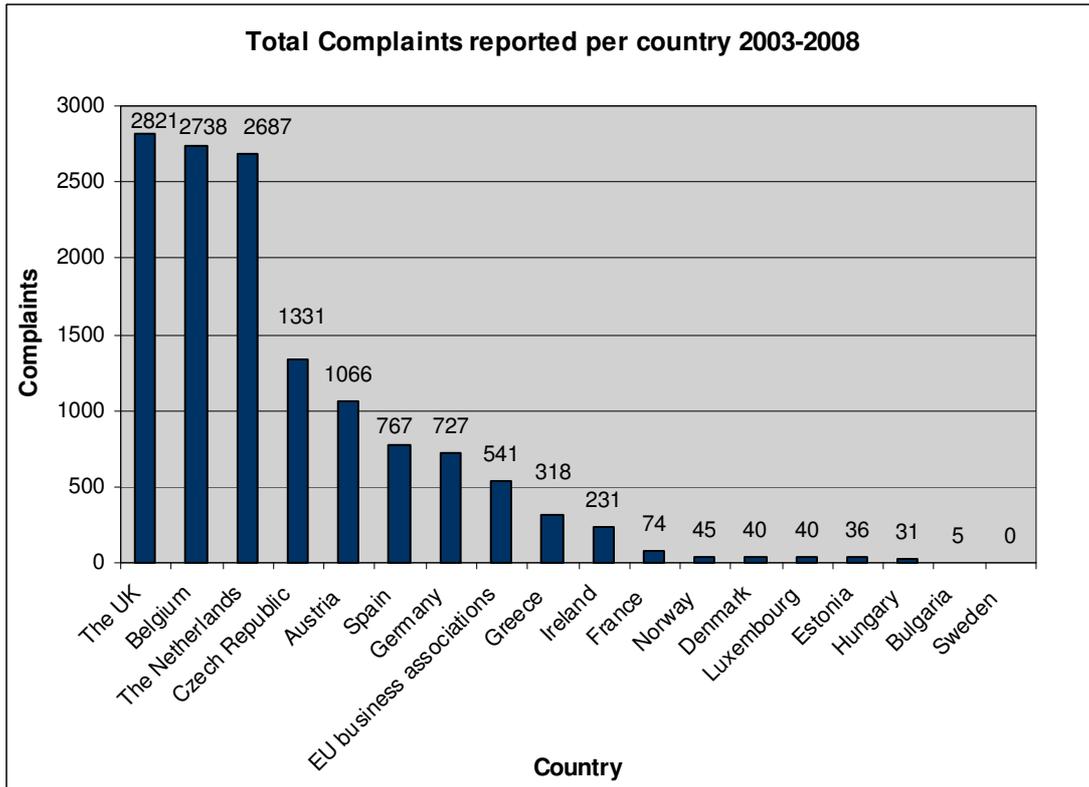


**C16. Have you taken any other measures in relation to 'Misleading Directory Companies'?**

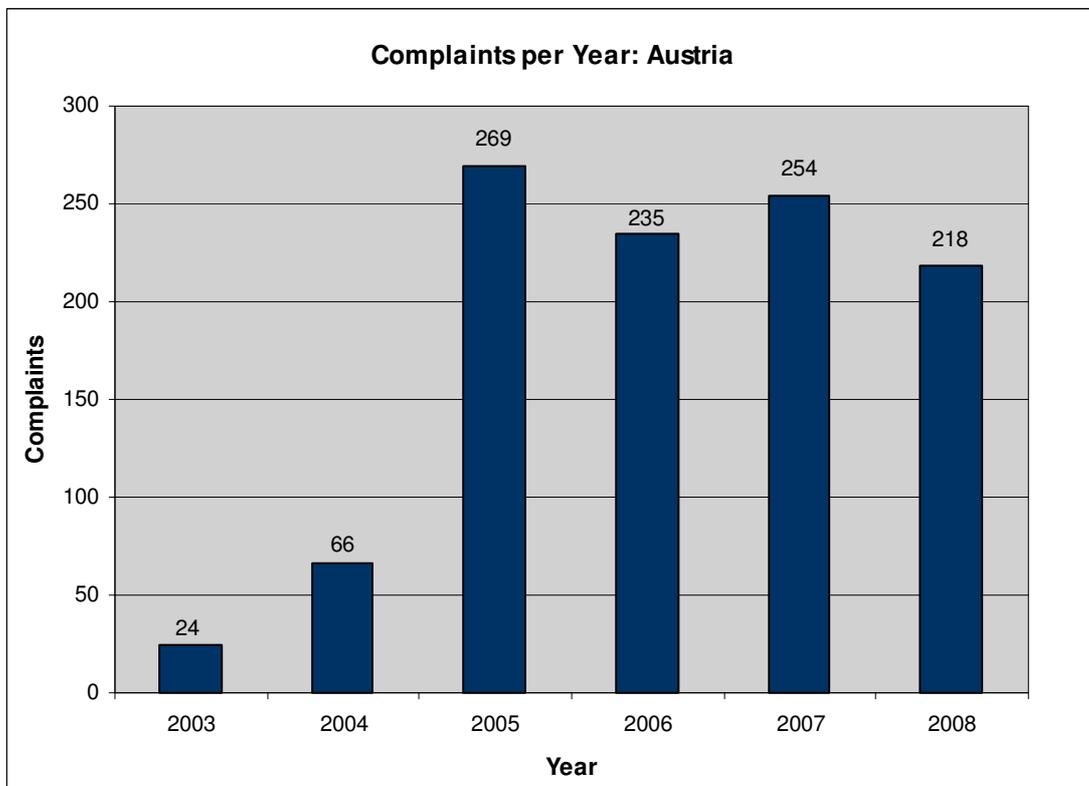


**C17. Are there any coordinated actions or information exchange between your organisation and organisations/authorities in other EU countries aimed at tackling these misleading practices?**

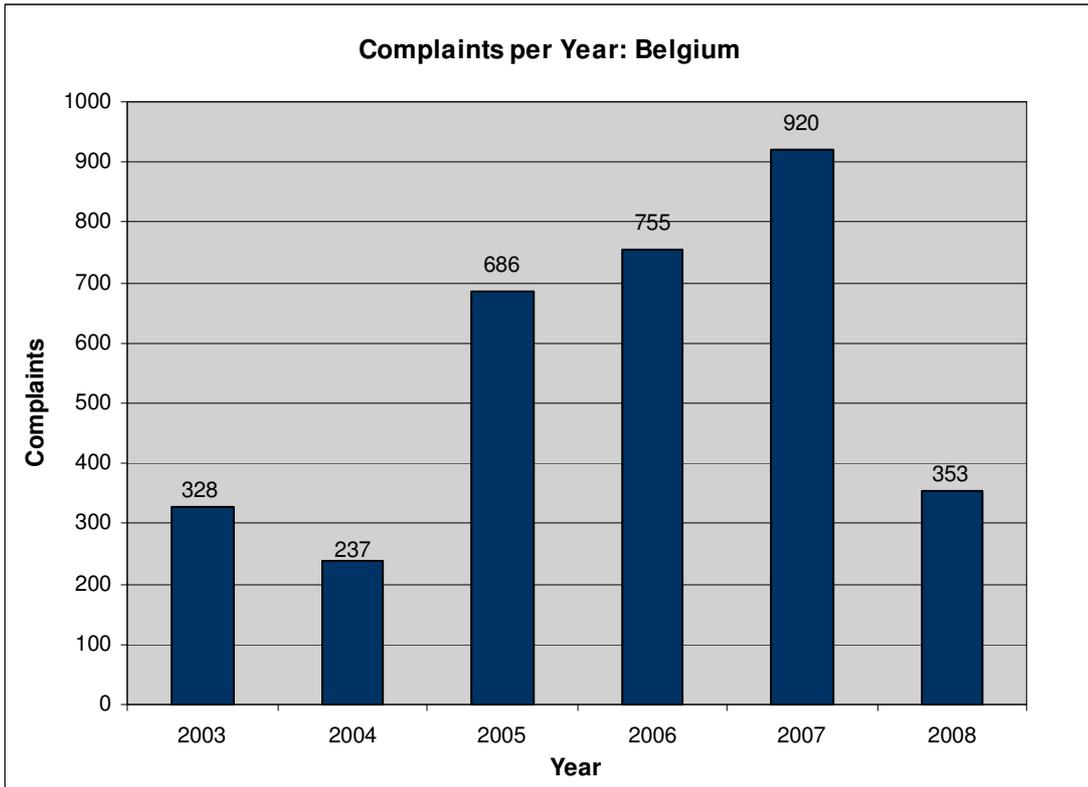




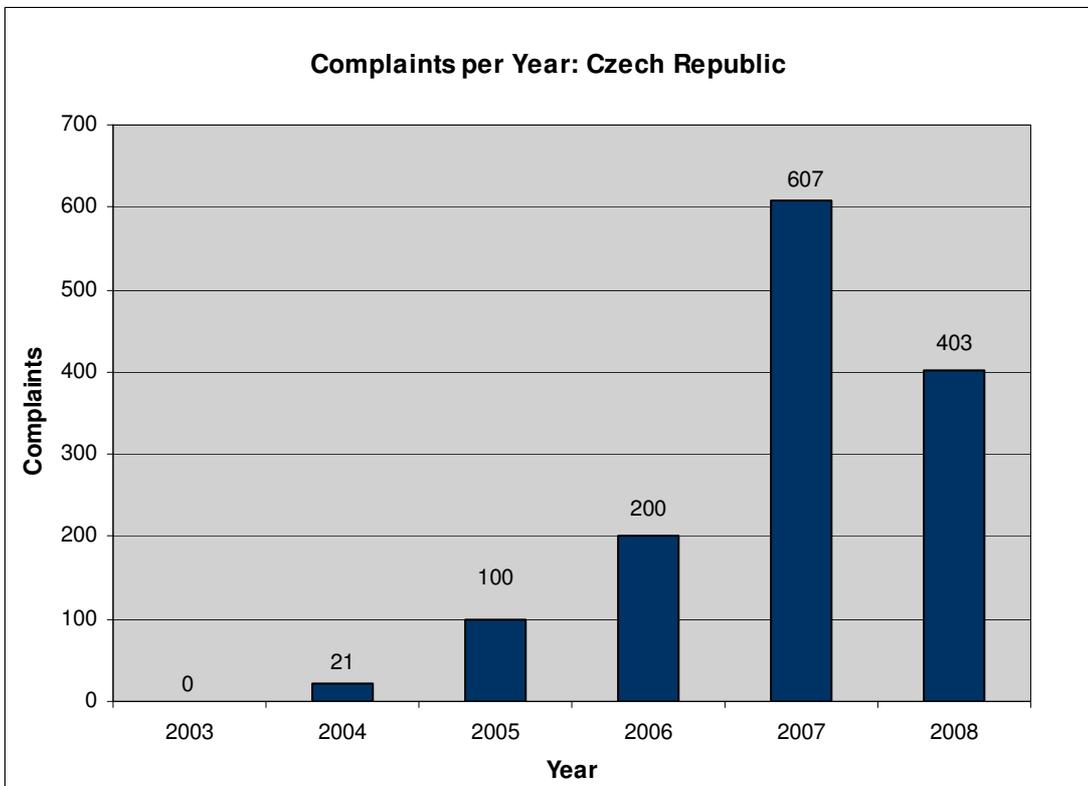
*Note: Three out of five Belgian stakeholders are EU level business associations. Their reported complaints are listed separately. Data for the year 2008 includes Jan-May/July 2008.*



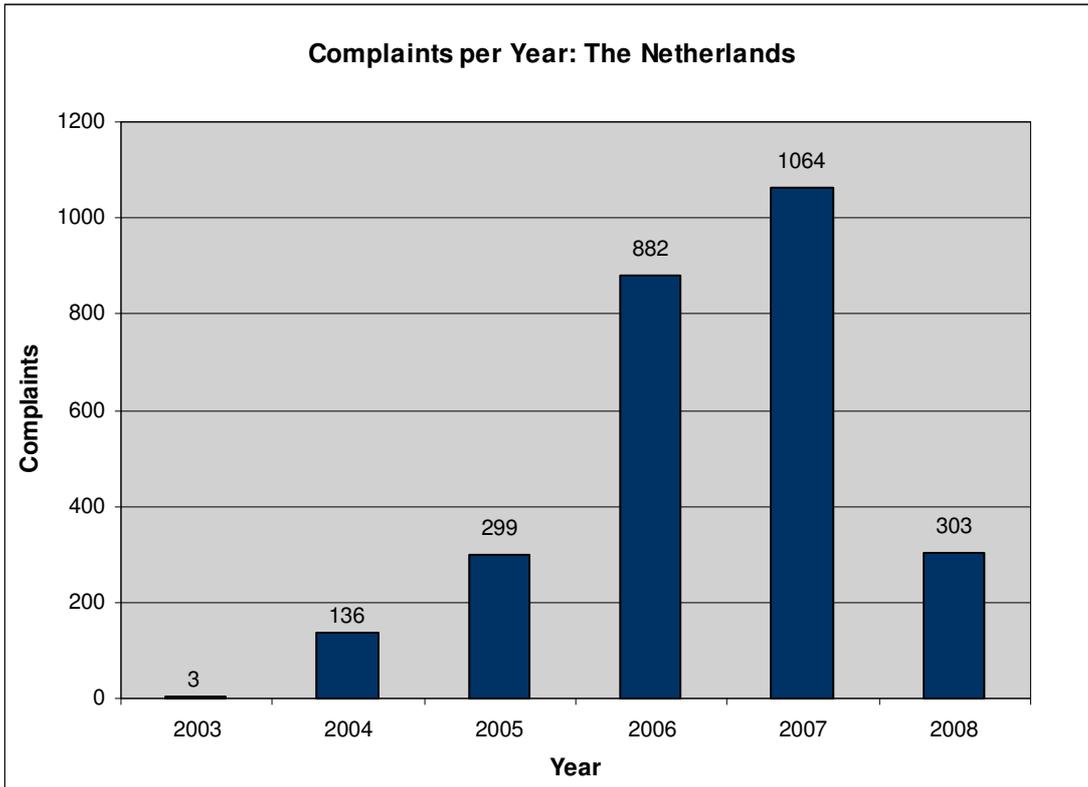
*Note: Data for the year 2008 includes Jan-May/July 2008.*



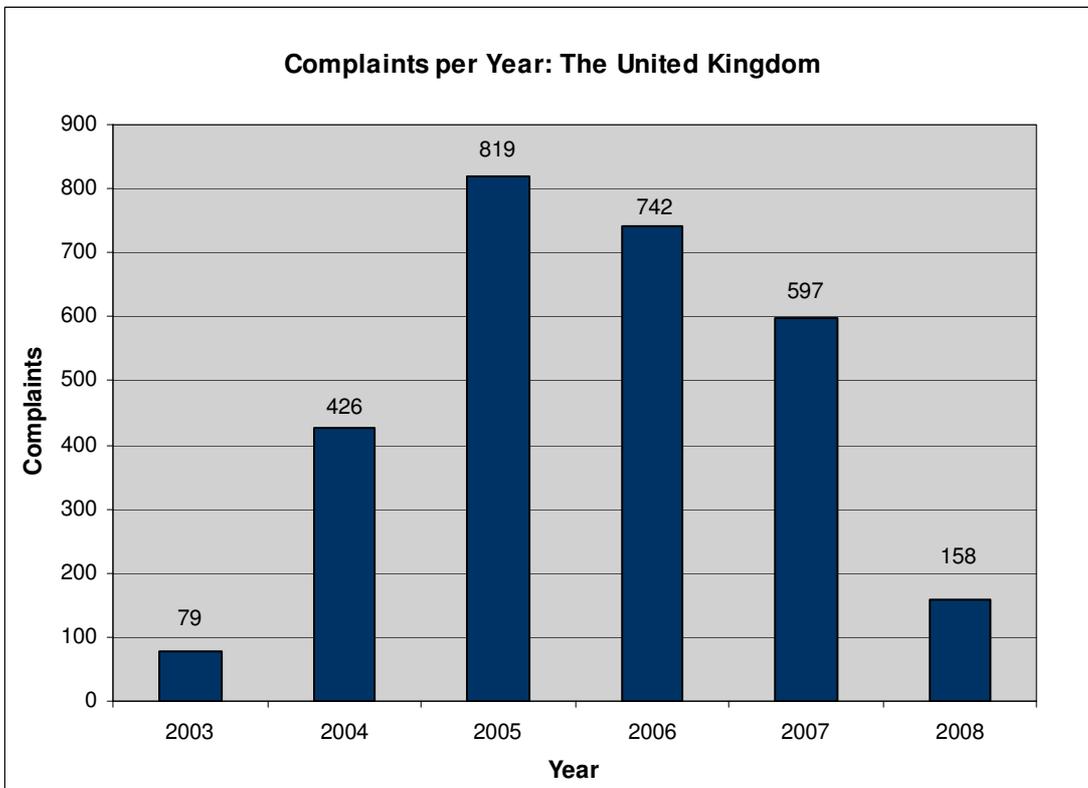
*Note: Data for the year 2008 includes Jan-May/July 2008.*



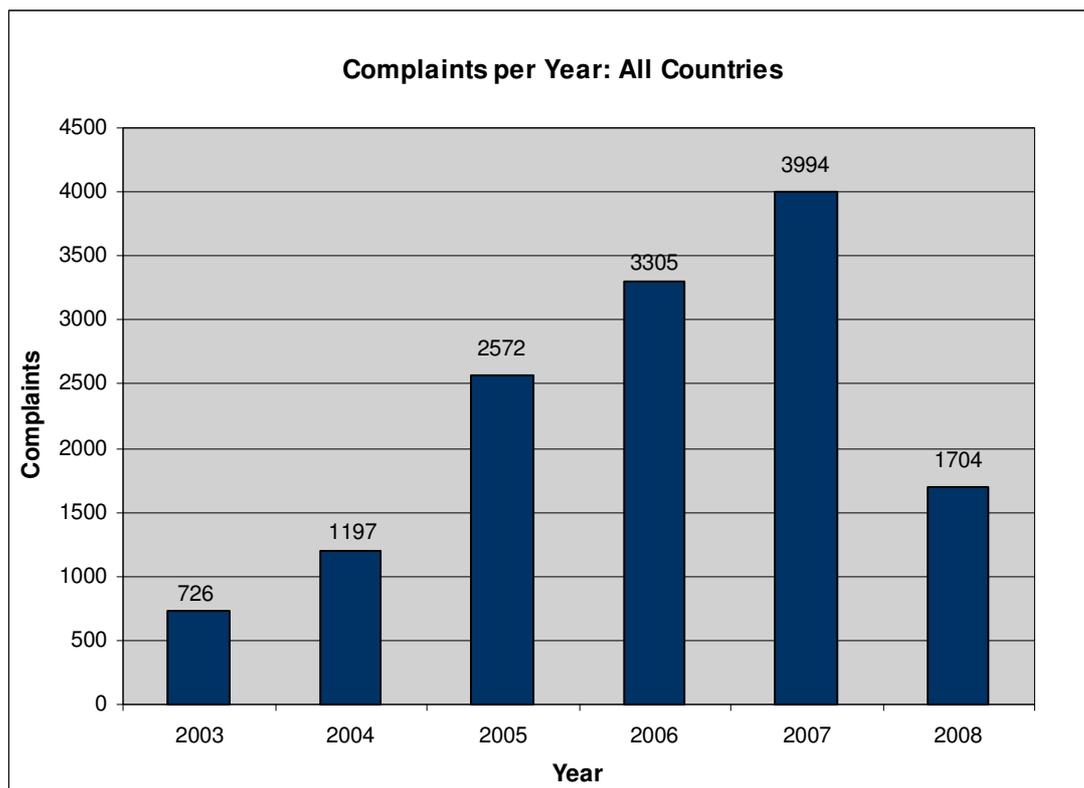
*Note: Data for the year 2008 includes Jan-May/July 2008.*



*Note: Data for the year 2008 includes Jan-May/July 2008.*



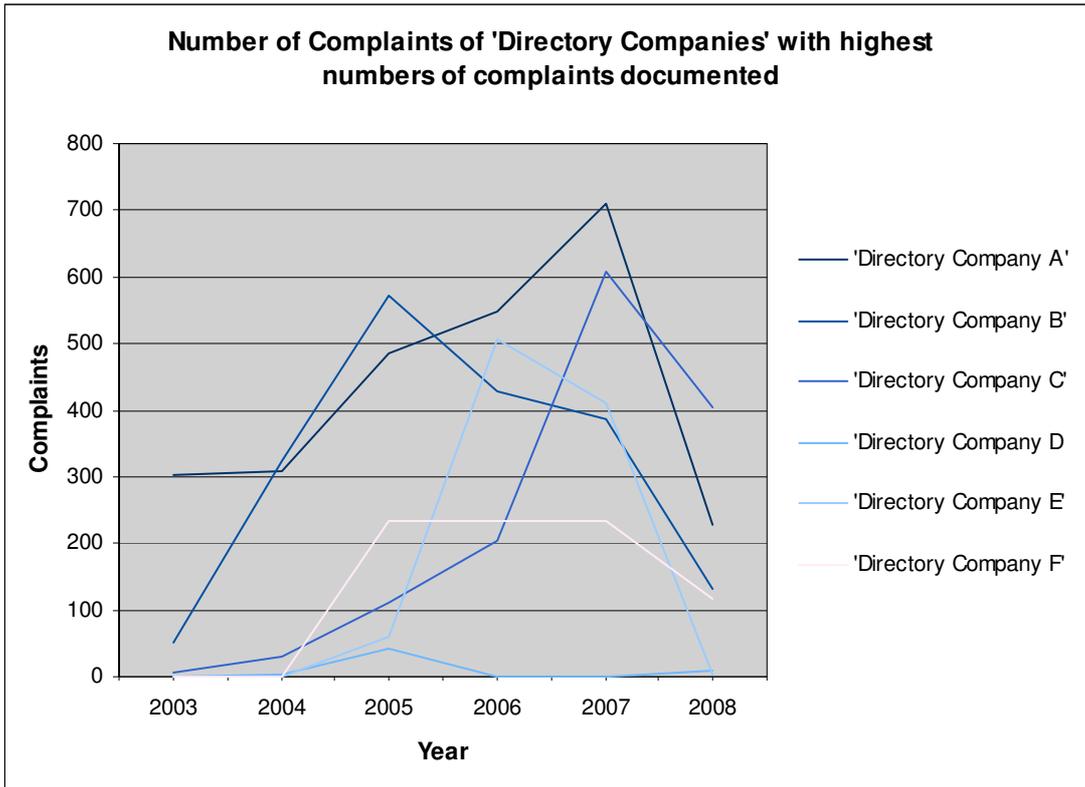
*Note: Data for the year 2008 includes Jan-May/July 2008. Data obtained from one UK stakeholder referred to complaints and enquiries.*



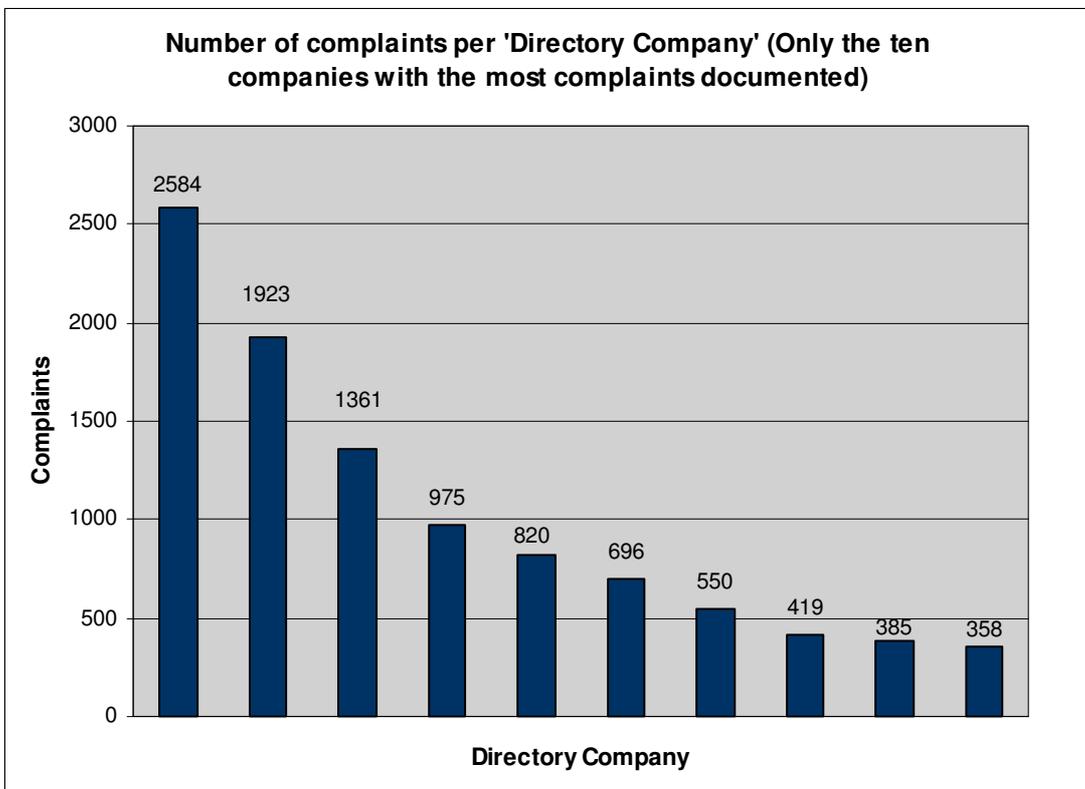
*Note: Data for the year 2008 includes Jan-May/July 2008.*

<b>Complaints reported per country and per year</b>							
	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>TOTAL</b>
<b>Austria</b>	24	66	269	235	254	218	1066
<b>Belgium</b>	148	105	609	688	850	338	2738
<b>Bulgaria</b>	5						5
<b>Czech Republic</b>		21	100	200	607	403	1331
<b>Denmark</b>				2	35	3	40
<b>Estonia</b>	4	5	6	8	7	6	36
<b>EU business ass.</b>	180	132	77	67	70	15	541
<b>France</b>	21		17	5	20	11	74
<b>Germany</b>	131	130	130	131	136	69	727
<b>Greece</b>			41	109	99	69	318
<b>Hungary</b>	2	20	9				31
<b>Ireland</b>	3	13	37	69	78	31	231
<b>Luxembourg</b>	1	4	26	2	4	3	40
<b>The Netherlands</b>	3	136	299	882	1064	303	2687
<b>Norway</b>				6	24	15	45
<b>Spain</b>	125	139	133	159	149	62	767
<b>Sweden</b>							0
<b>The UK</b>	79	426	819	742	597	158	2821
<b>TOTAL</b>	<b>726</b>	<b>1197</b>	<b>2572</b>	<b>3305</b>	<b>3994</b>	<b>1704</b>	<b>13498</b>

*Note: Three out of five Belgian stakeholders are EU level business associations. Their reported complaints are listed separately. Data for the year 2008 includes Jan-May/July 2008.*



*Note: Data for the year 2008 includes Jan-May/July 2008.*



'Directory Company'	Number of Complaints	
	Absolute- Descending	Percentage
A	2584	19,1
B	1923	14,2
C	1361	10,1
E	975	7,2
F	820	6,1
M	696	5,2
H	646	4,8
N	419	3,1
D	385	2,9
O	358	2,7
P	276	2,0
Q	178	1,3
R	121	0,9
S	100	0,7
T	96	0,7
U	72	0,5
V	63	0,5
W	58	0,4
X	35	0,3
Y	34	0,3
Z	30	0,2
Directory Companies 22-85	2268	16,8
<b>TOTAL</b>	<b>13498</b>	<b>100,0</b>

Answer to question 18. What suggestions would you make for a working information exchange between authorities in your country and in the authorities in other EU countries? (Original citations)

Use the enforcement cooperation network to ensure that claims are transmitted and that judgements can also be enforced in another Member State so that misleading providers cannot settle in another Member State and just restart their business.

Our proposals are the following:

- The revision of the Consumer Acquis and of the Unfair Contract Terms Directive need to ensure that business-to-business (B2B) contracts are also covered;
- The UCP Directive can also be amended, but the main instrument against Misleading Directory Companies need to be the Unfair Contract Terms Directive;
- For the scams and for misleading or unfair comparative advertising between businesses the UCP should be used. This means revising it, maybe in the course of the review of the Consumer Acquis;
- Member States must apply and properly enforce their regulations! Enforcement between Member States is pathetic and must be properly organized on a "Country of Origin" principle to avoid lengthy and wasteful legal arguments;
- Small Claims Courts need also to be used for B2B;
- The Distance Selling Directive could also be used to adequately protect businesses and SMEs against such misleading contracts and other scams.

I think this is an area of considerable potential, where the activities of a company in one member state are impacting upon the citizens of another member state there needs to be a mechanism for rapid coordination. There also needs to be a mechanism for higher review if it is felt that one member state is not taking sufficient action; I have seen the response sent by the Spanish to Commissioner Kuneva regarding the European City Guide and it gives the impression that they take the matter seriously when in fact they do almost nothing and even send letters to victims that suggest they support the guide.

The problem in Spain is that onus appears to lie with the regional authority in Valencia they do nothing and the national government then washes its hands on the matter. This is in spite of the fact that the guide was convicted in Catalonia and only moved to Valencia to avoid imposition of the penalties imposed in that conviction.

Were a working body set up where authorities coordinated it would

- 1) make the seriousness of the matter clearer to the authorities in countries that host the guides
- 2) make it harder to show who wish to ignore the matter because their citizens are not affected

More than cooperation at national level, it is coordinated action for cross border complaints that is needed. We are currently talking to DG SANCO in order to explore more effective information exchanges between our network and the CPC network.

Central web platforms

Information exchange between authorities should be already working

Authorities in Czech Republic and other former communist countries should be made to learn from more experienced authorities in EU countries with a continuous history of "Free Market" commerce. Though many post communist authorities do not believe it to be the case, their learning curve in matters such as the application of commercial law is far from over. It is further essential that the European Parliament recognize this state of affairs that exists in their midst.

<p>We suggest that a common central internet platform is set up from the side of the authorities. It must be a platform where the users can exchange information and experience on MDC and how to deal with them. There needs to be a central place/organisation/authority within the EU where information is gathered and to which the enterprises on their organisations can turn to.</p>
<p>Regular bulletins should be notified in national newspapers and business journals warning companies of these type of practices and the companies involved. Business representative groupings should be regularly updated with news on attempted unfair practices, the companies involved and the proposed actions to address the issue.</p>
<p>We consider that it is good to keep the specific are in our web page where includes all the information we can provide regarding this matter and our experience in our own countries.</p>
<p>To have more publicity.</p>
<p>To strike the right balance between exchanging too much and too little conscious always that the goal is to stop this activity.</p>
<p>The question could be discussed in the framework of CPC and beyond the EU, within the ICPEN. It is a common problem for the countries affected...</p>
<p>It might be interesting go develop an "alert" system (similar to the alerts issued under the CPCP regulation 2004/2006) providing information about new "misleading directory companies", numbers of complaints, taken action and especially possible convictions of those companies.</p>
<p>Taking into account that most of the companies affected by Misleading Directory Companies are not private consumers, affected companies are normally recommended to contact chambers of commerce or other trade authorities. It is necessary to ensure confidence on the Internal Market by coordinating and supporting problems faced by companies.</p>
<p>There should be a European blacklist of companies, using misleading terms.</p>
<p>Entscheidend ist, dass entsprechende Einrichtungen wie der Schutzverband gegen unlauteren Wettbewerb effektiv und konsequent gegen derartige Praktiken vorgehen. Für diese Aktivitäten im Interesse der europäischen KMU wäre eine finanzielle Unterstützung derartiger Einrichtungen durch EU-Mittel außerordentlich sinnvoll and wichtig.</p>
<p>Dealing with businesses acting like the fraudulent kind this questionnaire is targeting, it is essential to cope with companies frequently changing name or identity. As mentioned before, only few cases are brought to the courts of justice, which does not supply us with abundant sources of information to share. If workable ideas come up, we are very likely to be supportive.</p>
<p>Until today exchange information between members of the ICPEN/RICPC network regarding misleading practices and new 3misleading Directory Companies " targeting new victims in our country proved to be quick efficient thanks to informal relationship between its members. Dissemination of law cases condemning "Misleading Directory Companies" allows a positive contribution at European and national level tot eh consumer's legal protection.</p>
<p>This point is, for the time being, under consideration.</p>
<p>All competent authorities should cooperate in an effort to assist citizens who have been ensnared by advertising catalogues.</p>
<p>Identify appropriate contact points and authorities in each Member State with whom information can be exchanged.</p>
<p>Establishment of common databases. Foundation of DGCCRF or another organisation in order to gather and centralise the law suits.</p>
<p>An intensive information campaign on the homepage of the European Commission and intensive information of the national and local chambers of commerce about the latest forms of practices "Misleading Directory Companies" in the EU-Member States.</p>

## ANNEX 5: PETITIONS TO THE EUROPEAN PARLIAMENT

Petitions to the European Parliament regarding 'directory companies' (per country)

COUNTRY	2004	2005	2006	2007	2008	TOTAL
<b>EUROPEAN UNION</b>						
Austria						0
Belgium		1		4		5
Bulgaria			1	1	1	3
Cyprus			1			1
Czech Republic			2			2
Denmark			1			1
Estonia			1			1
Finland						0
France			28	4		32
Germany			1		1	2
Greece	1		7			8
Hungary		1	2			3
Ireland		1	14	1		16
Italy		1	13			14
Latvia			3			3
Lithuania			1			1
Luxembourg						0
Malta			5			5
Netherlands			6			6
Poland			26	1		27
Portugal			1			1
Romania			9			9
Slovakia			3			3
Slovenia			20			20
Spain			10			10
Sweden		1	7			8
United Kingdom		10	125			135
<b>TOTAL EU</b>	<b>1</b>	<b>15</b>	<b>287</b>	<b>11</b>	<b>2</b>	<b>316</b>
<b>OUTSIDE EU</b>						
Canada		2	7	1		10
USA		1	25			26
Croatia			3			3
Turkey			2			2
New Zealand			1			1
India			4			4
South Africa			1			1
Norway			4			4
Australia			3			3
Russia			2			2
Japan			3			3
Moldova			2			2
Brazil			1			1
China			1			1
Thailand			1			1
Serbia			9			9
Taiwan			2			2
Lebanon			1			1
Argentina			1			1
<b>TOTAL OUTSIDE EU</b>	<b>0</b>	<b>3</b>	<b>73</b>	<b>1</b>	<b>0</b>	<b>77</b>
<b>TOTAL</b>	<b>1</b>	<b>18</b>	<b>360</b>	<b>12</b>	<b>2</b>	<b>393</b>

Source: EP. Overview received in May 2008

## **ANNEX 6: QUESTIONS TO COMPANIES SUBJECT TO COMPLAINTS**

1. *Please identify your company (e.g. type of business, country of registration, geographical area of business activities).*
2. *Please list the directories published by your company and their main target groups (in terms of sectors and company size).*
3. *What was the total number of customers that ordered paid entries into directories published by your company in 2007?*
4. *Have you received any complaints from your customers with regard to your company's entry forms? If yes, could you please describe the nature of complaint and the number of complaining customers in 2007?*
5. *There has been some controversy about your company's entry forms called by some as "misleading". What is your company's code of conduct with regards to entry forms (if any)?*
6. *What is your company's code of conduct (if any) with regard to customer solicitation (e.g. protecting rights of customers)?*
7. *Have any institutions or any of your customers taken legal actions against your company? If yes, please give the number for all legal actions in 2007.*
8. *Have you taken any legal actions against your customers, or any other institution? If yes, please give the number for all legal actions in 2007.*
9. *Have you used any non-judicial mechanisms of dispute resolution in solving disputes with your customers (e.g. Ombudsman)? If yes, could you provide examples.*
10. *Some of the press releases and statements refer to your company as "misleading" – what is your response to this?*

**ANNEX 7: STATEMENTS OF COMPANIES SUBJECT TO COMPLAINTS ON  
QUESTIONS AND CURRENT REGISTRATION FORMS PROVIDED BY THE  
COMPANIES**

## COMPANY STATEMENT BY EUROPEAN CITY GUIDE

**1. Please provide a description of your company (for example, type of business, country of registration, geographic area of trade activities).**

E.C.G. s.l. is a Publishing and Advertising Agency which publishes its products in three media: printed paper, Cd and Internet.

We provide our customers with the service of publishing their advertisement, which we produce and/or design.

Our business is to sell advertising space in the Guides we publish.

We are a Spanish company established in Valencia, c/ Martínez Cubells 6, 4º 8ª E-46002 Valencia (SPAIN)

Nif (Tax Identification Number) B-60820305

Valencia Companies Registry, folio 210, Volume 7708, Book 5005.

We are in full compliance with all tax, labour and social security payments (attached are Certificates from the relevant Authorities)

Our market is in the countries of Andorra, Austria, Azerbaijan, Belarus, Belgium, Bosnia & Herzegowina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Gibraltar, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldava, Monaco, Netherlands, Norway, Poland, Portugal, Russia, Serbia & Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, Canada and Australia.

**2. Please provide a list of directories published by your company and your main target groups (per sectors of activity and size of the company).**

## INDUSTRY & COMMERCE

Since 2006 ECG S.L., under the name I & C, publishes a directory of companies in different countries whose data are constantly updated.

I & C represents a substantial help to both find and contact a firm of a specific branch, to set new business contacts and to get new clients.

ECG S.L. publishes these data on two significant computer media.

1. Internet – from 2006

### AUSTRALIA:

Some 767,000 Australian companies are published and listed according to state, city and trade.

### CANADA:

Some 865,000 Canadian companies are published and listed according to state, city and trade.

- Available in two languages (Canada)
- The advertisers highlight the advertisements with the due logo and other details, like advertising texts.
- Google map – Map service online
- Information on trade fairs
- Information on companies
  
- Information on cities and states
- Weather
- News
- Online Update

## 2. CD Rom – since 2007

AUSTRALIA: 767,000 Australian companies are published and listed according to state, city and trade.

CANADA:

Some 865,000 Canadian companies are published and listed according to state, city and trade.

- Available in two languages (Canada)
- Easy to operate program
- The advertisers highlight the advertisements with the due logo and other details, like advertising texts
- Information on cities and states
- Yahoo map – Map service online
- Information on trade fairs
- Information on companies

## EUROPEAN CITY GUIDE

Since 1999, European City Guide publishes a directory of European companies. European City Guide takes particular care in the updating of published data. A twelve person team updates and completes constantly the published data and graphics.

ECG represents a substantial help to both find and contact a firm of a specific branch, to set new business contacts and to get new clients.

ECG S.L publishes these data several times a year in three different media.

1. Print-Media (DIN A4 format, four colours) – since 1999, annual

Some 100,000 companies are listed according to state city and trade.

- Available in four languages.
- The advertisers highlight the advertisements with the due logo and other details, like advertising texts
- Since 2003 we have at you disposal a two volume guide (1650 pages each)
- Information on trade fairs
- Information on countries

## 2. Internet – since March 2001

We have published approximately 1.35 million companies listed according to state, city and trade.

- Available in five languages
- The advertisers highlight the advertisements with the due logo and other details, like advertising texts
- Information on countries and cities
  
- New web-page design (2004) with more functions
- Covers all Europe
- Additional coverage of countries and cities
- Online correction: the e-mail addresses have the chance of correcting their data personally
- Information on companies
- Weather
- News

### 3. CD Rom – Media – Since 2005 (quarterly)

We have some 650,000 companies published and listed according to states, cities and trade.

- Available in five languages
- The advertisers highlight the advertisements with the due logo and other details, like advertising texts
- Easy to operate program
- Information on trade fairs
- Information on companies

Our Customers are Professionals or Companies of **every size in all sectors** who are interested in publicising their Company, product or service so as to raise awareness with the final consumer, that is, all those for whom advertising is an element of the process of generating or attracting customers.

We do not include the following profiles in our advertising:

- All organisations, physical or legal persons who carry out non-profit activities, for example: Public schools, the Red Cross, Religious or Charity Associations;
- Final consumers.

Regarding the sectors, we target the industrial, professional and business sector, excluding the public sector.

**3. What was the total number of customers who requested entries subject to the tariffs in the directories published by your company in the year 2007?**

All our accounts are Public and are available at the Commercial Register.

**4. Have you received complaints by your customers with regard to the forms used to register with your company? If so, could you please describe the nature of the complaints and the number of customers who have made complaints in the year 2007?**

As an international Publishing Company, we attend to Customers in many countries, with very different mindsets.

Our Customer Service Department, twelve staff members, six languages, telephone attendance hours from 9:00 to 17:00 and 24 hour fax and email attendance dealing with enquiries of the following: the form of the advertisement, the content of the advertisement, location (if it relates to a certain trade and they consider a more appropriate of their advertisement), contracting period, corrections, cancellations, financial (different payments, delivery periods, queries on payments).

We do not have statistics on the number of complaints received. In order to attend to all of them we request that they be made in writing, and we have quite a high level of resolution, since the company wants contented and satisfied customers.

We increasingly receive complaints encourage by the libellous website STOPECG. [XXXXXXXXXXXXXXXXXXXX], owner of the said site, was a customer of our company in 2001 and never paid for the service provided. There was a problem of poor interpretation of the form

which has since been resolved. Mr [XXXXXXXXXXXXXXXX] lacks any legal background, formerly owned a site in which he used to facilitate instructions on how to circumvent security controls at G8 meetings. On his new site, STOPECG, he does not take into account the improvements which have been made to the form in agreement with the competent authorities, neither does he verify or corroborate the information he disseminates on his website.

Unfortunately for ECG, this defamation has been fundamentally detrimental causing a snow ball effect, with the result that customers who had not made any complaints before and were satisfied, have now changed their point of view and made allegations coerced by the use of such defamatory terminology as “scam”, for example.

**5. Has there been controversy with regarding the registration form used by your company, which some consider to be “misleading”? What is the code of conduct of your company (if it exists) with regard to registration forms?**

Over the past few years, our Marketing Department has been submitting all forms, or amendments to said form, to the Legal Department. The Legal Department then adapts these to Spanish Legislation and to Internal Market Regulations of the European Union. At the same time, there is provision for any Organisation and Country which requests for any amendment, with the result that we have agreed to various model forms which are appropriate for the requesting Organisation, and the interests of European City Guide.

To emphasise the more significant modifications of the form since its creation:

- The phrase *Free of Charge* has been omitted;
- The price of the advertisement is expressly highlighted in bold text;
- The cancellation period has been set at 15 days (more than double that which is normally required);
- At the top of the order form, it is written in bold text, “*Only sign if you want to place an insertion.*” ;
- The word ORDER, is written in bold text, outlining the conditions of the contract;
- Below the word ORDER, the text immediately reiterates, “*Please return this document accompanied by your signature/company stamp in the appropriate space below if you would like to place an order. This implies a cost that will be detailed according to the following conditions...*”
- the Customer Service Department has been extended to cover 6 languages, and has 12 staff members who attend to any type of enquiry given in any form;
- Special mention should be made to compliance with the Data Protection Act, which is ensured via files and specialised personnel, and which is rigorously complied with, having gone through several inspections which have been adhered to with total conformity;
- the fully independent Customer Ombudsman has been set up, which is given on the actual form, as well as on the web site [www.europeancityguide.com](http://www.europeancityguide.com), providing all the details of its service and the way in which to contact them;

This means that we find ourselves in the situation in which wherever a form can be considered as “misleading” in any way, it must be understood that these forms are in fact addressed to Companies,

Businessmen and Professionals who are sufficiently capable of reading and interpreting forms of this nature.

In view of the above the form is totally adjusted in conformity with the law.

**6. What is the code of conduct of your company (if it exists) in relation to gaining customers (for example, in terms of protection of consumer rights)?**

We would like first of all to emphasise that our customers are not classed as consumers, since ours is a relationship between Professionals or Businesses.

Therefore, with regard to potential customers, we carefully filter addresses which we use for Mailings, removing all non-profit Physical or Legal Persons. If, despite the filter, we enter into a contract with someone whose details are not in accordance with our profile, we update their information and in almost all cases, we accept their desire to publish their advertisement, although we will do this at no cost.

When a customer contract is accepted, there is a code of conduct (in 5 languages) which we attach (Annex 2) and which is available on our website.

Furthermore:

The form has an Original and Copy (which is a carbon duplicate). A cancellation voucher is provided, the address of the Customer Ombudsman and General Conditions of the contract.

The cancellation period given to proceed with automatic cancellation is 15 days (the Directive 97/7/EC makes provision for 7 days for consumer contracts, and not those between professionals).

We send a proof for correction of the advertisement, which the customer may amend or incorporate new information for placement of a new advertisement.

We have a Customer Service Department (twelve staff members, six languages, opening hours from 9:00 to 17:00 telephone attendance and with 24-hour fax and email attendance) which is available every day except on public holidays.

All data errors detected in a customer's advertisement are republished at no charge. We have the Customer Ombudsman to handle disputes which the Customer Service Department is unable to resolve. The Customer Ombudsman is independent, the service is at no cost to the customer and their decision is binding for ECG. There is a maximum response period of 3 months, after which the contract is automatically cancelled.

The details and why in which the Customer Ombudsman can be contacted are set out in the form as well as on the website.

**7. Has any institution or any of your customers brought legal action against your company? If so, please indicate the number of legal cases in the year 2007.**

Based on the forms produced prior to 2003, we have two open cases which are awaiting final judgement. With regard to 2007, we have had 3 cases which have been summarily rejected by the courts.

**8. Have you taken any legal action against your customers or any other institution? If so, please indicate the number of legal cases in the year 2007.**

No. Company policy does not presently contemplate this type of action

**9. Have you used any extrajudicial mechanism for resolution of disputes with your customers (for example, the customer ombudsman)?**

**If so, give examples.**

In the first place, we have the Customer Ombudsman whose information is specified in Annex 3 expressed clearly in question 6 and on our website (Annex 3).

**10. Some statements and publications in the press made reference to your company as “misleading”. What is your position in this regard?**

This point has already been addressed within question 5 in which we have explained the characteristics of the order form (for example, the price and the word ORDER written in bold text etc.) As a result, it must be acknowledged that by its content, the order form is not misleading in any way. The form is in total adherence to the Directive 2006/14 of the European Parliament and Council regarding misleading publicity whose date of application was 12/12/2007.

A large number of complaints have been coerced by the defamatory website STOPECG. On said website, promoted by Mr XXXXXXXXXXXXXXXXXX the name ECG is being generically synonymised with the word “scam”. Within the STOPECG website, there is much debate of

businesses which have absolutely no relation to ECG which enforce the libellous victimization of our company, for example the “Nigerian Scam”.

The misappropriation of our company’s name has impacted greatly and caused great damage to our public image, given that legislation of the Internet still permits such abuse.

Despite the consideration that we are a “misleading company”, it is not our intention to mislead anyone.

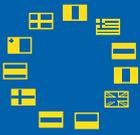
We would like to make it clear that we offer a product and a service, and in order to do so efficiently, with high quality and added value, we invest a lot of money and effort.

In the registration forms which the potential customer receives in their office, all the contracting conditions are featured in accordance with existing legislation, and he/she has the opportunity to make his/her decision without any pressure.

Like many other companies, we are victims of a defamatory campaign on the Internet, against which it is very difficult to defend ourselves, since as you are aware, the Internet legislation in force has not struck a balance between the necessary freedom and adequate protection.

In your letter of 01/07/2008, you say that there are numerous petitions. We do not know if these are regarding ECG, however, we know that since 2003 we have sent out 32,000,000 letters, so the percentage of complaints does not seem to be too high.

We wish to reiterate that ECG is a company with 15 years of experience within the market and has always provided the contracted service, both on printed paper as well as CD and the Internet.



# EUROPEAN CITY GUIDE

A return envelope is enclosed. No Postage necessary.

Please check your address carefully, for an update of the data, complete the form and return it in the enclosed envelope. Only sign if you want to place an insertion.

Dear Sirs,

We are presently compiling commercial information for the **European City Guide**. Filling in this form would give you the opportunity to be published in our inter-professional Guide on CD-Rom and Internet. In order to positively represent **your company** and **your city**, we would be grateful if you would fill in and return this form with additional information about your business as soon as possible in the enclosed envelope. **Thank you in advance for your co-operation.**

<b>Your current address and contact details:</b>	<b>Please make your corrections:</b>	<b>Please print clearly!</b>
<u>Name of the company</u>	<u>Name of the company</u>	
<u>Street</u>	<u>Street</u>	
<u>Postal Code / City</u>	<u>Postal Code / City</u>	
<u>Country</u>	<u>Country</u>	
<u>Telephone No.</u>	<u>Telephone No.</u>	
<u>Fax No.</u>	<u>Fax No.</u>	
<u>URL</u>	<u>URL</u>	
<b>Your current trade data:</b>	<b>Please make your corrections:</b>	<b>Please print clearly!</b>

### Order:

Please return this document accompanied by your signature / company stamp in the appropriate space below if you would like to place an order. This implies a cost that will be detailed according to the following conditions: by means of this form and in accordance with the contract conditions stated overleaf, we give the publishing company, European City Guide, S.L., authorisation to record and publish data and information listed above in the next and following two editions of the European City Guide, (CD-Rom - Internet), arranged according to cities, countries, trade or professional activity, in the form of an advertisement. The cost per edition is **Euro 987.00**. One CD-Rom for each edition will be delivered to the advertiser at no extra cost. This order will be extended each year by a further edition unless specific notice otherwise is received in writing three months before the end of the calendar year. The publishing house reserves the right to edit and illustrate the text. Our data will be electronically recorded. The contact details of the client defence service can be found on the reverse of this document. The place of jurisdiction is the editor's address in the case of action being taken by either party. The present contract is governed by the conditions overleaf.

Date

X

Legal Signature/Company Stamp

Von: Wolfgang Valvoda  
Datum: 28. August 2008  
Betreff: Studie Europäische Union, CIVIC Consulting, Darstellung/Beantwortung

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Bezugnehmend auf das Schreiben der CIVIC Consulting Alleweldt & Kara GbR vom 1. Juli 2008 sollen die Fragen die dem Schreiben beliegen beantwortet werden.

Wir erlauben uns der Beantwortung der von ihnen gestellten Fragen in einen Kontext zu stellen, da wir der Meinung sind, dass zur Bewertung dieser Antworten sachliche Grundsatzinformationen von Nöten sind.

## 1. Geschichte

Die Construct Data Verlag AG wurde 1992 gegründet und beschäftigt sich seit ihrer Gründung mit der Herausgabe von internationalen Fachverzeichnissen. Diese wurden bis 1996 in Buchform und danach auch im Internet veröffentlicht. Im Herbst 1998 begann die Planung des Messe- und Ausstellerverzeichnisses „FAIR Guide“, welches am 20. Mai 1999 der Öffentlichkeit zugänglich gemacht wurde. Aufgrund des großen Erfolges konzentrierte sich das Unternehmen seit dem Jahr 2000 ausschließlich auf den „FAIR Guide“. Ende 2001 kam es zum ersten großen Relaunch. Ein Team von Grafikern und Engineers strukturierten den mittlerweile angewachsenen FAIR Guide komplett neu, ein auf Benutzerfreundlichkeit aufgebautes Userinterface wurde entwickelt und die Antwortzeiten halbierten sich mit Hilfe eines modernen Datenbanksystems. Jedes Jahr wurde bis zum heutigen Tag die Serverlandschaft am neuesten Stand der Technik gehalten, die Funktionalität erweitert und an der Usability gearbeitet.

## 2. Das Nachschlagewerk „FAIR Guide“

Der FAIR Guide versteht sich als umfassende Datenbank für Messen und Ausstellungen, Aussteller und Veranstaltungsunternehmen. Mehr als 15.000 Messen und 3,2 Millionen Aussteller und 5.000 Veranstaltungsunternehmen sind jederzeit abrufbar. Verschiedene Such- und Recherchemöglichkeiten machen den FAIR Guide zum effizienten Nachschlagewerk und zum werbewirksamen Medium. Zum Auffinden von Messen und Ausstellungen, um als Aussteller oder Besucher daran teilzunehmen oder um qualifizierte Unternehmen aus der ganzen Welt in einer bestimmten Branche zu finden, ist der FAIR Guide das Referenzmedium.

Mit dem FAIR Guide erreicht der Werbekunde 205.000 Unique User pro Monat (490.000 Visits, 2.940.000 Page Impressions, Stand: Mai 2008). Der FAIR Guide stellt mit diesen Zahlen eine Chance für jeden Aussteller, den Bekanntheitsgrad des eigenen Unternehmens zu steigern und einer Messteilnahme einen noch höheren Wert zu geben.

Die Zielgruppe des „FAIR Guide“ wird im Pkt. 5, Frage 2 erörtert.

Eine 9-köpfige Redaktion und 15 Datenerfassungskräfte arbeiten täglich an den Daten des FAIR Guide und sind der Garant für ein tagesaktuelles und vollständiges Messeverzeichnis.

## 3. Marketingstrategie

Die Construct Data Verlag AG setzt seit ihrer Gründung auf Direct-Mail. Im Geschäftszweig der Adressbuchverlage werden üblicherweise potentiellen Kunden mittels Direct-Mail oder Außendienstmitarbeitern Werbeeinschaltungen angeboten. Außendienstmitarbeiter sowie alle anderen Vermarktungsstrategien scheiden aus Kostengründen aus, da der FAIR Guide potentielle Kunden aus ALLEN Ländern dieser Welt in seinen Datenbanken führt.

Zusätzlich wird dem Adressaten eines Direct-Mails die Korrektur seines bereits bestehenden, kostenlosen Zeilengrundeintrages angeboten. Früher wurde die Funktion der Auftragserteilung und der Korrektur auf einem Formular vereint. Heute werden die Möglichkeiten des Internets genutzt und dem Adressaten die Möglichkeit gegeben, seine Adresse online, selber zu korrigieren. Die neue Form

Construct Data Verlag AG | Ortsstraße 54 | 2331 Vösendorf | Österreich/Austria  
des Direct-Mails wurde CIVIC Consulting während der Besprechung am 21. August übergeben. Die alte Version liegt als Anlage 2 in deutscher und englischer Sprache diesem Memo bei.

Die Direct-Mails werden in enger Zusammenarbeit mit internationalen Rechtsanwälten entwickelt, um alle bestehenden Rechtsnormen zu berücksichtigen. Zusätzlich stellt das Direct-Mail auf dem Postweg die einzige Möglichkeit dar, die Adressen von weltweit domizilierten Unternehmen auf ihre postalische Verwendbarkeit bzw. auf die Existenz des Unternehmens zu überprüfen.

## 4. Das Unternehmen heute

Zum aktuellen Zeitpunkt beschäftigt die Construct Data Verlag AG 40 Mitarbeiter. Diese Mitarbeiter sind alle am Standort Wien-Vösendorf unter der bekannten Geschäftsadresse tätig. Das Unternehmen gliedert sich in die Abteilungen Redaktion (9 Mitarbeiter), Anzeigengestaltung inkl. Grafik (11 Mitarbeiter), Kundendienst (14 Mitarbeiter), Administration (3 Mitarbeiter), EDV (2 Mitarbeiter) und Geschäftsführung (1 Mitarbeiter) sowie 15 freiberufliche Datenerfassungskräfte. Das Nachschlagewerk „FAIR Guide“ wird am Firmensitz auf hauseigenen Servern veröffentlicht.

## 5. Beantwortung der Fragen

### ***1. Please identify your company (e.g. type of business, country of registration, geographical area of business activities)***

Gegenstand der Construct Data Verlag AG ist die Veröffentlichung eines internationalen Messe- und Ausstellerverzeichnisses im Internet, sowie die Dienstleistungen in der automatischen Datenverarbeitung und Informationstechnik, Werbeberatung und Werbemittlung, insbesondere auch durch Bereitstellung von Adressen.

Die Construct Data Verlag AG ist unter der Nummer FN 113218y im Firmenbuch beim Landesgericht Wiener Neustadt eingetragen.

Der Tätigkeitsbereich erstreckt sich auf alle Länder dieser Welt.

**2. Please list the directories published by your company and their main target groups (in terms of sectors and company size)**

Die Construct Data Verlag AG veröffentlicht im Internet unter dem URL [www.fairguide.com](http://www.fairguide.com) das Messe- und Ausstellerverzeichnis "FAIR Guide". Die Zielgruppe des FAIR Guide gliedert sich zwei Teilbereiche:

A. der Anwender

Als Anwender des FAIR Guide kommen 3 verschiedene Typen in Betracht:

- Personen die Messen besuchen
  - Als Rechercheinstrument wo und wann eine bestimmte Messe stattfindet oder wo und wann Messen einer bestimmten Branche veranstaltet wird.
  - Als Suchmaschine nach Unternehmen die auf Messen und Ausstellungen vertreten waren, um neue Kunden oder Lieferanten zu finden
- Personen oder Unternehmen die an Messen und Ausstellungen als Aussteller teilnehmen
  - Als Rechercheinstrument wo und wann eine bestimmte Messe stattfindet oder wo und wann Messen einer bestimmten Branche veranstaltet wird.
  - Instrument zur Beobachtung des Mit- und Wettbewerbs
- Unternehmen die Messen und Ausstellungen veranstalten.
  - Gewinnung von Neukunden (Aussteller)
  - Instrument zur Beobachtung des Mit- und Wettbewerbs

B. der potentielle Werbekunde

Jedes Unternehmen, das auf einer Messe oder Ausstellung vertreten war, kommt als Werbekunde des FAIR Guide in Betracht und gehört zur Zielgruppe.

**3. What was the total number of customers that ordered paid entries into directories published by your company in 2007**

**4. Have you received any complaints from your customers with regard to your company's entry forms? If yes, could you please describe the nature of complaint and the number of complaining customers in 2007.**

Im Kundendienst der Construct Data Verlag AG wird nicht zwischen Beschwerde und Anliegen eines Kunden unterschieden. Wie im Geschäftsleben üblich passieren in der Anzeigengestaltung Fehler und Beschwerden beziehen sich in den meisten Fällen auf fehlerhafte Inserate bzw. qualitative Anmerkungen zu den von unseren Grafiken gescannten und nachbearbeiteten Bildern. Besonders in den Jahren 2006 und 2007 mussten wir zur Kenntnis nehmen, dass aufgrund von hier nicht namentlich genannten Webseiten im Internet Musterschreiben zur Stornierung von Werbeverträgen kursieren.

Aufgrund dieser negativen Publicity erhielt und erhält die Construct Data Verlag AG Stornierungswünsche bzw. Beschwerdeschreiben von Kunden, die bis zuletzt zum Kreis der zufriedenen Kunden (mehrere, tlw. bis zu 5 Jahren Stammkunden) zählten.

**5. There has been some controversy about your company's entry forms called by some as "misleading". What is your company's code of conduct with regards to entry forms (if any)?**

Die Construct Data Verlag AG hält sich an alle Regeln des Wettbewerbs und respektiert alle Gesetzesnormen.

**6. What is your company's code of conduct (if any) with regard to customer solicitation (e.g. protecting rights of customers)?**

Den Kunden der Construct Data Verlag AG werden umfangreiche Rechte eingeräumt:

- Rücktritt vom Vertrag innerhalb von 10 Tagen ab Auftragserteilung. Intern wird der Vertragsrücktritt bis 21 Tage ab Datum des Auftrages akzeptiert.
- Bei eventuellen Fehlern in der Anzeige wird der Veröffentlichungszeitraum um die Periode

der fehlerhaften Veröffentlichung verlängert.

- Jedes Anliegen und jede Beschwerde wird innerhalb von 14 Werktagen ab Erhalt beantwortet bzw. erledigt.
- Jede Korrespondenz wird in den Sprachen Deutsch, Englisch, Französisch, Italienisch oder Spanisch behandelt. Telefonisch beantwortet der Kundendienst die Anfragen zusätzlich in Portugiesisch, Russisch und Tschechisch.
- Kann der Kunde glaubhaft machen, dass der Geschäftsgang keine Werbeausgaben zulässt, wird eine Vertragsverkürzung von 3 auf 2 Jahren gewährt.

***7. Have any institutions or any of your customers taken legal actions against your company? If yes, please give the number for all legal actions in 2007.***

Ja. Die Anzahl ist jedoch irrelevant, weil die Construct Data Verlag AG bei zahlreichen Entscheidungen als obsiegende Partei hervorging und die bloße Nennung einer Zahl irreführend wäre. (s.a. Anlage 1 zu diesem Memo: Cour d'Appel de Bordeaux, 06/02338, 2. Juni 2008)

***8. Have you taken any legal actions against your customers, or any other institutions? If yes, please give the number for all legal actions in 2007.***

Nein.

***9. Have you used any non-judicial mechanisms of dispute resolution in solving disputes with your customers (e.g. Ombudsman)? If yes, could you provide examples.***

Alle Anliegen und Beschwerden werden vom Kundendienst der Construct Data Verlag AG kundenorientiert und kulant abgehandelt (s.a. Frage 6.).

***10. Some of the press releases and statements refer to your company as "misleading" – what is your response to this?***

Die Construct Data Verlag AG agiert nicht irreführend. Weder die Werbemethodik noch das Nachschlagewerk FAIR Guide sind irreführend.

Die Werbeaussendungen der Construct Data Verlag AG werden seit dem Jahr 1992 in dieser Form durchgeführt und in enger Zusammenarbeit mit Rechtsanwälten entwickelt. Die im Internet geführte Kampagne, namentlich Herr **XXXXXXXXXXXXXXXXXXXX** Website [www.stopecg.org](http://www.stopecg.org), wird von rechtsunkundigen Personen geführt. Durch die Internetkampagne wurde das Image der Construct Data Verlag stark beschädigt.

Erst seit Herr **XXXXXXXXXXXX** seiner Internetkampagne das Image des FAIR Guide beschädigt, kommt es zu Beschwerden, dass die Werbemethodik des FAIR Guide irreführend ist. Auf seiner Website werden die Werbemethodiken der Construct Data Verlag AG als irreführend bezeichnet und das Unternehmen zweifelhaft dargestellt. Dem Leser dieser Zeilen muss es klar sein, dass ein über die Jahre präsentiertes Bild Spuren hinterlässt. Selbst wenn nur eine Anzahl im Promille-Bereich den Anweisungen (!!!) des Herrn **XXXXXXXXXX** Folge leistet und vorgefasste Serienbriefe an Botschaften und Behörden (!!!) zum Versand bringt, schädigt dieses Verhalten extrem.

Wenn ein Unternehmen aus freiem Willen einen Werbeauftrag im FAIR Guide erteilt, mit dem Produkt zufrieden ist und nach einigen Monaten auf die Website des Herrn **XXXXXXXXXX** stößt und darüber informiert wird, dass er „in die Irre geführt wurde“, ist es leicht nachvollziehbar, dass dieser Kunde mit Protest reagiert. Es ist sogar nachvollziehbar, dass der Kunde verärgert ist und die vorgefertigten Briefe, abrufbar auf der Website [www.stopecg.org](http://www.stopecg.org), zum Versand bringt.

Der Construct Data Verlag AG ist eine genaue Anzahl von Beschwerden nicht bekannt. Wenn von den kolportierten, mehreren hunderten Beschwerden ausgegangen wird, müssen folgenden Zahlen berücksichtigt werden:

Die Construct Data Verlag AG hat in den vergangenen 4 Jahren 25 Millionen Werbeaussendungen in Briefform zum Versand gebracht. 25 Millionen Mal hätte sich ein Unternehmen in die Irre geführt fühlen können. Es wird von hunderten Beschwerden gesprochen.

Wenn die Obergrenze von Hunderten, also 999 angenommen wird, sind das

**0,04 Promille an Beschwerden.**

# memo

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Jedes Telekom-Unternehmen in der Europäischen Union würde sich glücklich schätzen, wenn sich nur 0,04 Promille seiner Kunden über Netzabdeckung und –verfügbarkeit beschweren würden.

Please forward to the department  
in charge of fair participation !

1111.99999999

Firma Muster  
Musterstrasse 47  
0815 Musterstadt  
Musterland

Current entry:  
Mustermesse, Belgrade

The name of the fair and organiser are cited for informational purposes only, with no intent to violate copyright or protected trademark regulations.

your reference: -  
our reference: 99999999  
person in charge: F. Huiden

free update and offer 06/2007 - 99999999

date: 21.06.2007

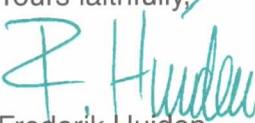
Your data update (listing under Mustermesse, Belgrade)

Dear Sir or Madam,

The update of your pre-registered listing in our exhibitors directory is essential to guarantee problem-free communication to all visitors seeking contact with your company and to ensure that only accurate data is published. The enclosed order form indicates what data is currently on record. The Fair Guide is independent, objective and not affiliated to any organizer or marketing association.

As you are responsible for your company's fair participation, you are asked to submit any necessary corrections of your data under [www.fairguide.com](http://www.fairguide.com). Upon receipt of these modifications, your free listing will be displayed as verified and receive priority ranking. Should you wish to place an order for a payable insertion please use the attached order form. Modifying data free of charge can only be done online.

We trust that you will check the accuracy of your listing and proceed with its update and remain

Yours faithfully,  
  
Frederik Huiden  
(project manager)

Please confirm the accuracy of your details with 

This form is only for your correct listing as an individual advertisement entry.

1111.99999999

1. Correct your data right away in the spaces below!

<small>company name</small>	<b>Firma Muster</b>	<input type="checkbox"/> correct
<small>street</small>	<b>Musterstrasse 47</b>	<input type="checkbox"/> correct
<small>postal code, city</small>	<b>0815, Musterstadt</b>	<input type="checkbox"/> correct

2. Your entry has been published to date for free under the following event (additional entries may be included)

<small>exhibition</small>	<b>Mustermesse Belgrade</b>
<small>organized by</small>	<b>Mustermesse, Messeort</b>

3.

<small>telephone</small>	???	<input type="checkbox"/> correct	<small>website</small>		<input type="checkbox"/> correct
<small>telefax</small>		<input type="checkbox"/> correct	<small>contact person</small>		<input type="checkbox"/> correct
<small>e-mail</small>		<input type="checkbox"/> correct			

4.

<small>description of your business activity ( use key words):</small>

5.

<small>level of operations</small>	<small>statistical data</small>
<input type="checkbox"/> regional <input type="checkbox"/> national <input type="checkbox"/> Europe <input type="checkbox"/> America <input type="checkbox"/> Asia <input type="checkbox"/> worldwide	yearly turnover ..... Mio. EUR employees .....

6. Please also include your business card (for further enquiries) and your company brochure (if available).

**Order:** We hereby agree to the publication of our company's data as a full-sized insertion and place the order with Construct Data Verlag AG to publish the data printed on this form for the next three years as an insertion in the fair and exhibitor directory under [www.fairguide.com](http://www.fairguide.com). The order is payable and irrevocable unless revoked by registered letter within ten days of the date of submission. Date of postage will be taken into account. Costs per year amount to 1531 USD and become due each year upon issue of the invoice. The three years' duration begins with the date of the first invoice. The order is prolonged by a further year, if no cancellation notice is given in writing by registered letter, at the latest three months before order's expiry. Sole legal venue and place of performance is Mödling, Austria. Applicable law is Austrian. Construct Data Verlag AG reserves the right to initiate legal proceedings at the contractor's place of business and to transfer rights and obligations related to this order to third parties. Company data will be processed and saved electronically.

7.

_____ place, date	 _____ stamp, legally binding signature
----------------------	--

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