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CZECH LAW AGAINST UNFAIR COMPETITION AFTER RE-CODIFICATION OF PRIVATE LAW

ЧЕСЬКИЙ ЗАКОН ПРОТИ НЕДОБРОСОВІСНОЇ КОНКУРЕНЦІЇ ПІСЛЯ ПОВТОРНОЇ КОДИФІКАЦІЇ ПРИВАТНОГО ПРАВА

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This contribution brings a comprehensive analysis of Czech law against unfair competition in the new Civil Code which came into force on 1st January 2014, particularly in comparison to the text of the Commercial Code in force till 31st December 2013. There is a concept of general clause supplemented by the demonstrative enumeration of non-compete type of conduct explained. In the third part legal means of protection against unfair competition are described and the fourth part is devoted to forbidden non-compete clauses.

Key words: Czech, unfair competition, commercial law, civil law.

У статті здійснено всебічний аналіз чеських законів проти недобросовісної конкуренції в новому Цивільному кодексі Чеської Республіки, який набрав чинності з 1 січня 2014 р., особливо в порівнянні з текстом Господарського кодексу Чеської Республіки станом на 31 грудня 2013 р.

Ключові слова: Чехія, недобросовісна конкуренція, господарське законодавство, цивільне законодавство.

В статті осуществлен всесторонний анализ чешских законов против недобросовестной конкуренции в новом Гражданском кодексе Чешской Республики, который вступил в силу с 1 января 2014 г., особенно по сравнению с текстом Хозяйственного кодекса новой Чешской Республики от 31 декабря 2013 г.

Ключевые слова: Чехия, недобросовестная конкуренция, хозяйственное законодательство, гражданское законодательство.

1. Basic conception and general provisions and of unfair competition in the new Civil Code

Provision on unfair competition was moved from the Commercial Code [2] to the new Civil Code [3] with effect from 1st January 2014 [4]. According to the preamble to a bill [5] legal regulation of unfair competition was embodied into the new Civil Code first of all for a reason, that *“economic competition is nowise limited only to entrepreneurs, but also to other competitors and its regulation affects also private rights and duties of other persons (for example so called auxiliary persons). Other essential reason of this systematic change consists in the fact, that even in the situation when the law of economic competition is regulated by a special Act (The Act № 143/2001 Coll.), this regulation does not contain private law provisions, which are necessary to be included into the Civil Code”*.

The former conception and regulation of unfair competition contained in Section 41(44) and foll. of the Commercial Code was mostly included into the new Civil Code, and namely with small partial changes (unlike many “revolutionary” changes

of other institutes), which indicates functionality and quality of the former legal regulation of unfair competition. The conception of unfair competition shall be based on determination of unfair competition conduct stated in the general clause amended by demonstrative enumeration of merits of the cases of unfair competition and with stating legal means of protection against unfair competition inclusive of persons with active legitimation in disputes resulting from unfair competition.

There have not been any dramatic changes within the general provisions on unfair competition. Unfair competition is now included in the new Civil Code in head III (obligations arising from civil wrongs), part 2 (abuse and restriction of competition), which is divided into chapter I (general provisions) and chapter II (unfair competition). Chapter II brings concrete regulation of unfair competition, analogously as in Section 44–55 of the Commercial Code.

General provisions regulate conceptual determination of a competitor, the new Civil Code is introducing a differently formulated *definition of competitor* (in comparison to the Commercial Code), when under its

definition is understood “*who participates in economic competition*” (comp. Section 2972 of the new Civil Code). Within the comparison with the definition contained in Section 41 of the Commercial Code, according to which competitors are understood as “*natural persons and legal entities participating in economic competition, even though they are not entrepreneurs*”, then it is possible to come to the conclusion that both definitions do not differ in meaning. The concept of competitor undergoes no changes, apart from those concerning formulation. Expression “who” in the new definition of competitor (instead of “natural persons and legal entities” in the Commercial Code) represents a circle of possible entities, which participate in economic competition, and which can be comprised of natural person and legal entity”. The second part of the existing definition of competitor “even though they are not entrepreneurs” was omitted in the new definition, when this codicil can be considered to be superfluous (in constant judicature a competitor means entrepreneur and also non-entrepreneur).

Even now it is regulated that abuse of participation of competitors (own or of other persons) in economic competition inclusive of its restrictions (comp. Section 2972 of the new Civil Code and Section 41 of the Commercial Code) is forbidden. In this given provision there is no explicit expression of the right of competitors to develop freely their competitive activity, (as it was stated in Section 41 of the Commercial Code), this can be deduced directly from the rights guaranteed by the Constitution (particularly Article 26 of the Declaration of Fundamental Rights and Freedoms).

The absence of the regulation similar to Section 42 of the Commercial Code can be considered as another change, this provisions stated, that: *abuse of participation in economic competition means unfair competitive conduct (hereinafter referred to as “unfair competition”) and forbidden restriction of economic competition” and “forbidden restriction of economic competition is regulated by a special Act* (The Act № 143/2001 Coll., on protection of economic competition, as amended), at a general level – the above stated can be deduced from Section 2972 of the new Civil Code. Moreover the new Civil Code contains quite a new provision (Section 2990), which expressly states, that “*a person, whose right has been jeopardized or violated as a result of forbidden restriction of competition, has rights stated in Section 2988*”. It results from the given provision, that when a provision of the Act on protection of economic competition has been violated, it is possible to demand all claims resulting from unfair competition.

Legal regulation of effects resulting from unfair competition conducts abroad and position of foreign persons in unfair competition (Section 43 of the

Commercial Code) is contained in provisions of Section 2973 of the new Civil Code (theory of effects) and Section 2974 of the new Civil Code (position of foreign persons) only with slight variations.

Legal regulation of unfair competition in the new Civil Code, analogously as in the legal regulation contained in the Commercial Code, is also even now based on conception of ***combination of so called general non-compete clause and so called special (legal) merits of the cases of unfair competition***, however it is necessary to fulfill cumulatively all conditions of the general clause of unfair competition for classification of certain conduct to be called as non-competitive.

2. General clause and denominate merits of the cases of unfair competition

The general clause of unfair competition is contained in the provision of Section 2976 subsection 1 of the new Civil Code and consists of (as in the Commercial Code) three conditions, which must be cumulatively fulfilled in order to classify a certain conduct as non-compete (thus within the identical legislative-technical concept of legal regulation in the Commercial Code): “*Who in business contacts comes into conflict with good competitive practices due to its behavior, which may cause harm to other competitors or customers, shall commit unfair competition. Unfair competition is prohibited*”.

The changes in wording of the general clause of unfair competition are only “cosmetic”, when closed terms were omitted (conduct in economic competition, consumer) and only broader terms preserved (business contact and customer). It is possible to trace the fact from the conception of the new Civil Code in relation to unfair competition, that the significance of institute of “the general clause of unfair competition” is not disappearing, but on the contrary. With development of new marketing techniques and tactics aimed at gaining consumers, the significance of existence of such an institute is increasing, which would stand in “time” and enable to conceive a broad spectrum of various constantly evolving tactics of competitors.

If we compare the general clause of unfair competition in the new Civil Code with the general clause contained in Section 44 subsection 1 of the Commercial Code (its general clause sounded like this: “*conduct in economic competition or business contacts which is in conflict with good competitive practices and which may cause harm to other competitors, consumers or other customers*”), we shall arrive at the conclusion, that the differences are more in formulation character and relatively inconsiderable in content.

The expression “conduct in economic competition” in alternative duplicity with “conduct in business contacts” was completely omitted from the general clause of unfair competition contained in the

Commercial Code and **only the expression “conduct in business contacts”** (the new Civil Code) was retained, which is a broader term including also the expression “conduct in economic competition”.

Also the term “consumer or other customer” (the Commercial Code) was completely removed from the general clause of unfair competition and **only the expression “to customers”** (the new Civil Code) was retained. The expression “customer” includes as the term “consumer” (thus according to Section 419 of the new Civil Code only natural person, who does not act within the business activity or within the independent discharge of its office/occupation), as the term “other customer”, it means other person than consumer – i.e. also legal entity, which does not run a business, or also legal entity or natural person running a business, if they are in business contact in position of a weaker party [6] (typically if legal entity or entrepreneur in position of non-professional conclude a contract with a person, who is a professional in the given branch [7]). The new Civil Code, just as in the case of the above analyzed condition of the general clause, included only a broader term (customer) arising from two terms of the existing general clause (consumer and other customer) into the new general clause of unfair competition.

Condition of the general clause of unfair competition consisting in necessity (for qualification of conduct as non-compete conduct) of contradictoriness of a given conduct with “*morals of competition*” is retained in the new Civil Code in the same wording.

The existing judicature in the field of interpretation of the general clause of unfair competition is fully usable even after the new Civil Code became effective and it is not necessary to be afraid of discontinuity of the existing judicature (apart from new eventual approaches of courts to single questions of the general clause given by time development of opinions, alternatively by influence of European legislature or decision-making practice of the Court of Justice of the EU).

The general clause of unfair competition is in the provision of Section 2 976 subsection 2 of the new Civil Code (analogously as in Section 44 subsection 2 of the Commercial Code) supplemented with **demonstrative (ostensive) enumeration of non-compete conduct** (so called denominate, special or legal merits of the cases of unfair competition), when unfair competition means in particular the following:

- a) misleading advertising;
- b) the misleading marking of goods and services;
- c) conduct contributing to mistaken identity;
- d) parasitic use of the goodwill of another competitor’s enterprise, products or services;
- e) bribery;
- f) disparagement;

g) comparative advertising, unless it is permitted as allowable;

h) violation of business secrecy;

i) intrusive interference;

j) endangering the health and the environment.

It results from the stated enumeration of special (legal) merits of the cases of unfair competition, that all merits of the cases of unfair competition from the Commercial Code with amendment of new merits of a case of so called intrusive interference (more details further in text) remained preserved in the new Civil Code. Newly there are altogether ten legal merits of the cases of unfair competition instead of the formerly existing nine ones.

The new Civil Code undertakes provision on single merits of the cases of unfair competition from the Commercial Code rather with slight variations, apart from provision on misleading and comparative advertising and on intrusive interference [8].

Misleading advertising

Provision on misleading advertising was regulated in the new Civil Code in order to correspond to the Directive 2006/114/EC [9]. As a result of implementation of the Directive 2006/114/EC it came to *specification of facts* (in the form of demonstrative enumeration), *which court is obliged to consider within the consideration of deceptiveness of advertising* (comp. Section 2977 subsection 2 of the new Civil Code). They are not completely new “guidelines” for courts how to consider deceptiveness of advertising [10], but rather “instructions”, what everything must be taken into consideration, alternatively that court is obliged to take account of all distinct signs of advertising, especially of data, which are contained in advertising with regard to:

a) availability, nature, realization, composition, production procedure, manufacture date or provision date, capacity for the determined purpose, usability, amount, geographical or mercantile origin, as well as detailed defining and other signs of goods or services inclusive of the supposed results of usage or results and essential signs of accomplished exams and tests;

b) price and way of its determination;

c) conditions, under which the goods is delivered or service is provided;

d) nature, attributes and rights of customer of advertising, which particularly are identity, property, professional capacity, its rights of intellectual property or its awards and honours [11].

The new Civil Code is introducing a *new definition of misleading competition* of the following text: “... such advertising, which is connected with enterprise or occupation, it aims to support marketing/consumption of movable and immovable chattels or rendering of services, inclusive of rights and duties, it misleads or is capable to mislead by presentation or it misleads

persons in any other way, whom it is determined to or who are reached by it, and also evidently capable to influence business conduct of such persons" [12]. A new definition is considered to be more exact, when it contains designation of a kind of advertising (commercial advertising), communication resource ("presentation" or "any other way") and affected persons ("persons, whom it is determined to or who are reached by it) and effects on these persons ("capability of influencing of such persons' conduct").

Changes in the field of misleading advertising can be considered as beneficial, as the introduction of a new definition of misleading advertising is concerned as the introduction of demonstrative enumeration of facts, which should be considered by court within the consideration of deceptiveness of advertising (it all within the full respect for the Directive 2006/114/EC), or the introduction of common provisions on misleading advertising and misleading marking of goods and services (the novelty is a consideration of elision, abbreviations and the whole external layout), which shows close relations of both institutes.

Common provisions on misleading advertising and misleading marking of goods or services

Evidence for convergence of legal regulation of merits of the case "misleading advertising" and "misleading marking of goods and services" is in the new Section 2979 of the new Civil Code, which is newly introducing a common provision of the following wording for these both merits of the cases: "...even correct data can include capability to mislead, can mislead with regard to circumstances and relations, under which it was made" (Section 2979 subsection 1 of the new Civil Code); "also amendments are taken into consideration within the assessment of deceptiveness of advertising, particularly use of expressions as "kind", "type", "way", as well as elisions, abbreviations and the whole external layout" (Section 2979 Subsection 2 of the new Civil Code).

The new legal regulation orders to take into consideration within the assessment of deceptiveness also so called elisions (e.g. providing no relevant data or finishing text with three full stops, when this omitted text is essential and intentionally hidden), abbreviations and the whole external layout.

With regard to a close relation of both problems (misleading advertising and misleading marking of goods and services) an introducing change can be considered to be beneficial, even if "the new one" only due to systematic point of view, not due to its content.

A slight change concerning misleading marking of goods and services can be evaluated positively, where the legal regulation of unfair competition and rights to industrial and other intellectual property

became more general. So called "the regulation of catalogue frauds", which came into existence with the amendment to the Act from 2010, was omitted from the same merits of the case. Even now such conduct shall be punishable according to the general clause of unfair competition.

Misleading marking of goods and services

Merits of the case of "misleading marking of goods and services" (Section 2980) [13] remained unchanged in comparison with the legal regulation contained in the Commercial Code, apart from Section 46 subsection 5 of the Commercial Code regulating so called catalogue fraud, which was omitted ("*advertising within the business activity and for the purposes of business contact, which offers registration in catalogues, particularly as phone or other lists, by means of payment form, paying-in-slip, invoice, offer of repair or of other similar way, must contain unambiguously and clearly expressed information, that this advertising is expressly an offer to conclude a contract. This is the appropriate rule also for direct offer of such a registration*"), which was included into the Commercial Code with amendatory Act from 2010. It is relatively illogical, that the new Civil Code did not adopt also this provision into its regulation of unfair competition, which was included into the Commercial Code according to the preamble to the amendment Act from 2010 due to requirement of practice. Nevertheless the given practices are punishable according to the general clause of unfair competition, so that the given change can not be considered as crucial.

Provision of Section 2978 subsection 3 of the new Civil Code states, that "*other legal regulations on protection of industrial or other intellectual property are not affected by provisions of previous subsections*". The given provision can be considered as an analogue of Section 46 subsection 4 of the Commercial Code, according to which "*rights and duties from registered designation of origin of products, trademarks, protected species of plants and breeds of animals stated by special laws are not affected by this provision*". The new legal regulation can be considered more appropriate with regard to its universality and also broader.

Comparative advertising

Basic concept of comparative advertising according to the new Civil Code (as well as Section 50a of the Commercial Code) is in compliance with Directive 2006/114/EC, when comparative advertising is not forbidden, it only states conditions of its admissibility (comp. Section 2980 subsection 2 of the new Civil Code).

The legal regulation of comparative advertising underwent several changes as well, their conditions of admissibility were reduced from previous eight to

six and some conditions underwent not very suitable changes in formulation.

Comparative advertising remains unchanged in the new Civil Code from the conceptual point of view (Section 2980 subsection 1) [14]. Even now it means “*advertising, which explicitly or indirectly identifies another competitor or the goods or services offered by another competitor*” (subsection 1). The stated provision defines comparative advertising regardless of its admissibility or not (identically with Section 50a of the Commercial Code) [15].

Also conditions underwent some changes, under which cumulative fulfilment the comparative advertising can be considered as admissible with reference to a bigger compatibility with Directive 2006/114/EC. It can be stated, that it shall come to a certain shift from the last well done amendment to Act of the legal regulation of comparative advertising contained in Section 50a of the Commercial Code realized as a result of implementation of Directive 2006/114/EC (effective from 11st February 2008), though the preamble to the new Civil Code [16] refers to a necessity of compliance with the stated Directive.

In contrast to Section 50a subsection 2 of the Commercial Code, which contained altogether eight conditions, which had to be fulfilled for legal admissibility of comparative advertising, the new Civil Code contains only six conditions (condition concerning prohibition: “reputation parasitism” and “disparagement” were connected into one condition contained in letter e) and the condition contained in Section 50a subsection 2 letter d) of the Commercial Code consisting in prohibition “conduct contributing to mistaken identity” was removed from the Act.)

According to Section 2980 subsection 2 of the new Civil Code comparative advertising shall only be permitted provided that:

a) it is not misleading (here the new Civil Code does not respect the above stated Directive 2006/114/EC either Section 50a subsection 2 letter a) of the Commercial Code, when there is absence of present condition “it does not use misleading commercial practices as defined under a special legal regulation”, by which the Act No. 634/1992 Coll., on consumer protection, as amended, is meant;

b) it compares only goods or services meeting the same needs or designated for the same purpose (this provision remained unchanged);

c) it objectively compares only one or more essential, important, verifiable and characteristic feature(s) of the goods or services inclusive of their price (this provision underwent only “slight/cosmetic” formulation changes, when expressions “important”, “verifiable” and “characteristic” were included in the Commercial Code and “this also may include the price” – this reformulation indicates incorrectly, as if a

price must be a part of every comparison; comp. more appropriate wording of Directive on misleading and comparative advertising identical with previous wording in the Commercial Code – “which may include price”);

d) it compares the goods with designation of origin only with the goods of the same designation (this provision remained without content change, changes refer only to formulation);

e) it does not disparage a competitor, its position, its activity or its results or their designations and it does not profit from them in an unfair way (here, the two above stated previous conditions were connected into one and the expression “competitor disseminates false information” was removed, which gave a better description of the fact, that comparative advertising is not allowed to disparage only with false information, because when we accept the interpretation that it is not allowed to disparage also with true information, incidence of comparative advertising would be de facto disaffirmed – for every comparative advertising actually disparages other competitor, who has a worse position from the given comparison, which is unacceptable in context of European legal regulation and also in judicature of the Court of justice of the EU;

f) it does not offer goods or services as imitations or duplicates of goods or services bearing a protected trademark of competitor or its business name (this provision remained unchanged).

The most crucial change in legal regulation of conditions of admissibility of comparative advertising, of course no positive, represents the above quoted letter in first part (“it does not disparage...”), when according to Section 50a subsection 2 letter of the Commercial Code there was contained a condition “disparagement by means of false information” (D.O. emphasized).

Intrusive interference

The new special merits of the case of unfair competition can be found in Section 2986 of the new Civil Code, namely so called intrusive interference. Nothing else than so called unsolicited advertising is hidden under this rather “non-transparent” and also inaccurate designation, which was formerly punishable according to the general clause of unfair competition (further this problem case may be punished for example according to the Act № 40/1995 Coll., on regulation of advertising, as amended [17] the Act on consumer protection as aggressive unfair business practices or the Act № 480/2004 Coll., on some services of information company, as amended [18]).

The name of the new stated merits of the case does not respect the existing inveterate practice of use “unsolicited advertising”.

According to Section 2986 subsection 1 of the new Civil Code intrusive interference means “*conveying information on competitor, goods or services, as well as offer of the goods and services with use of phone, fax appliance, electronic post or similar means, though a receiver does not evidently wish such an activity, or conveying advertising, in which data are kept back and disguised by its author, according to which this author can be found out, it does not state, where a receiver can order termination of advertising without any special costs*”. The given definition concerns the cases, which are “covered” in the Czech legal regulation with the Act on some services of information company.

According to Section 2986 subsection 2 of the new Civil Code it is the rule, that “*...if advertising is sent at electronic address, which entrepreneur gained in connection with sale of goods or rendering of services, it is not intrusive interference, if entrepreneur uses this address to direct advertising for own goods or services and other party did not forbid advertising, though entrepreneur gave notice of the right to order termination of advertising without any costs to a receiver when entrepreneur received the address or then in every case of its use to advertising*”. This provision comes out from similar concept, which is used by the present Act on some services of information company therewith, that the Act on some services of information company contains moreover condition of distinctive designation of such a notification as “business message” (comp. Section 7 subsection 4 of the stated Act).

It is thus incomprehensible, why issues of unsolicited advertising, and it spread only by electronic means (in contrast to other evidently or “legally” unregulated unfair competition judicial merits of the case), was included into legal merits of the cases of unfair competition, when it is as one of the original judicial merits of the cases of unfair competition expressly affected by rights against unfair competition and in detail it is regulated by other legal regulation (here the Act on some services of information company and the Act on consumer protection).

Other merits of the cases

The remaining merits of the cases, thus merits of the case **conduct contributing to mistaken identity** (Section 2981 of the new Civil Code) [19], **reputation parasitism** (Section 2982 of the new Civil Code) [20], **bribery** (Section 2983 of the new Civil Code) [21], **disparagement** (Section 2984 of the new Civil Code) and **breach of business secrecy** (Section 2985 of the new Civil Code) [22] underwent slight alternations, to which it is not possible to pay a bigger attention with regard to extent of this contribution. Without comprehension, also merits of the case “**endangering**

the health and the environment” (Section 2987 of the new Civil Code) [23] remained preserved in the Act, though it is exceptional in international context and it is designated as inanimate by the professionals, which can be documented with zero judicature in this field.

The changes in wording of the general clause of unfair competition are only “cosmetic”, when closed terms were omitted (conduct in economic competition, consumer) and only broader terms preserved (business contact and customer). It is possible to trace the fact from the conception of the new Civil Code in relation to unfair competition, that the significance of institute of “the general clause of unfair competition” is not disappearing, but on the contrary. With development of new marketing techniques and tactics aimed at gaining consumers, the significance of existence of such an institute is increasing, which would stand in “time” and enable to conceive a broad spectrum of various constantly evolving tactics of competitors [24; 25; 26].

3. Legal means of protection against unfair competition

Provisions on legal means of protection against unfair competition are regulated only in two provisions – Section 2988 and 2989 of the new Civil Code.

Catalogue of legal means of protection against unfair competition remains the same as it was in Section 53 of the Commercial Code, thus “*person whose rights have been jeopardized or violated as a result of unfair competition, can demand that the offender refrains from such conduct and eliminates the improper state of affairs.; it can also demand appropriate satisfaction, which may be rendered in money, compensation for damage and the surrender of unjustified enrichment*”. (Section 2988 of the new Civil Code).

Cardinal novelty in the law against unfair competition is the fact, that a *claim for compensation for damage* (but also claim for appropriate satisfaction (!) – comp. Section 2894, 2895 and 2911 of the new Civil Code) is newly based on *subjective principle* (comp. Section 2910 of the new Civil Code), thus commencement of a duty to compensate for damage caused by unfair competition conduct shall be bound on the fault of offender. This is a crucial shift from the existing legal regulation (Section 373 in link to Section 757 of the Commercial Code), which conceived the responsibility for damage on objective principle. Although the provision of Section 2911 of the new Civil Code reduces the given rigidity by so called legal presumption of negligence (*if a malefactor causes damage to an aggrieved person by breach of legal duty, it is assumed, that it caused the damage due to its negligence*), it is also assumed,

that the stated regulation of subjective principle shall complicate successfulness of application of both claims in the field of unfair competition than it has been up to now. In this connection it is necessary to point out, that subjective principle only refers to a claim for compensation for damage and acknowledgement of appropriate satisfaction, but no to general concept of legal responsibility for unfair competition conduct (objective principle remains preserved there even now).

As **active legitimate person** can act competitor, consumer and legal entity entitled to protect the interests of competitors (e.g. chambers of commerce) or of customers (e.g. association for protection of consumer), who can apply only right that an offender refrains from illegal conduct and remove unfair competition conduct, namely it with exception of cases stated in the provision of Section 2982 – 2985 (reputation parasitism, bribery, disparagement and breach of business secrecy). In contrast to the previous legal regulation (comp. Section 54 of the Commercial Code) possibility of the existing legal entity to demand claims in affairs of forbidden comparative advertising can be considered as a change for the better, which was not formerly possible due to previous legislative-technical mistake of legislator.

Even now **reversal of burden of proof occurs** (direct from the law), if plaintiff is simultaneously a consumer. Not even the new regulation *is in compliance with regulation contained in the Directive 2006/114/EC and Directive 2005/29/EC*, for these count in their texts with the fact, that courts or administrative bodies shall have the possibility to reverse burden of proof then, if it corresponds with procedural situation (moreover the Directive 2006/114/EC gives a possibility in its Article 6 to reverse burden of proof without existence of the fact, that plaintiff is a consumer, for in some disputes even a person in position of competitor or customer can be found in a weaker position, just as consumer).

The stated reversal of burden of evidence occurs (on the basis of Section 2989 subsection 2 of the new Civil Code) only as for the merits of the cases according to Section 2976–2981 of the new Civil Code and Section 2987 of the new Civil Code, thus in case of conduct punishable according to the general clause of unfair competition (Section 2976 of the new Civil Code), misleading advertising (Section 2977 of the new Civil Code), misleading marking of goods or services (Section 2978 of the new Civil Code), conduct contributing to mistaken identity (Section 2981 of the new Civil Code), endangering the health and the environment (Section 2987 of the new Civil Code) and newly also merits of the cases of comparative advertising (Section 2980 of the new Civil Code). However, the stated enumeration does not include provision of Section 2986 of the new

Civil Code regulating merits of the case of *intrusive interference*, that can strike the consumer rights, which can be considered as a crucial omission of legislator, for these merits of the case affects a consumer very often.

According to the new Civil Code (section 2988) the reversal of burden of proof in favor of consumer occurs in case of a claim for abstention and claim for removal of the improper state of affairs, the new legal regulation *does not count with a possibility that reversal of burden of proof in favor of consumer shall occur also in case of a claim for appropriate satisfaction and in case of the surrender of unjustified enrichment* (particularly when a claim for the surrender of unjustified enrichment and compensation for damage are from the view of substantiation of the facts at very similar problematic level for plaintiff – here consumer), but it counts only with giving evidence on the part of offender, that within the claim for compensation for damage the damage has not been caused due to unfair competition.

4. Forbidden non-compete clause

So called **forbidden non-compete clause** (Section 2975 of the new Civil Code) is included into general provisions on abuse and restriction of competition, which is applicable for all contractual types and innominate contracts (except those contractual types with special regulation – e.g. contract on trade agency), and can be considered as a novelty. According to the stated provision it is determined (subsection 1), that if “*no area, range of activities and circle of persons are contained in provision forbidding competitive activity to other entity, non-compete clause is not taken into account*”. The second subsection states, that “*non-compete clause agreed for an indefinite time or for a time exceeding 5 years is forbidden; if this ban has been violated, it is assumed, that non-compete clause was agreed for a period of five years*”. The third subsection of the stated provision forbids “*non-compete clause restricting bound party more than necessary protection of entitled party requires; if this ban has been violated, non-compete clause may be restricted, cancelled or declared for invalid by court on the proposal of affected party*”. The new legal regulation can be more acknowledged in this respect, when relation of non-compete clauses and competitive law hereby becomes more obvious and better arranged [24; 25].

5. In conclusion to the regulation of unfair competition in Czech Republic after re-codification

Legal regulation of so called forbidden competitive clause is newly included into the general provisions of unfair competition. The given change can be evaluated as systematic than content conceptual.

Rather with embarrassment, it is possible to take a stand on adoption of the new special (legal) merits of

the case of unfair competition – so called intrusive interference (unsolicited advertising spread by means of electronic communication), namely it as in relation to conceptual indefiniteness of this institute as to detailed regulation contained in the Act of some services of information company and the Act on consumer protection (so called aggressive unfair business practices). It is a question, why just so called legal merits of the case arose from these innominate, judicial merits of the case, when other merits of the case exist on the other hand, which are not expressly forbidden in any legal regulation and whose danger is not less important (e.g. hidden advertising, inappropriate forms of tempting customers, prohibitive competition and many others).

At first sight the legal regulation of means of protection against unfair competition did not undergo crucial changes, which appear only with detailed investigation of these provisions.

Consideration of merits of the case of comparative advertising in relation to active legitimacy of legal entities entitled to protect the interests of competitors or customers (in contrast to the Commercial Code) seems to be a good change, but this one is illogically missing within the merits of the case of intrusive interference (in relation to the merits of the case the reversal of burden of proof does not occur either, apart from other

merits of the case, which affect it directly) [26].

On the contrary the absence of the reversal of burden of evidence in case of claim for an appropriate satisfaction and the surrender of unjustified enrichment can be detrimental to a consumer (preserving reversal of burden of proof within the claim to restrain and to remove and to prove infliction of damage within the claim for compensation for damage).

Strong change is an adoption of subjective principle with the claim for compensation for damage and appropriate satisfaction (bond on culpability within the application of legal presumption of culpability).

Practical impacts of the new legal regulation will show application practice of courts, for (not only, but foremost) there is the rule in the law against unfair competition, that interpretation of legal text (provision on unfair competition), particularly interpretation of the general clause, are more significant than legal text itself. The significance of judicature in the field of unfair competition is (and there is no reason that it should be otherwise in future) considerable and it shall remain even after the new Civil Code becomes effective. Crucial is the fact, that the existing judicature from the field of unfair competition shall be fully usable in vast majority of cases also in future.

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