

The Belgian Civil Remedy in Case of an Unfair Commercial Practice Towards a Consumer: an effective, proportionate and dissuasive sanction?

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Abstract: - The European Directive on Unfair Commercial Practices leaves it upon the Member States to determine which remedies apply in case consumers become the victim of an unfair commercial practice. Article 41 of the Belgian Act on Market Practices and Consumer Protection contains a very specific civil remedy in case an agreement has been concluded following an unfair commercial practice. More specifically, it determines that the consumer can claim reimbursement of the amount paid without a duty to return the goods or services received. Whereas this remedy automatically applies in seven per se forbidden unfair commercial practices, Belgian courts have the possibility to apply this remedy in all other cases of unfair commercial practices towards consumers. First, this article analyzes and evaluates (the requirements to apply) this civil remedy. Secondly, it identifies a number of reasons accounting for the lack of use of this remedy in legal practice. Finally, it examines whether other Member States could benefit from incorporating this remedy into their national legislation.

Key-Words: - Unfair Commercial Practices – Consumers – Civil remedy

1 Introduction.

Within the European Union every Member State prohibits unfair commercial practices towards consumers. These rules are very similar in all Member States, since they are the result of the implementation of the European Directive on Unfair Commercial Practices [1]. Since this Directive is based on the principle of maximum harmonization Member States cannot incorporate or maintain provisions, which offer less or additional protection to consumers in their national legislation [2].

More specifically, every Member State had to enact an identical list of misleading and aggressive commercial practices, which are in all circumstances (per se) considered unfair (art. 5.5 Directive). In addition to this so-called black list(s) of misleading and aggressive commercial practices, Member States had to incorporate two open norms prohibiting misleading and aggressive commercial practices. Deception can take place by providing (wrongful) information, as well as by omitting essential information. However, with regard to practices not included in the black list(s), one will have to prove that the misleading or aggressive

practice was likely to cause the average consumer to take a transactional decision that he would not have taken otherwise (art. 6, 7 and 8 Directive), meaning that the consumer would not have acted, or at least would not have acted on the same terms or in the same way, in the absence of the unfair commercial practice (art. 2, k Directive). Therefore, the burden of proof will be heavier if one wants to prove that one of the open norms prohibiting misleading and aggressive commercial practices has been violated. Finally, the Directive required Member States to prohibit all commercial practices that are contrary to the requirements of professional diligence and that materially distort or are likely to distort the economic behavior of the average consumer (art. 5.2 Directive). The latter rule only applies to commercial practices that are considered unfair, without being misleading or aggressive [3].

Although the Directive is based on the principle of maximum harmonization, it does not determine which remedies apply in case of an unfair commercial practice. It is explicitly left up to the Member States to decide in what way unfair commercial practices are combatted (art.11-13).

However, remedies must be effective, proportionate and dissuasive.

Next to the possibility of a cessation order (art. 110 AMPC), warnings (art. 123 AMPC), a settlement (art. 136 AMPC) and penal sanctions (art. 124 and 127 AMPC), the Belgian Act on Market Practices and Consumer Protection contains a civil remedy. This remedy applies in case the consumer has concluded an agreement with a trader (professional) *following* an unfair commercial practice (art. 41 AMPC). It entitles the consumer in seven specific cases of prohibited misleading or aggressive commercial practices included in the black lists to claim reimbursement of the amount paid or refuse payment without a duty to return the goods or pay a compensation for the services performed. In all other cases of unfair commercial practices, the courts have the possibility to apply the same remedy. However, they are not obliged to do so.

Although this remedy is - or at least could be - very interesting for individual consumers being the victim of an unfair commercial practice, previous research has shown that most likely this remedy has not yet been invoked before or applied by the courts [4].

2. Methodology and research question

First, I will analyze the civil remedy incorporated in article 41 AMPC. This analysis includes a thorough examination of the requirements that must be met to apply this remedy. After that, I will evaluate article 41 AMPC and explain why this remedy not been successful up till now. All of this must allow us to conclude whether it could be interesting for other Member States to incorporate a similar remedy into their national legislation.

3. Analysis of the remedy

A distinction must be made between the automatic application of the remedy and the possibility to apply the remedy on behalf of the courts.

3.1. Automatic application of the remedy

The remedy, enabling the consumer to claim reimbursement of the amount paid without returning the goods or services received, automatically applies when the consumer has concluded an agreement following one of the next unfair commercial practices of a trader: a) Making a materially inaccurate claim concerning the nature and the extent of the risk to the personal security of the consumer or his family, if the consumer does not

purchase the product; b) Claiming that products are able to facilitate winning in games of chance; c) Falsely claiming that a product is able to cure illness, dysfunction or malfunctions; d) Creating the impression that the consumer cannot leave the premises until a contract is formed; e) Conducting personal visits to the consumer's home ignoring his request to leave or not to return; f) Creating the false impression that the consumer has already won, will win, or, will on doing a particular act, win a price or other equivalent benefit, when in fact there is no price or equivalent benefit, or taking any action in relation to claiming the price is subject to the consumer paying money or incurring a cost.

Since the remedy applies automatically, the consumer does not have to go to court. He can simply ask the trader to reimburse him and keep the goods and services received [5]. However, according to article 41 AMPC the consumer must ask for reimbursement within a reasonable period of time, starting when the consumer becomes aware or should have been aware of the unfair commercial practice. It is unclear what constitutes a reasonable period of time and when a consumer should be aware of the fact that a given commercial practice was unfair.

Only if the trader refuses to reimburse the consumer voluntarily, the consumer will have to go to court. In such case, the court must apply the remedy, once it is clear that the consumer has concluded the agreement following one of these six enumerated unfair commercial practices [6].

If payment has not yet taken place, the consumer can off course simply refuse payment. If the company sues the consumer for payment for the goods delivered or services performed, the consumer can invoke article 41 AMPC as a defense, which the court will have to apply as soon as the requirements for application are met. However, if the trader did not yet deliver the goods or perform the services, it seems that a consumer will not be able to claim delivery or performance without paying. This can be derived from the preparatory works that indicate how this remedy must be applied in case a contract relates to successive services. In a situation like this, the consumer is not required to pay for the services delivered, *but he will not be entitled to claim the execution of the remaining services to be performed, without having to pay for them* [7].

It is not clear why the Belgian legislator has limited the automatic application of this remedy to these six prohibitions laid down in the black lists. The preparatory works determine that this remedy is

limited to the six most unfair commercial practices [8], but it is not explained why these six commercial practices are considered as the most misleading or aggressive.

It is clear that in reality only few traders will commit one of these six unfair commercial practices. Moreover, one has to take into account that it is up to the consumer to prove that one of these prohibited commercial practices has taken place, which can be very difficult. For example, how will one be able to prove that the trader has created the false impression that the consumer could not leave the premises without signing the contract or that the trader has ignored the consumer's request to leave his home?

Finally, article 94, 6° AMPC must be mentioned. This article prohibits traders to demand immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer. If a trader violates this prohibition he will not be able to claim payment from the consumer, nor demand that the consumer returns or preserves the goods delivered (art. 41 AMPC). In Belgium, it is accepted that if the consumer has already paid, the consumer can claim reimbursement [9].

It is important to emphasize that, with regard to this unfair commercial practice, the burden of proof is dealt with otherwise. More specifically, it is sufficient for the consumer to allege that he did not order the goods or services in order to reverse the burden proof. Therefore, it will be up to the trader to prove that the consumer (or his representative) has ordered the goods or the services. The fact that the consumer fails to react upon the delivery does not establish evidence of a solicitation from the side of the consumer (art. 41 AMPC).

3.2. Possibility to apply the remedy

In all other cases of unfair commercial practices the court can decide to apply this remedy, but is not obliged to do so. Also, the courts can decide to apply the remedy in part, for example by allowing the consumer to keep the good or service received if the consumer pays half of the price or by deciding that the consumer must not pay, but must return the goods or pay a compensation for the services actually received [10].

Article 41 AMPC does not contain a list of criteria or circumstances the judge must, or even can, take into account when deciding whether to apply, this remedy. It can be assumed that the courts will take into consideration the severity of the infraction, the extent to which the economic behavior of the consumer has been influenced by the

unfair commercial practice, the financial consequences of the violation for the consumer and the proportionality of the remedy in relation to the infraction and the damages suffered by the consumer [11].

It can also be expected that the courts will be less strict when the trader has violated one of the open norms prohibiting misleading or aggressive practices than when the trader has violated a clear prohibition included in the black lists of prohibited misleading and aggressive commercial practices. Whereas a trader violating one of the provisions included in the black list knows - or at least should know - in advance that he is behaving in an unfair way, this is less clear in case the court afterwards decides that the open norm of misleading or aggressive unfair commercial practices has been violated. Indeed, with regard to these open norms the courts have a great discretionary power.

4. Application requirements

As mentioned earlier, article 41 AMPC requires that a consumer has concluded an agreement *following* an unfair commercial practice.

4.1. Defects of consent

According to other Belgian scholars, *following* means that it is necessary that the consumer would not have concluded the agreement at all, when the unfair commercial practice would not have taken place. More specifically, these authors argue that the remedy of article 41 AMPC can only be invoked if the unfair commercial practice can be regarded as a traditional defect of consent (error, fraud or violence) [12]. In this interpretation, the question arises as to the added value of article 41 AMPC. Answering this question, one must take into account that in case of a defect of consent the contract is null, implying that the consumer has to give back the goods or services received. The added value of article 41 AMPC becomes clear, since in case of a full application of the remedy incorporated in article 41 AMPC, the consumer does not need to return the goods or pay a compensation for the services performed. However, in this hypothesis, there will not be many cases where the remedy can be applied, since in most cases the unfair commercial practice will not have been the decisive reason to conclude the agreement.

I believe that this interpretation is too strict [13]. More specifically, I have argued in the past that it is not necessary that the consumer would not have concluded the agreement at all if the unfair commercial practice would not have taken place. In

my view it is sufficient that a consumer would not have concluded the agreement *on the same terms* in case the unfair commercial practice would not have taken place. When the legislator requires that the agreement has been concluded following an unfair commercial practice, this only means that there must be a causal link between the agreement and the unfair commercial practice. This will for example not be the case if the consumer has concluded the agreement without knowing of the unfair commercial practice (e.g. when he has concluded an agreement in the trader's shop without ever seeing this misleading advertising on the trader's website).

4.2. Causal link: burden of proof

With regard to the existence of the causal link, the question arises whether it is up to the consumer to prove that a causal link between the unfair commercial practice and the agreement exists or whether it is up to the trader to prove that there is no such causal link.

According to the established principles of civil procedure, it is left to the consumer to prove the existence of a causal link, since a person invoking a remedy must prove that the requirements to apply the remedy are met [14]. However, it is clear that if one requires that the causal link is proven with absolute certainty, it becomes very difficult for the consumer to invoke this remedy [15]. Whether this finding is sufficient to reverse the burden of proof as determined by the established principles of procedural law, is not certain. As long as the legislator does not explicitly impose the burden of proof on the trader, it will probably not be easy to convince Belgian courts that a causal link between the unfair commercial practice and the agreement must be presumed.

5. Evaluation

Some authors have argued that this remedy is excessive [16]. It is indeed easy to think of examples where the application of this remedy at first sight is excessive. Suppose a consumer has been misled about the features of a new car. Enabling the consumer to keep the car and to claim reimbursement is without doubt hard to accept.

However, these critics seem to forget that in most cases, it is left to a court's discretion to apply, not to apply or partly apply this remedy. Only in six specific cases (and the case of an unsolicited delivery), the remedy applies automatically. Therefore, left alone the six aforementioned cases, the courts are able to prevent that this remedy applies in an excessive manner.

Even where the sanction applies automatically, I don't expect too many problems. First, the infractions leading to the automatic application of this remedy can easily be avoided by traders, for they are formulated quite clearly. Furthermore, in cases where high-value goods have been pursued, it can be avoided that the remedy leads to unjustified consequences using traditional civil law principles. More specifically, one could argue that invoking the full application of this remedy in high-value cases constitutes abuse of law. If indeed, invoking this remedy means that the consumer is behaving in a manifestly unreasonable way or would cause excessive damages to the trader, the courts can reduce the remedy to what is reasonable [17]. It is up to the trader to invoke and prove abuse of law by the consumer.

Furthermore, it is interesting to emphasize that the application of traditional civil law principles could lead to the same consequences as article 41 AMPC. Although nullity normally implies that the consumer needs to return the goods received or pay a compensation for the services performed, this will not necessarily be the case. The courts can also decide that the consumer does not have to return the goods or pay a compensation for the services performed on the basis of the adagio "*in paricausaturpitudinis cessat repetitio*" [18]. Such decisions can for example be found in the jurisprudence with regard to contracts concluded outside the premises of the trader. Such contracts are null and void when they do not contain a withdrawal clause, provided by the legislator (art. 60 AMPC). In most cases it is decided that the consumer is not required to pay a compensation for the services performed, because of the abovementioned adagio [19].

Also, it must be stressed that article 41 AMPC is not the only article in Belgian consumer law which contains this severe remedy. More specifically, this remedy also applies in case of distance contracts between traders and consumers, where the trader did not inform the consumer on paper or on a durable medium about the possibility to withdraw from the contract, at the latest at the time of delivery of the goods or before the beginning of the execution of the service agreement (art. 46 AMPC) [20]. In the literature, it is accepted that the same remedy applies when a trader executes services within the withdrawal period awarded to the consumer because he has concluded the agreement outside the premises of the trader (art. 61 AMPC) [21].

Finally, one must not forget that the Directive requires effective and dissuasive remedies. Economic literature has shown that sanctions only

dissuade traders from violating the law if the costs resulting from a violation of the law exceed the benefits, taking into account the chance that the remedy will be applied [22]. However, assessing the severity of one specific remedy, one must take into consideration that deterrence will not only result from one specific remedy that can be invoked by consumers [23]. Other civil remedies, like a cessation order upon request of a consumer organization or a competing trader, also contribute to private enforcement. Especially (the treat off) cessation procedures introduced by competing traders seems to be an important stimulus for Belgian traders not to violate the law [24]. Apart from private enforcement, public enforcement (administrative and penal sanctions) also plays a role. In Belgium, penal sanctions are rather uncommon, because of the fact that public authorities spend their limited resources for prosecuting other types of crime. Therefore, public enforcement mainly takes place through agencies which can issue warnings and propose settlements [25]. Since warnings are not considered very dissuasive [26] and private enforcement in my view should not solely depend on cessation orders upon request of competing traders and consumer organizations, a severe civil remedy seems to be justified. On one hand a severe civil remedy can dissuade traders from violating the law, on other hand it stimulates consumers to invoke the remedy. However, one must ensure that either general principles of law, either the specific remedy itself allow judges to avoid that the remedy is applied in an excessive manner and consumers receive unjustified benefits. This seems to be guaranteed in Belgium, since in most cases judges have a great discretionary power and in other cases, general principles of abuse of law can be applied to avoid unwanted consequences.

Also, it is important to understand the limits of the cited economic theory. One must not forget that violations of rules of consumer law are not always the result of a rational calculation of costs and benefits, but can also result from unawareness or the lack of organization [27]. A severe civil remedy will not be able to prevent violations of the law by these traders. Moreover, one must be careful that unaware traders are not sanctioned to severely.

One author has argued that article 41 AMPC is not compatible with the European Directive for the latter requires that “penalties” are proportionate [28]. As already argued, we believe that the application of this remedy will not lead to a disproportionate sanctioning regime in Belgium, not even in those cases where the remedy applies

automatically, since the judge can reduce the remedy on the basis of the theory of abuse of law.

6. Limited success

The limited success of this remedy can first be explained by the unclear application requirements, especially in combination with the Belgian system of allocation of procedural costs. As mentioned earlier, the remedy of article 41 AMPC only applies automatically in six specific cases of unfair commercial practices and in case of unsolicited goods and services. In all other cases it is, due to the lack of criteria, hard to predict whether or not and to what extent the court will apply the remedy. Additionally, it is not clear, not even in those cases where the remedy applies automatically, whether the courts will require that the consumer actually proves that he would not have concluded the agreement without the unfair commercial practice (see 4.1) and that a causal link exists between the agreement and the unfair commercial practice (see 4.2). The possibility that such proof will be required, discourages consumers to invoke this remedy, since the consumer will have to bear the cost of the procedure (e.g. rights for enrolling the procedure) and have to compensate the procedural costs of the trader when he is not able to convince the court to apply the remedy. The latter compensation equals in principle 150 euro for disputes up to 250 euro, 200 euro for disputes between 250 and 750 euro and 400 euro for disputes between 750 and 2.500 euro [29]. Since consumer litigation often relates to low value goods and services, and no alternative dispute settlement mechanism is available, allowing for consumers to avoid these costs, this could clearly dissuade consumers from invoking this remedy.

Secondly, it has become clear that not many consumers are aware of this remedy. Moreover, previously conducted research [30] has shown that even many legal practitioners (such as lawyers) seem not to be familiar with the existence of this remedy. This could be partly due to the fact that the remedy is rather oddly located in the Act on Market Practices and Consumer Protection. It appears more than forty articles before the material rules on unfair commercial practices towards consumers, whereas other civil remedies can always be found in the same chapter as the material rules. Therefore, lawyers that are less familiar with the Act may fail to notice the remedy included in article 41 AMPC. Further, Belgian consumer organizations don't advise consumers claiming to be the victim of an unfair commercial practice to invoke this remedy. Finally, the remedy is not mentioned on the website

of the Department of Economic Affairs which informs consumers about their rights.

Therefore, it is clear that the civil remedy at the moment does not really contribute to the enforcement of the rules of unfair commercial practices in Belgium. As has been shown in economic literature, private enforcement by consumers can only play a significant role if consumers are aware of the possibility to invoke the remedy and are stimulated to do so[31]. If the Belgian legislator wants to maintain this sanction and make it effective, it is clear that consumers must be informed and that adaptations need to be done, not only with regard to article 41 AMPC, but also with regard to the way consumer disputes are settled.

7. Other Member States

The question arises whether other Member States could benefit from the incorporation of a civil remedy identical or similar to article 41 AMPC. First of all, it is important to repeat that the assessment of a civil remedy and its possible contribution to the effectiveness of a rule, must be done taking into account other means of private and public enforcement. Therefore, it is possible that in a given Member States the respect of the rules on unfair commercial practices is already “guaranteed” by other means of enforcement.

The introduction of this civil remedy could be useful in Member States where the existing means of enforcement are not sufficient to protect consumers from unfair commercial practices. However, the Belgian experience has shown that the introduction of such a civil remedy does not increase consumer protection if procedures involve high costs. Therefore the civil remedy only seems to be interesting if within a given Member State – contrary to what is the case in Belgium - efficient, accessible and cheap dispute settlement mechanisms are available. Also, incorporating such remedy is only useful if one determines very clearly in what circumstances the remedy applies. Requiring the consumer to prove that the unfair commercial practice has been decisive to conclude the agreement will make the remedy hard to apply, and therefore make it less dissuasive. Also, the burden of proof with regard to the existence or absence of a causal link needs to be determined, taking in mind that the burden of proof will have a serious impact on the ease with which the remedy can be invoked by a consumer. Furthermore, it is necessary to inform consumers and legal practitioners about this remedy. Finally, Member States must ensure that either existing principles of law, either new rules

avoid that this civil remedy can be abused by consumers or would lead to excessive damages on behalf of traders.

8. Conclusions

The Belgian Act on Market Practices and Consumer Protection contains a very specific and severe remedy, entitling the consumer who has concluded an agreement following an unfair commercial practice, to reimbursement of the amounts paid, without returning the goods or services received. Although this remedy may seem to be very appealing to consumers at first sight, it seems that it has not yet been invoked or applied by the courts up till now.

Several explanations can be given. The most relevant are: 1) the unclear application criteria, which make it hard to predict whether or not the remedy will be applied, 2) the fact that consumers will have to bear the costs of the procedure and compensate the trader in case they cannot convince the court to apply the remedy and 3) the fact that consumers and even legal practitioners are not aware of the existence of this remedy.

All of this does not mean that this remedy could not be interesting for other Member States. Member States should evaluate whether the existing private and public enforcement mechanisms are sufficient to protect consumers from unfair commercial practices. If not, a civil remedy similar to article 41 AMPC could be introduced. However in order to be effective, cheap dispute settlement mechanisms must be available, the application criteria of this remedy must be clear (and not too strict) and consumers and legal practitioners must be informed about this remedy. Also, it must be ensured that judges can prevent that this remedy is applied in an excessive manner, e.g. by giving them the power to take into account the severity of the infraction and the damages suffered by the consumer.

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