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## Concept Paper: Consumer Protection Laws in Bulgaria

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# CONCEPT PAPER

## CONSUMER PROTECTION LAWS IN BULGARIA†

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† This article was prepared as a concept paper on consumer protection for Bulgaria created under the auspices of the American Bar Association, Central and East European Law Initiative (CEELI). It is the cumulative work of numerous legal scholars and attorneys who have provided their expertise in this area. The contributing authors are as follows: Lionel M. Allen, Esq., ABA Small Business Sub-Committee Chair, Business Law Section; Prof. Vincent Brannigan, Univ. of Maryland College Park, School of Engineering; Janet Crosson, Esq., Federal Reserve Board - Law Division; Bruce D. Ensor, Esq., Fulton, MD; Helen Jaffe, Esq., Weil, Gotshal & Manges, New York; Prof. M. Stuart Madden, Pace Univ. School of Law; Prof. James R. McCall, Hastings College of Law; Elena Mola, Esq., McDermott, Will & Emery, Washington, D.C.; Prof. James P. Nehf, Indiana Univ. School of Law - Indianapolis; Holly Polgase, Esq., Holly Polgase-Campbell & Assoc., Cambridge, MA; Prof. Norbert Reich, Zentral fuer Europaeische Rechtspolitik, Universitaet Bremen; David L. Scull, Esq., ABA Rights of Consumer Chairman; Individual Rights and Responsibilities Section; Robin Silverman, Esq., Weil, Gotshal & Manges, New York. John C. Knechtle, Esq., CEELI Legal Assessments/Concept Papers Project Director, assisted in the production and publication. The article appears in substantially the same form as originally submitted to the Bulgarian government. The introduction was provided by William D. Meyer, Esq. The footnotes have been provided by Bruce D. Ensor, Esq., Prof. M. Stuart Madden and Prof. James Nehf.

## Overview of the CEELI Bulgarian Project

William D. Meyer††

Graffiti adorned the empty mausoleum of the embalmed Communist leader. A few feet away, vendors hawked memorabilia ranging from party medals to battle flags. Down the street, tiny shops selling long-unavailable foreign consumer goods blossomed in the garages of Stalinist-style apartment blocks. Passing by, the elderly *babichka* shook her head in disbelief at the changes of the past few months.

Democracy and the marketplace had come to Bulgaria. For a society where orderliness and state control had been a watchword for decades, freedom became a synonym for anarchy. Tyranny may have disappeared, but the new disorder was scant improvement for many Bulgarians. The crushing problems of the transition coupled with the lack of rudimentary knowledge concerning solutions available to democratic societies left the nation struggling to establish a framework for reform.

One of the most ambitious Western initiatives aimed at filling these voids is the American Bar Association's Central and East European Law Initiative (CEELI), which has harnessed the combined talents of members of the ABA to provide technical assistance throughout Central and Eastern Europe, the Baltics and the NIS. Under CEELI's auspices, American lawyers, judges and professors have held workshops, commented on draft laws, and generally provided assistance to reformers in these post-Communist societies. As an attorney from Boulder, Colorado, I served on the first long-term CEELI mission to the region. In my role as the CEELI liaison to Bulgaria from September of

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1991 to September of 1992, I dealt with a wide variety of projects ranging from legislative drafting to judicial reform to legal education to privatization.

In many instances, our work brought us into close contact with reformers who were preparing draft laws to govern the emerging market economy. At their request, we frequently sent these drafts for comments by panels of experts drawn from throughout the ABA. While these comments were extremely useful, one drawback became apparent: by the time comments on a draft law were received, the political process often had progressed to a point where making major conceptual revisions to the draft was quite difficult. Yet, because the drafts were prepared by local officials with scant knowledge of the subjects they were seeking to regulate, these drafts and later the substantive laws frequently contained significant conceptual flaws.

Some aid programs sought to resolve this problem by recommending or, in some cases, coercing the government to either let Western lawyers draft their laws, or simply translate and pass existing statutes from some Western country. Aside from the resentment it caused among a proud people, this approach also created turmoil since transplanted Western laws seldom fit the needs, existing legal structure and culture of the nation. Any transparently Western law had little chance of successful implementation, since it neither had indigenous legitimacy nor was supported by a reservoir of expertise capable of applying its concepts.

The better solution was to support indigenous efforts to draft appropriate laws. Political realities, however, required input at an earlier conceptual stage, before drafts became political documents with the attendant personal and professional baggage.

To meet this need in Bulgaria, in June of 1992 then-Deputy Prime Minister Ilko Eskenazi and I agreed that CEELI would develop a series of "concept papers" in areas where the government was anticipating but had not yet begun drafting laws. These papers had three purposes: to identify issues inherent in a law on a particular subject, to highlight current trends and solutions to these issues, and to provide a basic conceptual outline for use in preparing a draft law. Using this approach, Bulgarians could benefit from Western experience and yet retain the ability

to choose appropriate solutions from a variety of options. Where needed, more specific assistance could be provided as the drafts became defined and the issues sharpened. Furthermore, under this approach, Western lawyers could work as partners with our colleagues in the East, rather than appearing to impose any specific solution upon them.

One area of particular interest for Mr. Eskenazi was the regulation of private merchants. The swift change from state-run merchandising to the apparent anarchy of unrestrained capitalism frightened those more comfortable with the security of the old system. Public outcry was pressuring the government to act, but reformers, whose only experience was with the old controlled economy, had little home-grown expertise on the appropriate way to regulate market chaos.

At Mr. Eskenazi's request, CEELI prepared the following concept paper, which was delivered to the Bulgarian government in early 1993. While Parliamentary instability has slowed the pace of structural reform, the widespread dissemination of the concept paper and the follow-up by CEELI personnel stationed in Bulgaria suggest that it will provide the basis for upcoming legislation.

Because concept papers are utilized in the formative stages of long-range projects, their ultimate impact may be difficult to assess. Perhaps the best gauge is the eagerness of foreign officials for access to these resources. At present, numerous concept papers have been prepared for Bulgaria, Albania, Estonia and Russia, and have been distributed to additional countries facing similar issues.

No one should underestimate the challenges facing post-Communist societies emerging into the wondrous imperfection of the democratic, market-driven world. Hopefully, with patience, imagination, and a modicum of luck, initiatives like the concept papers can nudge these transitional societies toward a safe and prosperous tomorrow.

## PREFACE

This concept paper sets forth a number of recommendations on consumer protection issues that arise in a developing market economy. To present the complex subject of consumer protection laws in a useful manner, the editor and contributors have segregated various consumer protection topics into three developmental phases. In the beginning phase, activity should focus on the development of simple legal structures designed to achieve a minimal level of consumer protection. The recommendations include the development of a consumer small claims court system and the registration and regulation of street vendors. The goals during this phase should be to establish consumer and vendor confidence in the fairness of the marketplace and encourage vendor initiative. During the second or intermediate phase, more complex legal structures should be implemented to address such issues as consumer product safety and unfair contract issues. During the third or advanced phase of development, Bulgaria should seek to advance its consumer protection regime to the standards of leading market economies. At this stage, it would be appropriate to develop more specific product standards, consumer credit regulations and restrictions on false advertising. A continuing reevaluation of existing governmental regulation is advisable during all phases to ensure which consumer protection laws are consistent and effective.

## I. INTRODUCTION

The development of a market economy in a former socialist state requires the provision of numerous legal structures. Courts, lawyers, laws and regulations are essential to create a flourishing market economy. One of the key structures provided in most modern market economies is consumer protection. "Consumer protection" covers a broad range of activities including policies, statutes, regulations and voluntary self-policing by vendors and service providers. The unifying factor of all these activities is the protective effect they have (or are intended to have) on individuals who buy goods and services for personal or family use at home, in recreation or for transportation.

Consumer protection is justified on two primary grounds. First, it promotes a more efficient functioning of the market by compensating for the imbalance between consumers and sellers. Consumers are generally isolated individuals who do not have the substantial resources or routine access to government and courts, unlike business organizations. Furthermore, sellers often have dramatically superior information, while the cost of acquiring such information may be prohibitive to consumers. Absent legal protection to compensate for the unequal bargaining power between consumers and sellers, the market will fail to reflect consumers' desires and may even plunge into a state of utter chaos. In this sense, consumer protection is related to antitrust law in that they both structure the marketplace to protect the integrity of the free market itself.

The second justification for consumer protection is the societal recognition of the right of consumers to be protected from dangerous goods and deliberate attempts by vendors to exploit the consumer's weaker position. Legal structures are created to protect consumers from harmful substances such as defective foods and drugs. Some consumer protection laws, especially those concerning gambling, smoking, alcohol, drugs and prostitution, involve societal judgments that such forms of consumption are against public policy. Consumer protection regimes may also seek to protect consumers from making costly and dangerous mistakes because of a lack of information as to the quality and usefulness of the product or service they acquire. The intended effects of these socially motivated forms of regulation are the promotion of consumer confidence in the safety and justice

of the marketplace, and indirectly, the prevention of social unrest.

Consumer protection can be accomplished in several different ways and involves many areas of the legal and social system. A threshold determination will be whether a particular consumer protection issue should be addressed through the legal system. For example, consumer education is a desirable function but is normally outside the scope of consumer law. Also, consumer organizations may either be "established" by law to protect consumers' interests or by voluntary organizations which are primarily involved in consumer education.

This paper concentrates on one aspect of consumer protection law. A working definition of "consumer protection law" is "the mandatory power of society that defines the environment for the purchase and use of property and services by individual consumers in their homes, recreation and transportation." Inevitably, all consumer protection laws have an effect on individual consumer choice. In the United States, consumer protection laws do not constitute a single body of law such as torts, contracts or real property. "Consumer protection law" encompasses provisions in many legal areas and is defined solely by the special recognition of the consumer in those provisions. That situation is, however, simply a function of history and there is no reason why Bulgaria could not adopt a single comprehensive consumer protection code.

## II. CONSUMER PROTECTION LAWS IN TRANSNATIONAL ECONOMIES

Especially in the early stages of the creation of a market economy in a former command economy,<sup>1</sup> existing free-market models of political, social or legal behavior may not be appropriate or relevant. Instead, the period of transition from a command to a market economy should be viewed as a separate phase of economic development. Moreover, any regulatory system must be evaluated in terms of its effect on the transition and not compared with similar systems in more highly developed market

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1. A "command economy" is an economy in which the government controls all aspects of the marketplace - i.e. production levels, price levels, price subsidies, and government support and control over industry and the marketplace.



economies.

Market conditions such as chaos, for example, should not be treated as they might in an established market economy. In fact, any attempt to directly reduce market chaos by regulation may be counter productive. Market chaos itself does not indicate market failure. Few trading environments appear more chaotic than the Chicago Board of Trade where futures contracts for agricultural commodities are bought and sold in a riotous scene of screaming and waving.

Consumer protection regulations, by definition, create barriers to business entry in the market place. Thus, especially in the early phases of the transition period, when business creation is a primary economic goal, Bulgaria must balance its consumer protection laws against the economic goal of stimulating market participation and business investment. This paper divides the transition into three phases and suggests legal structures that may be appropriate in each phase.

#### *A. Beginning Phase*

The beginning phase is characterized by a chaotic environment where individual entrepreneurs may personally import goods and sell them for cash. There is considerable potential for the exploitation of naive consumers. At this stage, regulatory efforts should be concentrated on preventing health and safety disasters and preventing exploitation by foreign vendors. These goals will be significantly furthered by establishing mechanisms for the registration of businesses and for informal dispute settlement.

With respect to foreign vendors, it is important to discourage or prevent entrepreneurs from more sophisticated marketplaces from exploiting the fledgling Bulgarian free-market system. Thus, Bulgaria would be advised to create not only new substantive legislation and regulations, but also jurisdictional bases whereby Bulgaria can enforce its consumer protection policies against foreign entities that engage in business in Bulgaria or with Bulgarian nationals. Additionally, Bulgaria should take full advantage of its status as a signatory to a variety of international treaties and conventions to force compliance with its laws and policies.

### 1. *Registration and Regulation of Street Vendors*

Many developing market economies begin with small traders who peddle their wares on the street. When these vendors achieve commercial success, they often assemble into more formal markets and marketing firms. In Washington, D.C., street vendors sell clothing, jewelry, leather goods, hardware and many other products from stands along the most prestigious streets in the capital. These street vendors are registered with the municipal government and the permitted spaces for trading are taken each day on a first-come-first-serve basis.

As a matter of public policy, this type of commercial activity should be encouraged. The street vendor can gain valuable business training and experience while serving the public need for goods at a reasonable price. This type of business operation does not require large amounts of capital outlay and business risk is limited to the entrepreneur's investment in the goods in his or her possession. Because street vendors are not burdened with overhead costs, the price of goods that are sold is typically less than a shop owner would charge.

In formulating consumer laws regarding street vendors, consideration should be given to a registration regime, whereby all street vendors would be required to register with local governmental authorities for operation permits. This registration process would permit the local government and consumers to locate merchants in the event of a consumer protection problem, such as the safety or quality of the goods sold. Registration of merchants would also facilitate a dispute resolution system, whereby small consumer complaints could be heard by an informal court or tribunal thereby reducing the burden on the "ordinary" court system.<sup>2</sup>

In many states and municipalities in the United States, street merchants are required to post their operation permit in a conspicuous manner. Typically, each permit includes an assigned permit number, a photograph of the merchant, a permanent address and the type of goods that the merchant is authorized to sell. Registration of merchants permits the government to regulate certain activities of each individual merchant. Public

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2. See discussion *infra* part II.A.2.

policy decision-makers, however, should exercise care in balancing the public need to ensure the safety and quality of goods sold in the marketplace with the need to stimulate the economy by encouraging entrepreneurs to enter the market.

Specific zoning ordinances could be considered to regulate the time and place that market vendors could operate in order, for example, to preserve historical sites or government buildings. Here too, care must be exercised to not unduly restrict street vendors. No regulation should act as an absolute barrier to entry for the retail sale of goods, particularly in economies with high unemployment rates. Small business entities in western industrialized countries normally are credited with producing the largest number of new jobs in the marketplace.

## *2. Consumer Claims Court Structure*

The establishment of an efficient and effective "small claims" court mechanism will contribute greatly in furthering the goal of consumer protection. Small claims courts generally hear cases in which a relatively small amount of money is at stake. Procedures in a small claims court are simplified. The consumer can file a case at little or no cost, the parties need not file written legal briefs or comply with formal rules of evidence and trial procedures and the consumer generally does not have to hire a lawyer. The small claims judge simply hears the testimony of both parties and others who have knowledge relevant to the dispute, and either attempts to mediate a compromise or makes a decision in favor of one party. Because procedural rules are relaxed and the parties present their cases without professional assistance, there may be a slightly greater risk that the decision will be inconsistent with some legal doctrine. Error on the part of the decision-maker, however, will not cause as great a burden on the losing party because the disputed amount will be small. The benefits of a simplified procedure may therefore justify the increased possibility of error.

Establishing the appropriate maximum jurisdictional amount for the small claims court should depend on a variety of factors, including the income of the average Bulgarian citizen in relation to the cost of the consumer good or service, the cultural and political importance of rendering decisions in a prompt manner without incurring unnecessary social costs, and the rela-

tive difficulty (and expense) of pursuing a remedy through the regular court system. Typically, small claims consumer cases involve issues of commercial law, private contracts, property rights and minor personal injuries. Other types of small claims cases might include landlord-tenant disputes, family law (e.g., divorce and adoption), and decedent's estates. Many jurisdictions, however, opt to have a separate small claims court for each of these legal subjects and rely on the expertise of a judge versed in the substantive law of that particular legal area.<sup>3</sup> Bulgaria may wish to use a distinct small claims court for consumer-merchant disputes over defective goods and services unless there are a sufficient number of available judges who are competent to decide in all of these diverse areas of law. For most small claims courts, any product that is moveable and can be hand carried into court will fall within the jurisdiction of the small claims court. If such small claims courts are established in Bulgaria, the appropriate level of jurisdiction initially might be based on one month's wages of the ordinary Bulgarian citizen.

An important component of an effective small claims court system is the procedure for appeals. In the United States, disappointed small claims litigants typically have an automatic right of appeal to the first level of the ordinary courts. The losing party may have a right to have the case retried in its entirety by the first level court, or the appeal may be limited to reviewing whether the small claims judge made errors interpreting the law (e.g., erroneously deciding that merchant's contract disclaimer of liability is enforceable). As a practical matter, most cases are not appealed because the appeal will cost more than the amount in dispute. Another alternative for appellate review would be an appeal to a three-member arbitration panel including lay persons, law students or lawyers who would hear the dispute as an informal trial but whose final decision would be binding on all

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3. For example, subject matter jurisdiction is exclusive in the District Court of Maryland for landlord/tenant and replevin cases by statute. Jurisdiction is also exclusive in the District Court of Maryland for all claims under \$2,500.00 by statute. MD. CODE ANN., CTS. & JUD. PROC. §§ 4-401, 4-404, 4-405 (1993). The District of Columbia Superior Court also has a landlord/tenant division, which only hears those cases. Often, courts will assign one judge per county or local jurisdiction to hear the landlord/tenant cases for the period of one month, etc., depending on how the respective court system decides to allocate its judges.

parties. Such an arbitration board could also consist of randomly selected members of the population at large. This type of arbitration review panel would help to eliminate pressure on the ordinary court system and would act as a check in the event that a small claims judge was improperly influenced in rendering his or her decision. Even in the situation where the three-member arbitration panel had rendered its "final" decision, the ordinary court, upon petition by either party, could agree to waive that "final" decision for those cases that involved substantial social interests or legal issues of first impression. In any event, when Bulgaria considers which approach to use, it should consider the social costs involved, the expenses of the parties in relation to the amount in controversy and the desire to avoid backlog in the trial court's docket with cases involving small amounts of money.

In the United States, the small claims litigant is required to pay filing fees, summons fees and service of process fees. Bulgarian authorities may, however, wish to ensure full access to the small claims courts, even to those individuals who are unable to pay, by eliminating or reducing such fees.

One simple way to eliminate the summons and service of process fees is by eliminating the necessity of service of process. Generally speaking, the plaintiff must notify the defendant that a case has been filed against him. This is usually done by a "process server" locating the defendant, handing him the complaint, and making an appropriate record. This process can be time consuming and relatively costly in small cases, especially when the defendant is a transient merchant who does not have a permanent place of business. This problem could be solved by substituting a "merchant return day" system. For all ordinary transactions, a merchant would be required to issue the consumer a receipt, which at the minimum would identify the merchant, list the quantity and type of goods sold, the purchase price, and include the merchant return day (e.g., the third Wednesday of every month). Forms for these receipts could be provided by the local tax authority or commercial merchant licensing authority and would only be given to merchants who were properly registered with the appropriate governmental authority. Each merchant would be assigned a "merchant return day" on which all consumer complaints would be heard by the

small claims court for that particular merchant. Consumers would need only to inform the court prior to that day that they intended to be present to make a complaint against the merchant. Merchants who refused to attend the merchant return day would have judgments placed on the record against them and all judgment amounts would be required to be satisfied prior to the merchant receiving additional receipt booklets. Merchants seeking to appeal an adverse decision would be required to post a bond in the amount of the judgment against them with the small claims court prior to receiving additional receipt booklets for the next month. This receipt system would reduce procedural costs and obstacles for consumers and would ensure that judgments would be satisfied if the merchant wishes to continue as a licensed business.

### 3. *Beginning Phase Summary*

In summary, the transitional strategy during the first phase should be to: (1) ignore chaos as a necessary stage; (2) register businesses with as little bureaucracy as possible; (3) solicit input from businesses and consumers as to what are critical problems; (4) gain confidence from entrepreneurs and consumers that the goal is a stable functioning market; and (5) provide an effective but informal dispute resolution system to promote confidence in the rule of law.

### B. *Intermediate Phase*

As the economy improves and consumers and businesses gain greater confidence and comfort with the new market system, Bulgaria may wish to take a more sophisticated regulatory approach to high priority consumers problems. Of particular importance will be health and safety regulation. Many consumer products such as pesticides, cleaning products and food additives contain potentially harmful chemicals. Tools, appliances and even toys may be dangerous to the users. While the first phase, the regulatory regime, focused on health and safety disasters, in the intermediate phase, additional regulation should seek to protect individual consumers from hazardous and unsafe products.

In addition, at this stage of economic development, Bulgaria

may wish to adopt a rudimentary code of laws defining consumer rights in simple transactions. Although it may be premature to adopt comprehensive laws with respect to unfair contract terms, government, business leaders and consumer groups can begin to work together to create desirable contract standards.

### 1. *Regulation of Product Safety*

An important function of consumer law is to protect consumers from hazardous and unsafe products. In the United States, a cluster of federal agencies share roles in the government regulation of product safety concerns. The Consumer Product Safety Commission ("CPSC"), one such agency, has a product safety mandate that touches several core, serious and systematic product safety hazards.<sup>4</sup> Generally, the CPSC is empowered to promulgate or effectuate standards, impose bans, create reporting requirements, develop or effectuate labeling requirements and pursue enforcement orders against manufacturers and other sellers of a wide range of products.<sup>5</sup>

The CPSC has regulatory authority over "consumers products," defined to include most products used in the home, in school, or in recreation. Significantly, the CPSC does not have jurisdiction over tobacco products, motor vehicles, pesticides, aircraft and aviation products, boats, prescription drugs, medical devices, cosmetics, food or firearms. Regulatory authority over these latter categories of products is vested in other governmental agencies.<sup>6</sup>

The stated purposes of the CPSC are: (1) to protect the public against unreasonable risks of injury associated with consumer products; (2) to assist consumers in evaluating the comparative safety of consumer products; (3) to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations; and (4) to promote research

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4. Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083 (1988 Supp. III 1991) [hereinafter CPSA].

5. See CPSA § 8, 15 U.S.C. § 2057 (1988 & Supp. III 1991) (Hazardous Product Bans); CPSA § 7, 15 U.S.C. § 2056 (1988 & Supp. III 1991) (Product Safety Standards); CPSA § 14, 15 U.S.C. § 2063 (1988) (Labeling); CPSA § 20-22, 15 U.S.C. §§ 2069-2071 (1988 & Supp. III 1991) (Civil Penalties, Criminal Penalties, Injunctive Relief and Seizures).

6. CPSA § 3(a)(1)(A)-(I), 15 U.S.C. § 2052(a)(1)(A)-(I) (1988).

and investigation into the causes and prevention of product-related deaths, illnesses and injuries.<sup>7</sup> While the "conflict" minimizing reference of part (3) and the research and development mandate of part (4) may have only a secondary or future pertinence to Bulgaria, the purposes set forth in parts (1) and (2) are central and thematic to national product safety concerns even at an intermediate phase of economic development.

The CPSC administers the Consumer Product Safety Act ("CPSA"),<sup>8</sup> the Federal Hazardous Substances Act ("FHSA"),<sup>9</sup> the Flammable Fabrics Act ("FFA"),<sup>10</sup> the Poison Prevention Packaging Act ("PPPA")<sup>11</sup> and the Refrigerator Safety Act ("RSA").<sup>12</sup> Under the CPSA, the Commission has implemented bans of (1) paint and certain other consumer products that contain lead and (2) consumer products that contain respirable asbestos.<sup>13</sup> Pursuant to this law, the CPSC has also issued standards affecting matchbooks and installation of potentially flammable cellulose insulation.<sup>14</sup> Pursuant to the FHSA, the Commission has issued standards regarding fireworks (including some banned components), baby toys, cribs, crib accessories and bicycles.<sup>15</sup> Under the FFA, the CPSC has implemented important regulations, including standards and explicit testing protocols, for the flammability of: clothing textiles, vinyl plastic film, children's sleepwear, carpets and rugs, and mattresses and mattress pads.<sup>16</sup> Pursuant to the PPPA, the Commission has adopted special packaging requirements, often related to avoidance of accidental juvenile exposure, for such products as: aspirin, furniture polish, methyl salicylate, sodium and potassium

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7. CPSA § 3(a)(1)-(4), 15 U.S.C. § 2052(a)(1)-(4) (1988).

8. CPSA, *supra* note 4.

9. Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-77 (1988 & Supp. III 1991).

10. Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (1988 & Supp. III 1991).

11. Poison Prevention Packaging Act of 1970, 15 U.S.C. §§ 1471-76 (1988).

12. Refrigerator Safety Act, 15 U.S.C. §§ 1211-14 (1988).

13. 16 C.F.R. § 1304 (1992).

14. 16 C.F.R. § 1209 (1992).

15. 16 C.F.R. § 1507 (1992) (fireworks); 16 C.F.R. §§ 1510, 1511 (1992) (baby toys, baby rattles, and pacifiers); 16 C.F.R. § 1508, 1509 (1992) (baby cribs); 16 C.F.R. § 1501 (1992) (crib mobiles, crib gyms, etc.); and 16 C.F.R. § 1512 (1992) (bicycles).

16. 16 C.F.R. § 1610 (1992) (clothing textiles); 16 C.F.R. § 1611 (1992) (vinyl plastic film); 16 C.F.R. §§ 1615-1616 (1992) (children's sleepwear); 16 C.F.R. §§ 1630-1631 (1992) (carpets, rugs); 16 C.F.R. § 1632 (1992) (mattresses and mattress pads).



hydroxide, turpentine, lighter fuel and certain prescription drugs.<sup>17</sup>

As an initial step, Bulgaria may wish to adopt, or to expand existing regulation to establish safety standards focused upon a small number of widespread product risks. First-tier or priority endeavors should include regulation of systematic risks, such as products containing lead and asbestos, and protection of vulnerable segments of a population, such as infants, children or the elderly. Specific regulated products and risks may include leaded paint, matchbooks, asbestos-containing products, children's toys and cribs, flammability of children's sleepwear, flammability of carpets and mattresses and the labeling and packaging of certain poisons. As an informational and educational endeavor, Bulgaria may wish to establish a telephone "hot-line" similar to the one established by CPSC for citizens to report emerging product risks or injuries or to learn of information concerning the same.

In the future, Bulgaria may wish to enact laws concerning the regulation of warranties. For example, for sellers wishing to describe their products as having a "full" warranty, the Magnuson-Moss [Warranty] Act,<sup>18</sup> administered by the Federal Trade Commission provides explicit *minimum* standards for consumer remedies and warranty duration.<sup>19</sup> The Magnuson-Moss Act also creates a framework through which manufactures and others offering warranties can fashion an alternative dispute-resolution or settlement "mechanism."<sup>20</sup> An approved "mechanism" can relieve pressure on the judiciary by requiring that "product disappointment" claims first be handled through a less formal and nonjudicial forum.

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17. 16 C.F.R. § 1700.14(1) (1992) (aspirin); 16 C.F.R. § 1700.14(2) (1992) (furniture polish); 16 C.F.R. § 1700.14(3) (1992) (methyl salicylate); 16 C.F.R. § 1700.14(4) (1992) (sodium and potassium hydroxides); 16 C.F.R. § 1700.14(5) (1992) (turpentine); 16 C.F.R. § 1700.14(6) (1992) (lighter products); 16 C.F.R. § 1700.14(7) (1992) (certain prescription drugs).

18. Magnuson-Moss Warranty Act, 15 U.S.C. §§ 45, 46, 49, 50, 52, 56, 57a-57c, 2301-2312) (1988) [hereinafter Magnuson-Moss].

19. Magnuson-Moss, 15 U.S.C. §§ 2303(a), 2304. See generally 1 M. STUART MADDEN, PRODUCTS LIABILITY, § 5.23 (1988).

20. Magnuson-Moss, 15 U.S.C. § 2310(a)(1) (1988).

## 2. *Food and Drug Regulation*

### a. *Regulation of Food*

The regulation of food products for the enhancement of public health and the prevention of deception with regard to the ingredients of foodstuffs is important for the protection of the consumer. Generally, the consumer has no knowledge of the conditions under which food products are prepared for sale. Further, although most food products contain some type of label which describes the contents, often the label is either inadequate, or the consumer has no understanding of, nor interest in, the information contained on the label. Thus, the United States and the various nations of the European Community have developed standards that food products must meet to be sold in those countries.

Of note in the area of food regulation is the fact that the EEC has adopted the principle of "mutual recognition" with respect to the import and export of foodstuffs among the Member States as opposed to standardized regulations in this area. Under this principle, where food is prepared and labelled in compliance with the laws and regulations of the exporting state, the importing state cannot preclude the sale of that product because the product does not meet its own standards. The Court of Justice has maintained that so long as the product label adequately informs the consumer regarding the nature, ingredients, and other characteristics of the food, the consumer is adequately protected, and the concept of "free movement of goods" requires that the product be allowed access to the importing state's market. The EEC, however, has developed standard regulations for a number of food items such as fruit juices, jams and milk products and substitutes, and it is likely that the EEC will continue to "harmonize" the regulations of the Member States with respect to food standards.

The regulation of food products necessitates the establishment of a regulatory agency that can determine which areas require regulatory controls, promulgate those regulations and oversee enforcement. In the United States, the Food and Drug Administration ("FDA") oversees this task. Regulatory control can be divided into two areas: (1) the preparation and inspection of food products, and (2) labelling. In both areas, the potential

for harm to the consumer is great.

Standards for food preparation methods and facilities should concern not only the appropriate degree of cleanliness, but temperature, time of cooking or other preparation, and conditions of storage and transport. Inspection standards and methods should cover such health issues as cleanliness, method of preparation, storage and transport and address the degree to which the product complies with substantive standards regarding content and adheres to the representations on the label. Regulations pertaining to food labelling should specify which ingredients must be set forth and explained on the label. In addition, labelling regulations should prohibit labels that mislead consumers by calling a product something other than what it is. For instance, a dairy spread labelled "butter" should be just that, butter. Manufacturers, however, often add fillers and other materials to their products. Thus, at some point, even though the spread may in fact contain some butter, it can no longer be considered "butter" as the consumer understands that term. Labelling regulations should also mandate the sizes and shapes in which various products may be sold. A consumer can be easily misled as to the quantity being purchased by deceptive packaging.

Finally, as with any regulatory scheme, a method of enforcement must be developed. The regulatory agency may prohibit the sale of food which does not have a stamp or seal indicating compliance with preparation and labelling requirements. Further, enforcement may involve a mechanism for laboratory testing by the regulatory agency or by an independent laboratory at the direction of the agency.

#### *b. Regulation of Drugs and Medical Devices*

There is a vital need to protect the public from innovative but dangerous or even toxic drugs that have not gone through sufficient laboratory and clinical testing to ensure safety and benefit. There is a further need to ensure that drugs already on the market are safe and provide the curative benefits that the manufacturer represents them to have. In addition, the known risks of the drug or device should be published in a prescribed way so those who have a need for this information will be assured of getting it. These needs, however, must be rationally bal-

anced with the goal of providing new and helpful drugs and medical devices quickly to those who require them.

As with the area of food regulation, it is necessary to establish a regulatory agency to oversee the development and enforcement of regulation. The European Community is also developing an authority which will centralize the procedure for obtaining licensing decisions in a timely and cost effective manner while ensuring that only medicines that have been scientifically proven to be safe and effective can enter the market.

One of the primary tasks of such an agency, or the entity creating this agency, is the determination as to what constitutes a drug or medical device and which drugs and devices will fall under the regulatory umbrella. Resort to the laws and regulations of other countries such as the United States and the western European nations will provide the agency with a list of drugs, devices and areas which have already been found ripe for government control. Another initial concern should be the decision as to which drugs or devices will require the prescription of a physician or other health care provider and to what extent so called "non-prescription" drugs will require regulation by the agency.

A further concern, although one which may not be addressed by the agency, is who will be allowed to prescribe various drugs and medical devices. Some countries in Europe allow pharmacists to prescribe medication. In the United States, only medical doctors or specially licensed medical care providers are allowed to prescribe medication; the pharmacist is a licensed trained technician who distributes medication to the patients according to the physician's prescription.

Once the scope of the agency's regulatory arm is defined, the promulgation of standards and the enforcement of compliance with those standards will be its primary function. The standards of any agency regulating the sale and manufacture of drugs should be based on the premise that the drug or device be proven safe and effective before the manufacturer is granted a license to sell the product. The specific technical requirements that each drug or device must meet will likely be developed over time and be subject to change as scientific achievement in the area progresses. Initially, however, the Bulgarian agency may find it helpful to refer to the regulations of the FDA and the

European Community.

The standards should also address the content and design of labels and package inserts. Drugs and devices often have a proven set of risks associated with their use and each risk should be explained in a prescribed manner so that medical care providers can be properly informed when making choices about the patient's care. Likewise, "non-prescription" drugs should be properly labelled so as to advise the consumer of any risks associated with their use. Further, labels should not contain information that misleads the consumer as to the curative benefit of the drug or device. Other issues which the agency may wish to consider are the fair pricing and distribution of needed drugs and the related issue of the protection of property rights in a newly developed medication.

The agency will need to decide on and adopt a procedure for ascertaining whether drugs and medical devices comply with its standards. This process should consider technical data used in the development process as well as laboratory testing and clinical trials. Prior to granting a license, the agency will likely want to obtain a report or certification that the drug or device complies. This certification may be obtained by: (1) the manufacturer providing submissions or reports that document compliance of the new drug or device with various laboratory and clinical trials; (2) the agency appointing an independent lab to conduct the testing and submit a report indicating whether the agency's standard has been met; or (3) the agency performing the needed laboratory testing and clinical studies to determine compliance.

### 3. *Unfair Contract Terms*

In virtually all of Western Europe and North America, laws exist that preclude businesses from including terms in consumer contracts that are unreasonably favorable to the merchant who drafted the contract. The generally accepted rationale for such laws is that "freedom of contract" usually does not exist, as a practical matter, when a consumer signs an agreement with a merchant. Merchants are usually more sophisticated in commercial transactions and draft contract forms that are not negotiable by the consumer. Even if some terms could be negotiated, consumers who are not familiar with legal concepts and do not

understand their import will often sign the document without objecting to unfair terms. Form contracts are useful for some purposes, however, and are less expensive than individually negotiated documents, thus reducing transaction costs and (in theory) prices. Laws therefore do not prohibit form contracts in consumer transactions, but they are regulated in a variety of ways.

Most nations employ a combination of several approaches. Each has its advantages and disadvantages:

a. *General prohibitions.* A statute can, in general terms, render unfair terms unenforceable in consumer transactions. Appropriate language might include: "A contract can be canceled wholly or in part if it would be unreasonable or contrary to honest conduct to maintain it." (Denmark).<sup>21</sup> "Provisions in standard contract conditions are void if they place the other party at an undue disadvantage to such an extent as to be incompatible with the requirements of good faith." (Germany).<sup>22</sup> "A contract term is unfair if . . . it causes to the detriment of the consumer a significant imbalance of the parties' rights and obligations . . . , causes the performance of the contract to be unduly detrimental to the consumer, or . . . causes the performance of the contract to be significantly different from what the consumer could legitimately expect, or is incompatible with the requirements of good faith."<sup>23</sup>

General prohibitions are useful because of their flexibility; consumers can employ them to avoid any term that fits the general description. Their principal drawbacks are that they create uncertainty and are effective only if a court (or other authoritative tribunal) agrees with the consumer's interpretation. They also fail to give businesses specific notice that a particular term is prohibited. General prohibitions are also reactive, rather than

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21. NORBERT REICH & HANS-W. MICKLITZ, CONSUMER LEGISLATION IN THE EC COUNTRIES: A COMPARATIVE ANALYSIS 162 (1980) (quoting Section 36 of the Danish Contracts Act).

22. Gesetz der Allgemeinen Geschäftsbedingungen in der Bundesrepublik Deutschland (AGBD) (1977), par. 9, *translated in* The German Standard Contracts Act 83 (H. Silberberg, ed., 1979). The AGBD applies not only to consumer transactions, but also to business contracts where one party imposes standard terms that are not negotiable. *Id.* at 14.

23. Council Directive on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 36 [hereinafter EC Directive].

preventive. They are effective only when someone notices the term and decides to challenge its enforceability in court. Unchallenged abuses go unremedied and can therefore cause injury to consumers.

b. *Lists of prohibited terms.* Some statutes, like the German Standard Contracts Act<sup>24</sup> and the EC Directive,<sup>25</sup> enumerate specific terms that are not permissible. The list in the EC Directive provides a good illustration of the types of terms that have caused problems in other countries: limiting liability in the event a consumer dies or is injured as a result of a merchant's acts or omissions; providing that the merchant may alter the terms of a contract (including its price) unilaterally without the consumer's consent; denying the consumer the right to complain that goods contain hidden defects, or placing an unreasonably short time limitation for discovering such defects; precluding effective remedies for defective goods; imposing on the consumer a burden of proof that is, according to applicable law, to be placed on the merchant.<sup>26</sup> Lists such as these give both the consumer and the merchant clearer notice of which terms are prohibited; these rules also may be easier for judges to apply than the more general prohibitions described above. Drawbacks include the possibility that some truly unfair terms will not fit one of the definitions (thus requiring statutory amendments as commercial practices change), and like general prohibitions, this approach is reactive rather than preventive, requiring consumers to recognize an unfair term and challenge it under the statute.

c. *Declarations of affirmative consumer rights.* Often a statute will declare specific consumer rights in a certain area, such as a law setting mandatory warranty periods for goods or a law governing insurance agreements. If a law grants specific rights, it often will also provide that a contract cannot negate them. This

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24. AGBD, *supra* note 22, par. 10, 11. Examples include par. 10, no. 4 (prohibits clauses that permit one party to deviate from the terms of the contract unless the other party can reasonably be expected to agree to the deviation; par. 11, no. 8(b) (prohibits limitation of liability for intentional or grossly negligent conduct); par. 11, no. 10 (prohibits exclusion of liability for defects upon the sale of new goods).

25. EC Directive, *supra* note 23. Developments in EC consumer protection policy are discussed generally in E.C. COMMENTARIES—CONSUMER POLICY (Coopers & Lybrand, Apr. 22, EUROPE library, search "EURSCP."

26. EC Directive, *supra* note 23, at Annex.

ensures that the consumer's rights on the subject will not be affected by inconsistent contract terms. The Uniform Consumer Credit Code<sup>27</sup> in the United States is one example, as is the 1992 Russian Consumer Protection Act,<sup>28</sup> which creates mandatory consumer remedies when a consumer buys defective goods and services. These laws can be effective but, of course, only in the subject areas covered. Moreover, if history is a reliable guide, merchants tend to be clever in devising unfair terms that are not expressly prohibited by the statute. An example is the growth of the consumer "leases" in the United States as a way of avoiding regulation under laws governing credit "sales." Statutes declaring affirmative consumer rights also are effective only if the consumer is aware of their provisions; if not, the merchant's contract will be enforced because the consumer does not know that it violates the law.

d. *Standard contracts.* In many nations, various industries recommend, sometimes under government coercion, the use of the same standard form contract terms for all industry members. This can effectively control the use of unfair contract terms, but only if consumer interests are adequately represented in formulating the standard. This can be accomplished in several ways. One method is to permit industry trade associations to formulate their own standards initially without government involvement, but to have a government body responsible for investigating consumer claims that some of the terms are unfair. If unfairness is found the trade association is ordered to change its recommended form. Under a second method, the trade association adopts standard terms and submits the form to a government office, like the Federal Cartel Office in Germany,<sup>29</sup> which checks them against applicable laws and must approve them before implementation. A third method is a "negotiated" ap-

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27. U.C.C.C. § 1.107 (1974). In other statutory schemes, rights often can be varied in the contract. See, e.g., U.C.C. § 1-102(3) (broadly permits variation by agreement).

28. Law of the Russian Federation on the Consumer Rights, Feb. 7, 1992, *Rossiiskaya Gazeta*, Apr. 7, 1992, translated in, 1 *RUSSIA AND THE REPUBLICS LEGAL MATERIALS* (V. Pehota, ed., 1992 release). For a discussion of this act, see Nehf, *Empowering the Russian Consumer in a Market Economy*, 14 *MICH. J. INT'L L.* 739 (1993).

29. NORBERT REICH & HANS W. MICKLITZ, *CONSUMER LEGISLATION IN THE FEDERAL REPUBLIC OF GERMANY* 282 (1981). The Cartel Office may oppose the terms if the agreements constitute an abuse of market power. *Id.*



proach, whereby industry representatives, consumer organizations and government officials negotiate a standard contract for industry members. Encouraging the use of standard contracts is attractive because it can have preventive benefits; if the standard was drafted to incorporate consumer interests, consumers need not worry as much about knowing the law and challenging individual terms. Drawbacks are that often the laws do not make use of the standard contract mandatory in the industry, and consumer groups are not always effectively represented in the process.

For Bulgaria, addressing unfair contract terms may not be urgent, and there may be good reason to delay legislative action. Prohibiting specific unfair terms in a list might not be necessary until markets are more mature and commercial practices are better known. The evolving business practices in Bulgaria might differ from those in other countries, and a long list borrowed from other nations might be inappropriate. Encouraging the immediate adoption of standard industry contracts might also be unwarranted. Trade associations comprising a wide variety of business entities may not exist for some time, and consumer organizations may need time to gain sophistication. If standard contract terms are created by current monopoly businesses (or near-monopoly cartels), and if consumer interests are not adequately represented, the resulting standard contracts may offer consumers little protection and may create barriers to new businesses that would like to enter the market.

The following plan of action may be appropriate. First, enact a law that generally prohibits unfair contract terms and provides a relatively short, nonexclusive list of clauses that are prohibited. The EC Directive would be an appropriate place to start because it reflects the experiences of more than one nation. Second, when laws concerning specific types of consumer transactions are under consideration, such as laws governing insurance, banking, consumer credit, product liability or warranty, provide that consumer rights and remedies granted by the law cannot be diluted by contract. Third, seek means to strengthen consumer organizations (possibly through funding them) and develop a framework in which the organizations can work with industry to create standard industry contract terms in sectors the government identifies as particularly susceptible to consumer

problems. Fourth, take steps to ensure that consumers are educated about the laws and can enforce them quickly and inexpensively.

### C. *Advanced Phase*

The primary goal of the advanced phase of development of a market economy is bringing consumer protection up to international standards. As a general matter, all structures of regulation previously adopted should be evaluated and revised as appropriate. In the areas of health and safety, design and production of products should meet international standards. Product liability standards should be in harmony with those in other countries. The regulation of unfair contract terms should be refined and expanded. In addition, Bulgaria at this stage may wish to implement or add to consumer laws relating to consumer credit protection and deceptive advertising and trade practices.

#### 1. *Consumer Credit*

When a retailer allows a consumer to purchase goods without paying the full price in cash at the time of purchase, what is generally called "consumer credit" is created. The simplest form of consumer credit transaction involves a retail installment contract under which the buyer takes possession of the good he or she is purchasing and agrees to pay the full "installment purchase price" over a period of time. The installment purchase price is the sum of the cash price for the good and the interest or "finance charge" imposed by the seller. The contract requires that partial payments, or "installments," be made by the consumer on a monthly or bi-weekly basis until the full installment purchase price has been paid.

A more sophisticated version of consumer credit involves installment charge accounts which allow buyers to purchase goods from the seller from time to time with the total retail installment price for all the purchased goods to be paid by the customer in prescribed installment payments. Third-party financed retail installment sales are found only in consumer motor vehicle markets in the United States. On the other hand, third-party financed retail installment accounts are common in all other consumer markets due to the prevalence of bank-issued credit

card purchasing. This form of consumer credit started in the 1960s and is probably the most common form of consumer credit in the United States today.

Consumer credit regulation is unavoidably complex and the type and degree of regulation is highly dependent upon the particular consumer market. As a general matter, it is far better to start with simpler forms of regulation and adjust as the market becomes more sophisticated, than to overload merchants and credit extenders with burdensome laws at the outset.

Since retail markets change over time, the type of credit regulation that is appropriate at any given moment will also change. A specific example is the advent of third-party retail installment sales credit in the form of credit cards usable for purchases at a large number of retail stores. Unknown to the general public in the United States twenty-five years ago, credit cards, referred to as "plastic," are considered indispensable to our consumer purchasing life today. American retail installment sales statutes have, with varying degrees of success and sophistication, been altered to take this form of consumer credit into account. Thus, whatever type of retail credit regulation is initially adopted, the Bulgarian legislative branch will periodically have to revisit the topics raised in this paper.

As stated above, the type of consumer credit regulation needed will of necessity depend on the ways that consumers finance their purchases. For example, while not strictly an extension of credit, a simple form of consumer purchase financing is the "lay away plan" whereby a merchant holds a particular good for a customer while the consumer pays the purchase price to the merchant in installments. In this arrangement there is no finance charge and the time period for payment is typically much shorter than with a retail installment contract. Once the full price is paid the customer may take possession of the good. In the United States, lay away plan regulation provides that the consumer has the right to get deposited monies back in the event that the purchase is not consummated and restricts the length of time that a merchant can contract for such plans.

Once beyond the lay away plan stage, there are a number of threshold decisions that must be made before a retail installment sales act ("RISA") can be devised. First, should the RISA apply to "all goods" (usually this type of statute is applied to

credit sales of consumer *services* as well as chattels) or just to certain "big ticket" items such as cars, furniture, appliances and home repair contracts? Historically, the first commercial activity subject to a RISA in California was the sale of automobiles to consumers on credit, and the same is true of most other states. Second, should the RISA apply to third-party financing (banks, credit unions and, since 1970, credit card issuers) as well as merchant extended credit? Third, should the maximum finance rate the consumers can be charged be established by a provision in the RISA or left for market determination?

The answers to the first two questions will depend upon the degree of economic activity in the Bulgarian retail marketplace. Answering the third question requires attention to the level of such activity, but also requires some idea of the level of sophistication of Bulgarian consumers and a consideration of the general importance policy makers place on the value of the market mechanism.

During the period from the mid 1930s to the early 1960s, most states in the United States regulated consumer credit sales with RISA's containing statutory finance rate maximums. The Federal Truth in Lending Act of 1968 took a somewhat different approach by opting for "disclosure" rather than "regulation" of finance rates. Opponents of finance rate maximums argue that (1) they result in *de facto* price fixing because all creditors charge the maximum rate, (2) as a consequence of such "price fixing," the sophisticated and credit worthy consumer has to pay a higher rate than the market would set for such an individual, and (3) the result is both a subsidy (in the form of lower rates) to the non-credit worthy consumer *and* a generally higher gross charge for consumer credit for the whole of society (thereby subsidizing credit extenders). Although far from extensive, the empirical data available tends to support the three arguments of the opponents of rate regulation. The opponents of state-imposed finance charge limits have recently prevailed in California. In that state, with the largest amount of consumer credit selling in the nation, statutorily imposed rate limits were eliminated in 1988.

Issues that an effective RISA should address, regardless of whether rate regulation is attempted, are:

(1) What terms must be disclosed by credit extenders? The

lesson of history is to "keep it simple." Disclosure of cash price, total credit price, amount of down payment, annual finance rate, method of periodic payment and consequences of the consumer's failure to make such payments should be sufficient.

(2) What are the consumer's remedies for failure of the goods to perform satisfactorily? The key question is whether the consumer can withhold installment payments in such a case. Most people believe the consumer should have that option, but there is less agreement on the issue of whether the consumer should have the right to withhold payment when the underlying installment contract has been assigned to a third-party financier. Most American experts in the field of consumer credit believe that a consumer should have the right to withhold against such an assignee. To give consumers more confidence in asserting the right to withhold, most RISAs give a prevailing consumer an automatic award of attorney's fees (and often a mandatory penalty) in a court action for collection of the installment debt in which a defect in the sold good is claimed. Giving consumers a fourteen day penalty-free right to return goods purchased on credit alleviates some of the need to give consumers the right to withhold and to receive automatic attorney's fees (and penalties) in such later court actions.

(3) What limits are there on a creditor's remedies when the consumer fails to make the installment payments? Most of the RISAs in the United States answer the question by limiting the creditor to the right of repossession of the sold chattel *with no deficiency judgment*. This policy has the virtue of forcing sellers to require higher down payments, which in turn makes consumers go through a more serious consideration of the economics of a proposed consumer credit purchase.

## 2. *False Advertising*

Advertising is one of the most significant elements affecting consumers' purchasing behavior. Its form varies—claims made on packaging, advertisements in newspapers, magazines and on billboards, and commercials on radio and television; even apparently neutral news reports about products can, in reality, be placements made by creative public relations experts who want their products to be positioned in a certain light. No matter what the advertising medium, however, the result sought is the

same—to influence consumers' behavior by providing them with information concerning product attributes and benefits.

Therefore, within any framework of consumer protection laws, the issues raised by the dissemination of deceptive advertising must be addressed. It is important to the efficient functioning of a market economy that consumers be exposed to a variety of messages about consumer goods and, as a result, be able to make informed purchasing decisions. Thus, the free flow of information in the marketplace should not be stifled. In order, however, for consumers' purchasing decisions to be truly informed, there must be a mechanism by which disinformation can be halted.

Establishment of a formal mechanism to regulate deceptive advertising is therefore necessary. Initially, a basic prohibition on false or deceptive advertising should be promulgated, either as a part of a consumer protection or unfair trade practices statute, or as a regulation issued by a collective self-regulating business group. The prohibition on false advertising should then be enforceable (perhaps by both injured competitors and consumers) either in the court system or by some quasi-judicial panel or arbiter within the self-regulatory business body (provided the quasi-judicial panel or arbiter can remain disinterested). Regardless of which approach is employed, it is critical that the enforcement mechanism include penalties severe enough to ensure compliance. Additionally, the challenge procedure should be reactive rather than preventive because, as discussed above, it is important to avoid unnecessary restrictions on speech in the marketplace.

One area which must be addressed is the scope of advertising prohibitions to be imposed. The challenge procedure should be available to enforce the law with respect to all false claims, wherever they occur (i.e., in traditional consumer advertising, on product packaging and perhaps even in business advertising). In this fashion, a uniform system of regulation can be established and advertisers will not be able to thwart the regulatory intent merely by placing their claims in different environments. Such a comprehensive approach may be more difficult to effectuate if a self-regulatory approach is chosen because many more entities will have to become involved in the process. Moreover, a media exemption should be provided to avoid the imposition of liabil-

ity for allegedly false claims on pure transmitters of information such as newspaper and magazine publishers who do nothing more than publish advertising created by others. By so doing, the system will both close off an area of potential private censorship and simultaneously encourage the free flow of information to the consumer.

Another major issue to be explored is whether any type or category of advertising will be absolutely prohibited, such as comparative advertising claims or advertising for specific products such as tobacco, alcohol products or prescription drugs. While deceptive comparative claims may do significant damage in the marketplace by providing false information about more than one product, as a general matter it is nonetheless advisable to permit comparative claims in order to provide the consumer with as much information as possible on which to base his or her purchasing decision. Permitting comparative advertising should, however, be coupled with a challenge procedure that is simple, cost-efficient and accessible to both consumers and competitors. Competitors will likely vigorously enforce the laws with respect to each other, thereby providing a benefit to consumers as well.

With respect to the scope of the regulation, there are additional considerations. For example, while it might be easier in the abstract only to prohibit advertising that is false on its face, it would be better also to prohibit advertising that, while literally truthful, conveys to consumers a deceptive message. For example, an advertisement may be found to be deceptive if even though it truthfully states that a particular product has a specific attribute it also implies that this attribute is unique to the product when it is not. Additionally, the regulatory scheme should be broad enough to prohibit advertising that communicates half-truths or is deceptive due to its omission of material fact. For example, an advertisement for Product X noting that 30 percent of consumers surveyed liked Product X may be deceptive even if it does not also disclose that in the same survey 65 percent of the consumers said they loved Product Y. If these types of advertising techniques are prohibited, advertisers will take care not to convey false innuendo, thereby creating more understandable advertising for consumers. As a result, it is more likely that consumers will make truly informed purchasing decisions.

An additional area to be covered by regulation is the amount of substantiation that an advertiser needs before making a claim for the product. For example, an advertiser should have reproducible evidence before it is entitled to make factual claims, such as those of uniqueness or superiority. It may, however, be advisable to avoid specifying the exact type of proof that is required; over-regulation may have a chilling effect on the types of advertising claims made and, in effect, deprive the consumer of information that could enable him or her to make an informed choice in the marketplace.

With respect to false advertising proceedings, the burden of proof of falsity should be placed upon the challenger. By requiring both the advertiser to have substantiation and the challenger to prove deception or falsity, consumers can receive the benefit of having new products (or claims) in the marketplace as soon as their effectiveness or truth has been established, while still receiving protection from the requirements of prior substantiation and the results of continued investigation. In addition, this approach would discourage larger entities from harassing small successful businesses as a part of an overall business plan. If the burden were not placed on the challenger, companies with significant resources could continuously drag smaller less prosperous entities through costly and time-consuming deceptive advertising challenge proceedings for no other purpose than to divert the smaller company's resources from product and marketing development and into fighting the legal battle.

Finally, as discussed above, based on experience in the United States, it is critical that the laws on advertising contain severe penalties so that advertisers will comply with the regulations. There are a variety of sanctions that can be imposed, such as immediate withdrawal of the offending advertising, payment of the cost of the challenger's expenses in bringing the challenge (with the payment of additional sums in the case of egregious conduct) and an affirmative requirement to publish corrective advertising. Of course, if the court system is chosen as the enforcement mechanism, then the full power of the court, including its jurisdictional reach and ability to impose sanctions, should be made available to deal with those entities and individuals who fail to adhere to the court's determinations in the false advertising area.



It may prove difficult to obtain the cooperation and participation of certain multinational corporations in regulatory schemes that are either self-regulatory or created and enforced on a local level. If, however, the judicial system is used to enforce the advertising prohibitions, these multinational corporations can be required to consent to jurisdiction in the court system as a condition of being allowed to do business in the country. On a related point, it is important to recall that Bulgaria is a signatory to various international agreements which may provide enforcement mechanisms on related areas of law. For example, Bulgaria is a signatory to the Paris Convention for the Protection of Industrial Property (1967 Stockholm Act) which affords protection for certain types of trademarks (both registered and unregistered) against unfair competition and specific forms of confusion. It may be possible under certain circumstances to invoke the protection so afforded to achieve the objective of maintaining the free-flow of truthful information in the marketplace.

## APPENDIX

### METHODOLOGIES FOR TESTING CONSUMER PROTECTION LAWS

This appendix briefly summarizes one committee member's proposed framework for analysis of a regulatory program. Once Bulgaria has established a consumer protection legal regime, "regulatory effectiveness analysis," outlined below, should be helpful in evaluating whether the regime is coherent and effective. Regulatory effectiveness analysis is designed to measure separately and together three key components of a technical regulatory system described below.

1. *Public policies* are narrative statements of the goals to be achieved by the regulatory program. These statements can be either concrete or abstract. For example, with respect to consumer protection, regulators may have as goals any or all of the following:

(a) Preventing the market inefficiency that arises when the market fails to reflect consumers' desires.

(b) Giving consumers confidence in the justice of the market place and preventing social unrest and unwillingness to participate in the market.

(c) Minimizing the cost of dispute resolution by providing access to speedy resolution of disputes.

2. *Legal structures* are the mechanisms used to enforce the social will embodied in public policy. Virtually all consumer protection legal structures fall into one or more of three functional categories, all definable by the effect on consumer protection.

(a) *Information* is the provision or limitation of data provided to the consumer at or before the point of consumer choice. Information includes any form of mandatory labeling as well as controls on data, such as advertising restrictions.

(b) *Intervention* is the substitution of social for individual choices. Intervention includes such areas as business, licenses, price controls, weights and measures and restrictions on sales, for example, of alcohol.

(c) *Compensation* is a system for relieving the consumer of the consequences of a choice. Compensation includes mandatory insurance systems, court litigation, bonding and other methods to provide or guarantee payment.

Legal structures frequently combine aspects of two or three of these functional categories. For example, a requirement that beer be sold in standardized, properly labelled bottles is a combination of information and intervention.

3. *Technical tools* are necessary both to implement the laws and to measure the effectiveness of legal structures in achieving the public policy goals. Tools must be carefully distinguished from the legal structures, because the one is frequently implied from the other. For example, in order to further the public policy of safety on the streets and highways, each of the states of the United States has established a legal structure requiring drivers to be licensed. In order to obtain a license, the would-be driver must take various tests designed to measure his or her eyesight and knowledge of traffic safety rules. In addition, records are kept of each driver's traffic infractions and excessive citations may prevent a driver from obtaining renewal of his or her license. It is those tests and the use of records of traffic violations that constitute the "technical tools" for furthering the public policy through the legal structure. The choice of technical tests will depend largely on not only the existence of an effective tool for measurement but equally significantly, on whether the regulators are trying to promote a public policy goal directly or

indirectly.

All three of these components must be properly designed to achieve a working regulatory system. Public policies must be coherent, legal structures must contain all necessary components, and technical tools must be available to produce the needed results. Furthermore, these components must interact efficiently. If there is no match between public policy, legal structure and technical tools, a discontinuity exists.

An excellent illustration of the interaction of these three components is the regulations passed by the Food and Drug Administration ("FDA") to regulate computer software under the 1976 medical device amendments. The 1976 amendments mandated either pre-market approval or product standards. Both of these legal structures require a technical tool that can test a given piece of software and determine how safe it is. Such a tool did not exist. This created a discontinuity, which required changing one of the components.

Under the medical device amendments of 1990 the FDA was given the authority to allow software on the market with minimal testing, but was given much strengthened authority to pull it from the market after an injury. The FDA thus had a new legal structure, which required a different, but available technical tool. It is easier to show that a given piece of software is defective than that it is *not* defective. Note, however, that using the legal structure of post-market removal of defective products meant that the policy goal of preventing all defective products from reaching the market had to be adjusted.

Public policies, legal structures and technical tools tend to be developed by different groups. Politicians and executives make policy, lawyers and bureaucrats make structures, and engineers make tools. These groups do not always understand the other and frequently assume the existence of the capabilities in the policy, legal or technical areas needed by their own component. The internal design of a component can often be judged by the standards of the field which created it, but the interfaces among components may defy simple understanding.