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**GUIDANCE ON THE IMPLEMENTATION/APPLICATION OF DIRECTIVE  
2005/29/EC ON UNFAIR COMMERCIAL PRACTICES**

*Accompanying the document*

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**A comprehensive approach to stimulating cross-border e-Commerce for Europe's  
citizens and businesses**

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## Contents

INTRODUCTION .....	5
1. Scope of the UCPD.....	6
1.1 Commercial practices falling within the scope of the UCPD.....	6
1.1.1 After-sales practices, including debt collection activities .....	6
1.1.2 Traders buying products from consumers .....	8
1.2 Commercial practices falling outside the scope of the UCPD.....	9
1.2.1 Commercial practices which do not affect the consumer's economic interests .....	9
1.2.2 Commercial practices which relate to a business-to-business transaction or which harm only competitors' economic interests.....	10
1.3 Full harmonisation .....	12
1.3.1 Sales promotions and price reductions.....	12
1.3.2 Exceptions to full harmonisation.....	13
1.4 Interplay between the Directive and other EU law .....	14
1.4.1 Relationship with other EU legislation .....	14
1.4.2 Impact on enforcement.....	17
1.4.3 Information established by other EU law as 'material' information.....	17
1.4.4 Interplay with the Consumer Rights Directive .....	19
1.4.5 Interplay with the Unfair Contract Terms Directive.....	21
1.4.6 Interplay with the Misleading and Comparative Advertising Directive .....	21
1.4.7 Interplay with the Services Directive .....	22
1.4.8 Interplay with the e-Commerce Directive .....	22
1.4.9 Interplay with the Audiovisual Media Services Directive.....	23
1.4.10 Interplay with the Data Protection Directive and the e-Privacy Directive.....	23
1.4.11 Interplay with Articles 101-102 TFEU (competition rules) .....	27
1.4.12 Interplay with the EU Charter of fundamental rights .....	28
1.4.13 Interplay with Articles 34-36 TFEU.....	28
1.5 The relationship between the UCPD and self-regulation .....	30
1.6 Application of the UCPD to traders established in third countries.....	31
2. General concepts.....	33
2.1 The notion of trader.....	33
2.2 The concept of commercial practice.....	35
2.3 The concept of 'transactional decision' .....	36
2.4 To 'materially distort the economic behaviour of consumers' .....	39
2.5 'Average consumer' .....	41
2.6 Vulnerable consumers .....	46

2.6.1	The vulnerability criteria in Article 5(3).....	48
2.6.2	‘Foreseeability’ requirement.....	50
2.7	Invitation to purchase — the concept .....	51
3.	Provisions of the UCPD.....	54
3.1	The functioning of the UCPD – Directive flowchart.....	54
3.2	The general clause — the requirements of professional diligence .....	55
3.3	Misleading actions .....	57
3.3.1	General misleading information.....	58
3.3.2	Confusing marketing .....	64
3.3.3	Non-compliance with codes of conduct.....	66
3.4	Misleading omissions.....	68
3.4.1	Material information .....	69
3.4.2	Hidden marketing/failure to identify commercial intent.....	70
3.4.3	Material information provided in an unclear manner .....	72
3.4.4	The factual context and limits of the communication medium used .....	73
3.4.5	Material information in invitations to purchase — Article 7(4).....	74
3.4.6	Free trials and subscription traps.....	80
3.4.7	Provision of certain information in another language .....	82
3.4.8	Planned obsolescence .....	82
3.5	Aggressive commercial practices.....	84
4.	The black list of commercial practices (Annex I) .....	87
4.1	Products which cannot legally be sold — banned commercial practice No 9.....	87
4.2	Pyramid schemes — banned commercial practice No 14 .....	88
4.3	Products which cure illnesses, dysfunctions and malformations — banned commercial practice No 17 .....	91
4.4	Use of the word ‘free’ — banned commercial practice No 20 .....	94
4.5	Persistent marketing by a remote tool — banned commercial practice No 26 .....	98
4.6	Direct exhortations to children — banned commercial practice No 28 .....	100
4.7	Prizes — banned commercial practice No 31 .....	103
5.	Application of the UCPD to specific sectors .....	105
5.1	Environmental claims.....	105
5.1.1	Interplay with other EU legislation on environmental claims.....	105
5.1.2	Main principles: Articles 6, 7 and 12 of the UCPD applied to environmental claims .....	107
5.1.3	Application of Article 6 of the UCPD to environmental claims .....	109
5.1.4	Application of Article 7 of the UCPD to environmental claims .....	112
5.1.5	Application of Article 12 of the UCPD to environmental claims .....	115
5.1.6	Application of Annex I to environmental claims .....	118
5.1.7	Comparing environmental claims .....	120

5.2	Online sector .....	121
5.2.1	Online platforms.....	121
5.2.2	The applicability of the UCPD to online platforms.....	122
5.2.3	E-commerce platforms (marketplaces).....	127
5.2.4	App stores.....	129
5.2.5	Collaborative economy .....	131
5.2.6	Search engines.....	132
5.2.7	Comparison tools .....	134
5.2.8	User review tools.....	139
5.2.9	Social media .....	142
5.2.10	Collective buying platforms.....	145
5.2.11	Dynamic pricing.....	146
5.2.12	Price discrimination.....	147
5.2.13	Personalised pricing .....	148
5.2.14	Use of geo-localisation techniques .....	150
5.3	Travel and transport sector .....	151
5.3.1	Cross-cutting issues .....	151
5.3.2	Package Travel.....	155
5.3.3	Timeshare contracts.....	156
5.3.4	Issues relevant in particular to air transport.....	157
5.3.5	Issues specific to car rental .....	160
5.4	Financial services and immovable property .....	162
5.4.1	Cross-cutting issues .....	162
5.4.2	Issues specific to immovable property.....	164
5.4.3	Issues specific to financial services .....	165
Annex I:	Case-law from the CJEU on the UCPD (ordered by year).....	169

## INTRODUCTION

The purpose of this guidance document is to facilitate the proper application of [Directive 2005/29/EC](#) on unfair business-to-consumer commercial practices in the internal market ('the UCPD'). It provides guidance on the UCPD's key concepts and provisions and practical examples taken from the case-law of the Court of Justice of the European Union (thereinafter 'The Court') and from national courts and administrations on how to implement it. It builds upon and replaces the 2009 version of the Guidance.<sup>1</sup>

The UCPD constitutes the overarching piece of EU legislation regulating unfair commercial practices in business-to-consumer transactions. It applies to all commercial practices that occur before (i.e. during advertising or marketing), during and after a business-to-consumer transaction has taken place.

The 2013 Communication on the application of the Unfair Commercial Practices Directive<sup>2</sup> and its accompanying Report<sup>3</sup> have shown that there is a need to step up enforcement of the UCPD provisions. To facilitate enforcement activities and ensure legal certainty, this Guidance highlights questions that are common to all Member States. This includes topics such as:

- the interplay between the UCPD and other EU legislation;
- the mounting case-law of the Court and national courts;
- how the UCPD applies to new and emerging business models, especially in the online sector.

This guidance is linked to the Commission's Communication on "a comprehensive approach to stimulating cross border e-Commerce for Europe's citizens and businesses" (COM(2016)320), in particular section 6 thereto. It was prepared by the Commission services and does not necessarily reflect the views of the European Commission. It is intended to facilitate the implementation of Directive 2005/29/EC on unfair commercial practices. However, it is itself not legally binding. Any authoritative reading of the law should only be derived from Directive 2005/29/EC itself and other applicable legal acts or principles. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law.

The assessment of whether a commercial practice is unfair under the UCPD must, except in the case of the practices listed in Annex I to the Directive, be performed on a case-by-case basis. The power to make this assessment rests with the Member States.

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<sup>1</sup> SEC(2009) 1666.

<sup>2</sup> COM(2013) 138 final, 14.3.2013.

<sup>3</sup> COM(2013) 139 final, 14.3.2013.

## 1. **Scope** of the UCPD

### Article 3(1)



*This Directive shall apply to unfair business-to-consumer commercial practices as laid down in Article 5, before, during and after a commercial transaction in relation to a product.*

The Directive is horizontal in nature and protects the economic interests of consumers. Its principle-based provisions address a wide range of practices and are sufficiently broad to catch fast-evolving products, services and sales methods.

### 1.1 Commercial practices falling within the scope of the UCPD

#### Article 2(d)



*'business-to-consumer commercial practices' (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.*

#### Article 2(c)

*'product' means any good or service including immovable property, rights and obligations.*

This section mainly focuses on examples of commercial practices for which there can be a need to clarify that they do fall within the scope of the UCPD. The application of the UCPD to online business models is discussed in Chapter 5.2.

#### 1.1.1 **After-sales** practices, including debt collection activities

Under Article 3(1), commercial practices occur not only during the marketing and supply stages, but also after the transaction has been made.

Recital 13 of the UCPD also refers to *'unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution'*.

For example:

- *A trader who uses onerous or disproportionate non-contractual barriers to prevent a consumer from switching service providers: the Italian competition authority (AGCM) fined a telecoms company for delaying and preventing its customers from switching to another service provider.<sup>4</sup>*



Some national authorities stated that, irrespective of whether a trader has assigned a claim to a third party, **debt collection activities should be regarded as after-sales commercial practices**, because the debt collection is directly connected with the sale or supply of products. There are no objective reasons to differentiate that assessment based on whether a trader outsources it through specialised agencies or not.

This is also implied in No 25 of Annex I which considers the practice of ‘*Conducting personal visits to the consumer’s home ignoring the consumer’s request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation*’ as unfair in all circumstances.

For example:

- *A Slovakian court held that informing a consumer who is not complying with his financial obligations that his name will be published as a default payer in local media is an aggressive commercial practice.<sup>5</sup>*
- *The Italian competition authority (AGCM) took action against a debt collector that used a logo, name and documents that were similar to those used by official Italian agencies. The trader gave consumers the misleading impression that it was enforcing official court orders to force consumers to pay their debts when in fact such powers are reserved for public authorities.<sup>6</sup>*
- *The Polish authority (UOKiK) considered debt collection as an after-sale commercial practice falling within the scope of the UCPD and fined a debt collection agency for misleading consumer debtors about the extent and gravity of adverse consequences they would face, would they fail to settle their debt immediately. The debt collection agency also failed to properly inform consumers about the exact contractual basis for the debt and exercised on them undue psychological pressure<sup>7</sup>.*



<sup>4</sup> PS1268 - TELE2-ostruzionismo migrazione, Provv. n. 20266 del 03/09/2009 (Bollettino n. 36/2009); PS1700 - Tiscali-ostruzionismo passaggio a TELECOM, Provv. n. 20349 del 01/10/2009 (Bollettino n. 40/2009).

<sup>5</sup> Krajský súd v Presove, 27 October 2011, 2Co/116/2011.

<sup>6</sup> PS9042 - Esattoria-Agenzia Riscossioni. Provvedimento n. 24763, 22 January 2014.

<sup>7</sup> DKK - 61 - 10/07/DG/IS

### 1.1.2 Traders buying products from consumers

Certain traders may, in the course of their professional activity, purchase products from consumers. Examples of this include car dealers, antique dealers and retailers of second-hand goods.

According to the definition provided in the UCPD, commercial practices are only those *'directly connected with the promotion, sale or supply of a product to consumers'*. The reverse situation, **where traders purchase products from consumers, does not fall within the scope of the UCPD**. However, there are cases where a link can be established between the sale of a product by a consumer to a trader and the promotion, sale or supply of a (different) product to the consumer.

For instance, trade-in agreements are common place in the motor vehicle trade. The trader purchases a used vehicle from the consumer who in turn buys a vehicle from the trader. In such cases, the trader's purchase could be considered as part of the remuneration given by the consumer for the business-to-consumer part of the transaction. **Trade-in agreements clearly fall within the scope of the UCPD.**

For example:



- *The UK Office of Fair Trading (now: Competition and Markets Authority - CMA) investigated the practice of companies specialized in buying used cars from consumers, considering that it falls within the scope of the UCPD. In particular, the UK authority took action against a used car buying company on the ground that its online evaluations could be misleading<sup>8</sup>.*

The purchase and resale of gold could in some circumstances fall under the UCPD. For example, a trader, who offers consumers a professional evaluation for their gold before buying it, could be considered as providing a service to the consumers. When this is the case, the UCPD will apply and, as a consequence, the trader should not provide misleading information on the real value of the gold or on the price of the service offered (e.g. omission of 'administrative fees').

For example:

- *'A trader who is an expert on Chinese pottery tells a consumer that a Ming vase she wants to sell to him is a fake. If it is not the case, the statement would be likely to amount to a misleading action'.*

<sup>8</sup> Case Webuyanycar - CRE-E/25631, 28 March 2011, <https://www.gov.uk/cma-cases/we-buy-any-car-unfair-practices-by-trader-offering-vehicle-buying-service>



## 1.2 Commercial practices falling outside the scope of the UCPD

### 1.2.1 Commercial practices which do not affect the consumer's economic interests

#### Article 1



*The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.*

The UCPD does not cover national rules intended to protect interests which are not of an economic nature.

Therefore, the UCPD does not affect the possibility of Member States to set rules regulating commercial practices for reasons of health, safety or environmental protection. Also existing national rules on marketing and advertising, based on 'taste and decency' are not covered by the UCPD. According to Recital 7, *'This Directive [...] does not address legal requirements related to taste and decency which vary widely among the Member States. [...] Member States should accordingly be able to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers' freedom of choice. [...].'*

Therefore, in the context of commercial practices, the UCPD does not cover national rules on protecting human dignity, preventing sexual, racial and religious discrimination or on the depiction of nudity, violence and antisocial behaviour.

For example:



- *The Court clarified that the UCPD did not apply to a national provision preventing a trader from opening its shop seven days a week by requiring traders to choose a weekly closing day, as this specific provision did not pursue objectives related to consumer protection.<sup>9</sup>*

Conversely, national rules that aim to protect the economic interest of consumers, in conjunction with other interests, do fall within its scope.

<sup>9</sup> Case C-559/11, *Pelckmans Turnhout NV*, 4 October 2012.

For example:



- *National rules banning sales with bonuses: the Court has clarified that the UCPD precludes a general national ban on sales with bonuses that is designed to achieve consumer protection and other objectives (such as the pluralism of the press).*<sup>10</sup>
- *National rules allowing clearance sales to be announced only if authorised by the competent district administrative authority: the Court noted that the referring court had implicitly accepted that such a provision, which was at stake in the case, was aimed at the protection of consumers and not solely at the protection of competitors and other operators in the market. Therefore, the UCPD was applicable.*<sup>11</sup>

### 1.2.2 Commercial practices which relate to a business-to-business transaction or which harm only competitors' economic interests

#### Recital 6



*This Directive [...] neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders; taking full account of the principle of full subsidiarity, Member States will continue to be able to regulate such practices in conformity with Community law, if they choose to do so [...].*

Business-to-business ('B2B') commercial practices do not fall within the scope of the UCPD. They are partly regulated under the Misleading and Comparative Advertising Directive.<sup>12</sup> Member States may also extend, under their national laws, the protection granted under the UCPD to B2B commercial practices.<sup>13</sup>

<sup>10</sup> Case C-540/08 *Mediaprint*, 9 November 2010.

<sup>11</sup> Case C-206/11, *Köck*, 17 January 2013, paragraph 31.

<sup>12</sup> Directive 2006/114/EC concerning misleading and comparative advertising.

<sup>13</sup> Seven Member States currently apply the UCPD also to B2B relations. Out of those, Austria (see § 1(1) of the Federal Act amending the 1984 Federal Act against Unfair Competition at <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.viewFile&lawID=36&languageID=EN>) and Sweden (see Section 1 of the Marketing Practices Act (2008:486) at <https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.country.viewFile&lawID=38&languageID=EN>) have extended all its provisions to B2B commercial practices. Instead, Denmark (The Marketing Practices Act, Consolidated Act no. 58 of 20 January 2012 as amended by section 33 of Act no. 1231 of 18 December 2012, section 5 of Act no. 1387 of 23 December 2012 and section 1 of Act no. 378 of 17 April 2013), France (Cf. Article L. 121-1, I and III and L. 121-1-1 of the Consumer Code), Germany (Cf. Section 3 of the Unfair Competition Act (UWG) at [http://www.gesetze-im-internet.de/englisch\\_uwg/englisch\\_uwg.html#UWGengl\\_000P3](http://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#UWGengl_000P3)), Italy (See Article 19 of the Consumer Code as amended by Article 7, co.2 of Decree-Law 1/2012, converted with amendments into Law March 24, 2012, n. 27), and Belgium (Chapter 4 of Loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur) apply it with some modulation. In Denmark, businesses are protected by provisions on both misleading and aggressive practices. France applies Article 6 and Annex I (limited to the misleading practices part of the UCPD) to B2B transactions exclusively. In Germany, parts of the Directive also apply to business-to-business commercial practices. Italy has extended the application of the Directive to 'micro-enterprises' (defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance

Only measures which protect exclusively competitors' interests fall outside the scope of the UCPD. Where national measures regulate a practice with the dual aim of protecting consumers and competitors, such national measures are covered by the UCPD.

Regarding the distinction between consumers' and competitors' interests, the Court considered that:

*'39 [...] As is evident from recital 6 in the preamble to [the UCPD], only national legislation relating to unfair commercial practices which harm 'only' competitors' economic interests or which relate to a transaction between traders is thus excluded from that scope.*

*40 [...] that is quite clearly not the case with the national provisions [that] refer expressly to the protection of consumers and not only to that of competitors and other market participants.'*<sup>14</sup>

It is for national authorities and courts to decide whether a national provision is intended to protect consumer interests.

The Court noted that:

*'29 It is therefore for the national court and not for this Court to establish whether the national provisions [...] concerning price reduction announcements to consumers, actually pursue objectives relating to consumer protection, in order to determine whether such provisions are liable to fall within the scope of the Unfair Commercial Practices Directive [...].'*<sup>15</sup>

The Court has also found that the UCPD precludes a national provision prohibiting sales at loss only in so far as its aim is to protect consumers.<sup>16</sup>

Regarding national rules prohibiting price reductions during pre-sales periods, the Court has clarified that such a prohibition is not compatible with the UCPD if it seeks to protect the economic interests of consumers.<sup>17</sup>

However it also found that a national provision does not fall within the scope of the UCPD *'if it aims solely, as argued by the referring court, at regulating relations between competitors and does not aim at protecting consumers.'*<sup>18</sup>

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sheet total does not exceed EUR 2 million', based on the Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [Official Journal L 124 of 20.05.2003]. Belgium has extended the scope of its legislation to B2B transactions only for certain banned practices listed in Annex I.

<sup>14</sup> C-304/08, *Plus Warenhandelsgesellschaft*, 14 January 2010.

<sup>15</sup> Case C-13/15, *Cdiscount*, Order 8 September 2015.

<sup>16</sup> Case C-343/12, *Euronics*, paragraph 31, Order of 7 March 2013.

<sup>17</sup> Case C-288/10 (*Wamo*), paragraph 40, Order of 30 June 2011.

<sup>18</sup> Case C-126/11 (*Inno*), Order of 15 December 2011, paragraph 29.

### 1.3 Full harmonisation

The UCPD is based on the principle of full harmonisation. In order to remove internal market barriers and increase legal certainty for both consumers and businesses, a uniform regulatory framework harmonising national rules was established at EU level.<sup>19</sup>

The Court has further clarified this. It held that *'the Directive fully harmonises those rules at the Community level. Accordingly, [...] Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection'*.<sup>20</sup>

Consequently, the Directive was found to preclude a national general prohibition on combined offers.

#### 1.3.1 Sales promotions and price reductions

The UCPD covers commercial practices such as combined or tied offers, discounts, price reductions, promotional sales, commercial lotteries, competitions and vouchers.

The UCPD includes several provisions on promotional practices (e.g. Article 6(d) on the existence of a specific price advantage, Annex I point 5 on bait advertising, point 7 on special offers, points 19 and 31 on competitions and prize promotion, and point 20 on free offers).<sup>21</sup>

The Court has clarified that rules requiring a price reduction to refer to a reference price and the duration of the promotion are not compliant with the UCPD:

*'61. Consequently, national rules of this nature, which place a general prohibition on practices not referred to in Annex I to Directive 2005/29, without providing for an individual analysis as to whether the practices are 'unfair' in the light of the criteria laid down in Articles 5 to 9 of that directive, are not permitted under Article 4 thereof and run counter to the complete harmonisation objective pursued by that directive, even where they seek to achieve a higher level of consumer protection [...]'*<sup>22</sup>

The UCPD does not expressly require traders to display price reductions in specific ways or to state the reasons for the reduced prices. Whether a trader acts contrary to the UCPD should be assessed on a case-by-case basis.

<sup>19</sup> See in particular Recitals 5, 12 and 13 of the Directive.

<sup>20</sup> Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium, and Galatea BVBA v Sanoma Magazines Belgium NV*, Judgment of 23 April 2009, paragraph 52.

<sup>21</sup> See also judgments of the Court in Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium, and Galatea BVBA v Sanoma Magazines Belgium NV*, Judgment of 23 April 2009; Case C-304/08, *Plus Warenhandels-gesellschaft*, 14 January 2010, Case C-540/08, *Mediaprint*, 9 November 2010, Case C-522/08, *Telekomunikacja Polska*, 11 March 2010.

<sup>22</sup> Case C-421/12, *European Commission v Kingdom of Belgium*, 10 July 2014.

Questions on price promotions and the full harmonisation character of the UCPD have also been raised in light of the **Price Indication Directive**.<sup>23</sup>

The purpose of that Directive is to require traders to state the retail price, the unit price and the measurement of products in order to facilitate price comparisons by consumers.

It has been argued that, for pricing policies linked to promotional campaigns, that Directive's objectives can only be achieved by introducing more restrictive requirements on how the price should be indicated than what follows from the UCPD.

The Court found that:

*'59. [...] the purpose of Directive 98/6 is not to protect consumers in relation to the indication of prices, in general or with regard to the economic reality of announcements of price reductions, but specifically in relation to the indication of the prices of products by reference to different units of quantity'.<sup>24</sup>*

The Court further concluded that keeping more restrictive national provisions on price reductions cannot be justified under the Price Indication Directive.

### 1.3.2 **Exceptions to full harmonisation**

Article 3(5) and (6) of the UCPD laid down a temporary derogation from full harmonisation for six years starting from 12 June 2007. This applied to national provisions which implement directives containing minimum harmonisation clauses.<sup>25</sup> The Commission's 2013 Report on the application of the UCPD concluded that there was no need to further extend this derogation.<sup>26</sup> Since 12 June 2013, Articles 3(5) and 3(6) of the UCPD are therefore no longer applicable.

**Recital 14 clarifies that the full harmonisation does not preclude Member States from specifying in national law the main characteristics of particular products,** the omission of which would be material when an invitation to purchase is made. It also clarifies that the UCPD is without prejudice to provisions of EU law which expressly afford Member States the choice between several regulatory options for the protection of consumers in the field of commercial practices.

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<sup>23</sup> Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80, 18.3.1998, p. 27.

<sup>24</sup> Case C-421/12, European Commission v Kingdom of Belgium, 10 July 2014.

<sup>25</sup> Article 3 (5) and (6) of the UCPD read as follows:

'5. For a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective. The review referred to Article 18 may, if considered appropriate, include a proposal to prolong this derogation for a further limited period.

6. Member States shall notify the Commission without delay of any national provisions applied on the basis of paragraph 5'.

<sup>26</sup> [COM\(2013\) 139 final](#), section 2.4 'Derogations'.

Article 3(9) places a limitation on the full harmonisation character of the UCPD by stating that *'in relation to 'financial services' [...] and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates'*. Consequently, in these sectors, Member States can impose rules which go beyond the provisions of the UCPD, as long as they comply with other EU law. Chapter 5.4 specifically deals with how the UCPD applies to financial services and immovable property.

## 1.4 Interplay between the Directive and other EU law

### Article 3 (4)



*In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.*

### Recital 10

*It is necessary to ensure that the relationship between this Directive and existing Community law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. [...] This Directive accordingly applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectorial legislation at Community level and prohibits traders from creating a false impression of the nature of products. This is particularly important for complex products with high levels of risk to consumers, such as certain financial services products. This Directive consequently complements the Community acquis, which is applicable to commercial practices harming consumers' economic interests.*

Due to its general scope, the Directive applies to many commercial practices which are also regulated by other general or sector-specific EU legislation.

### 1.4.1 Relationship with other EU legislation

Article 3(4) and Recital 10 are key features of the UCPD. They clarify that the UCPD complements other EU legislation ("Community rules") that regulate specific aspects of unfair commercial practices. Consequently, the UCPD works as a "safety net" ensuring that a high common level of consumer protection against unfair commercial practices can be maintained in all sectors, including by complementing and filling gaps in other EU law.

Where sector-specific or other EU law is in place and its provisions overlap with the provisions of the UCPD, the corresponding provisions of the *lex specialis* will prevail.

Article 3(4) of the Directive clarifies indeed that *"in case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects"*.

Article 3(4) read in conjunction with Recital 10 implies that a provision of EU law will prevail over the UCPD if all of the following three conditions are fulfilled:

- it has the status of EU law,
- it regulates a specific aspect of commercial practices, and
- there is a conflict between the two provisions or the content of the other EU law provision overlaps with the content of the relevant UCPD provision, for instance by regulating the conduct at stake in a more detailed manner and/or by being applicable to a specific sector.

For example:



- *Article 12 of the Mortgage Credit Directive<sup>27</sup> prohibits, in principle, tying practices whereby a credit agreement for a mortgage is sold with another financial product and is not made available separately. This per se prohibition conflicts with the UCPD because tying practices would be unfair and thus prohibited under the UCPD only following a case-by-case assessment. Its Article 12 prevails over the general rules of the UCPD. Thus, tying practices within the meaning of Article 12 of the Mortgage Credit Directive are prohibited as such.*

Where all three conditions set out above are fulfilled, the UCPD will not apply to the specific aspect of the commercial practice regulated, for example, by a sector-specific rule. The UCPD continues nonetheless to remain relevant to assess other possible aspects of the commercial practice not covered by the sector-specific provisions, such as, for example, aggressive behaviour by a trader.

For example:



- *In order to switch to a different telecom provider, a consumer is required by his current provider to fill in a form. However, the form is not accessible on-line and the provider is not replying to the consumer's emails/phone-calls. This behaviour is not prohibited by Article 30 of the*

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<sup>27</sup> Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property. Member States had until 21 March 2016 to transpose it in their legal system.



*Universal Service Directive<sup>28</sup>, which only provides that, when switching, subscribers may retain their phone number, the porting of numbers shall be carried out quickly and not be overly costly. It can however be assessed under Articles 8 and 9(d) UCPD, which qualify disproportionate non-contractual barriers to switching as an aggressive commercial practice<sup>29</sup>.*

It follows from the above that, in general, the application of the UCPD is not per se excluded just because other EU legislation is in place which regulates specific aspects of unfair commercial practices.

For example:



- In Joined Cases C-544/13 and C-545/13, the Court noted<sup>30</sup>:

*"(...) the referring court asks, in essence, whether, if medicinal products for human use [...] fall within the scope of Directive 2001/83, advertising practices relating to those medicinal products [...] can also fall within the scope of Directive 2005/29(...)*

*As the Court has already held, Directive 2005/29 is characterised by a particularly wide scope ratione materiae which extends to any commercial practice directly connected with the promotion, sale or supply of a product to consumers. (...)*

*"the answer (...) is that even where medicinal products for human use, such as those at issue in the main proceedings, fall within the scope of Directive 2001/83, advertising practices relating to those medicinal products [...] can also fall within the scope of Directive 2005/29 provided that the conditions for application of that directive are satisfied."*

Therefore the UCPD can usually be applied together with sector-specific EU rules in a complementary manner; thus, the more specific requirements laid down under other EU rules usually add to the general requirements set out in the UCPD, typically to prevent traders from providing the information required by the sector specific legislation in a misleading or aggressive manner, unless this aspect is specifically regulated by the sector-specific rules.

<sup>28</sup> The Universal Service Directive 2002/22/EC (as amended in 2009) is one of the five directives of the EU regulatory framework for electronic communications. It also includes Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/20/EC on the authorisation of electronic communications networks and services, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities and Directive 2002/58/EC on ePrivacy.

<sup>29</sup> For example, the [UK regulator Ofcom launched in June 2015 an investigation](#) into consumer problems with switching electronic communications providers using as legal basis both the sector-specific provisions and the rules transposing the UCPD.

<sup>30</sup> Joined Cases C-544/13 and C-545/13, 16 July 2015, paragraphs 72, 74 and 82.



For example:

- *Motor vehicles are subject to fully harmonised EU requirements defining pollutant emission limits and the procedures for testing pollutant and CO<sub>2</sub> emissions as well as fuel consumption (see Regulation 715/2007/EC).<sup>31</sup> To help consumers choose vehicles with low fuel consumption, Directive 1999/94/EC specifically requires that information on official fuel consumption and CO<sub>2</sub> emissions is provided to potential buyers of new passenger cars offered for sale or lease in the EU.<sup>32</sup> A failure to do so, combined with an aggressive marketing behaviour, such as pressure selling, would expose the relevant trader to the risk of being found in breach of both Directive 1999/94/EC and the UCPD<sup>33</sup>.*



#### 1.4.2 Impact on enforcement

##### Article 11

*1. Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.*



Based on Article 11, in order to ensure the proper enforcement of EU consumer protection laws, Member States should ensure coordination in good faith between the different competent enforcement authorities. In those Member States where different authorities are responsible for enforcing the UCPD and sector-specific legislation, the authorities should closely cooperate to ensure that the findings of their respective investigations into the same trader and/or commercial practice are consistent.

#### 1.4.3 Information established by other EU law as ‘material’ information

##### Article 7(5)

*5. Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.*



<sup>31</sup> Work is currently ongoing to update the procedures for the emission testing of vehicles: [http://europa.eu/rapid/press-release\\_MEMO-15-5705\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5705_en.htm)

<sup>32</sup> Articles 3, 4, 5 and 6 of this Directive lay down specific information requirements related to fuel economy and CO<sub>2</sub> emissions for passenger cars, e.g., that a label on fuel economy and CO<sub>2</sub> emissions be attached to or displayed, in a clearly visible manner, near each new passenger car model at the point of sale. Member States shall also ensure that promotional material indicates CO<sub>2</sub> emission data and fuel consumption data.

<sup>33</sup> During autumn 2015, national consumer authorities in several Member States, including Poland, Italy and Ireland, have started investigations of the marketing practices of a leading car producer and its distribution network on the suspicion that it had failed to enable its customers to take a truly informed transactional decision. See for example: <http://www.agcm.it/en/newsroom/press-releases/2244-italian-competition-agency-launched-an-ex-officio-investigation-into-volkswagen-ag-and-its-distribution-network-in-italy.html> and: [https://uokik.gov.pl/news.php?news\\_id=11973](https://uokik.gov.pl/news.php?news_id=11973)

*'Information requirements established by Community law in relation to commercial communication'* are found in a number of pieces of sector-specific EU legislation. For example:

- environment (e.g. Energy Labelling Directive,<sup>34</sup> Eco-design Directive,<sup>35</sup> Fuel economy Directive<sup>36</sup>);
- financial services (e.g. Markets in Financial Instruments Directive,<sup>37</sup> Payment Services Directive,<sup>38</sup> Consumer Credit Directive,<sup>39</sup> Mortgage Credit Directive,<sup>40</sup> Payment Accounts Directive,<sup>41</sup> the Regulation on key information documents for PRIIPs<sup>42</sup>);
- health (e.g. Directive 2001/83/EC<sup>43</sup>);
- telecommunications (e.g. Universal Service Directive<sup>44</sup>);
- transport (e.g. Air Services Regulation,<sup>45</sup> Passenger Rights Regulation<sup>46</sup>)

Such information requirements will often be more specific than the information requirements of the UCPD.

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<sup>34</sup> Directive 2010/30/EU on information on the consumption of energy and other resources by energy-related products requires that household appliances and energy related products offered for sale, hire or hire-purchase be accompanied by a fiche and a label providing information relating to their consumption of energy (electrical or other) or of other essential resources.

<sup>35</sup> Directive 2009/125/EC establishing a framework for the setting of ecodesign requirements for energy-related products contains a specific information requirement on the role consumers can play in the sustainable use of the product.

<sup>36</sup> Directive 1999/94/EC relating to the availability of consumer information on fuel economy and CO<sub>2</sub> emissions in respect of the marketing of new passenger cars requires the display of a fuel economy label next to all new passenger cars at the point of sale containing, in particular, the official data on fuel consumption.

<sup>37</sup> Directive 2004/39/EC on markets in financial instruments requires investment firms to provide clients, including consumers, with specific information on their services, the financial instruments and proposed investment strategies, costs and associated charges. This directive will be repealed by the revised Directive 2014/65/EU of 15 May 2015 on markets in financial instruments (Mifid 2).

<sup>38</sup> Directive 2007/64/EC on payment services contains more specific provisions on pre-contractual information and on the modalities for delivering this information. This directive will be repealed by a revised Directive on payment services, known as PSD2.

<sup>39</sup> Directive 2008/48/EC on credit agreements for consumers contains specific information requirements when advertising for a credit.

<sup>40</sup> Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property contains rules on the marketing of mortgage credits such as the prohibition tying practices. The Directive also contains specific information requirements at advertising and pre-contractual stages.

<sup>41</sup> Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.

<sup>42</sup> Regulation (EU) No 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment. The Regulation applies from 31 December 2016.

<sup>43</sup> Directive 2001/83/EC relating to medicinal products for human use contains additional requirements in terms of advertising and labelling of medicinal products.

<sup>44</sup> Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) as amended by Directive 2009/136/EC requires the provision of contractual information on the minimum service quality levels, the type of maintenance offered and any compensation and refund arrangements which apply if the service contracted does not meet quality levels.

<sup>45</sup> Regulation (EC) No 1008/2008 on common rules for the operation of air services requires the final price payable – which shall include all the foreseeable and unavoidable price elements available at the time of publication – to be indicated and broken down by components: air fare or air rate, taxes, airport charges, other charges and surcharges.

<sup>46</sup> Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights contains a specific obligation to inform passengers that in case of denied boarding, flight cancellation or flight delay, they may be entitled to compensation and assistance and care; Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004; Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport.

Article 7(5) of the UCPD clarifies that such information requirements *'shall be regarded as material'*. The concept of 'material information' within the meaning of the UCPD is discussed in Section 3.4.1.

For example:



- *Article 23 of the Air Services Regulation requires air carriers, their agents and other ticket sellers, when offering flight tickets, to break down the final price by components (e.g. air fare, taxes, airport charges, and other charges and fees, such as those related to security and fuel). This constitutes material information within the meaning of Article 7(5) of the UCPD.*

Recital 15 provides that Member States can retain or add information requirements relating to contract law where this is permitted by minimum harmonisation clauses found in existing EU legal instruments.

For example:



- *Member States can introduce additional pre-contractual requirements for on-premises sales, which are subject to the minimum harmonisation clause in Article 5(4) of the Consumer Rights Directive.*

#### 1.4.4 Interplay with the Consumer Rights Directive

The Consumer Rights Directive<sup>47</sup> entered into application on 13 June 2014. It applies to all business-to-consumer contracts including off-premises, distance and on-premises contracts. It also fully harmonises pre-contractual information requirements for distance and off-premises contracts, while allowing Member States to adopt or maintain additional pre-contractual information requirements for on-premises contracts (Article 5(4)).

This minimum harmonisation clause has consequences for commercial practices falling under the fully harmonised UCPD.

Indeed, under Article 5(4) of the Consumer Rights Directive, Member States may adopt or retain pre-contractual information requirements that go beyond the UCPD if these national requirements only apply to on-premises sales and only relate to pre-contractual information requirements, as opposed to advertising and marketing.

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<sup>47</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22.11.2011, p. 64.

For example:



- *A national requirement for traders in brick-and-mortar shops to mention the previous price next to the promotional one in price promotions would go beyond the remit of the UCPD. However, under Article 5(4) of the Consumer Rights Directive, this could be considered a permissible information requirement, as long as it applies merely to on-premises sales and at the pre-contractual stage.*

Both directives also complement each other.

For example:



- *Inertia selling: Point 21 of Annex I to the UCPD prohibits the practice of including in marketing material an invoice or similar document which falsely creates the impression that the consumer has already ordered the marketed product. The Consumer Rights Directive complements the UCPD on the consequences of such practice. Its Article 27 clarifies that, in the case of inertia selling, the 'consumer shall be exempted from the obligation to provide any consideration' and in such cases 'the absence of response from the consumer (...) shall not constitute consent'.*

For 'invitations to purchase', the Consumer Rights Directive provides more detailed pre-contractual information requirements than the information requirements in Article 7(4) of the UCPD.

An invitation to purchase under the UCPD refers to both the information provided at the marketing stage (advertising) and before the contract is signed. In the latter case, there is an overlap between the information requirements under Article 7(4) of the UCPD and the pre-contractual information requirements under the Consumer Rights Directive. The difference between pre-contractual information and an invitation to purchase is further explained in Section 2.7.

Given the more exhaustive character of the information requirements in the Consumer Rights Directive, complying, already at the stage of invitation to purchase, with the requirements laid down by the CRD for the pre-contractual stage should normally also ensure compliance with Article 7(4) UCPD, as far as the content of the information is concerned.<sup>48</sup> The UCPD will still be applicable when assessing any misleading or aggressive commercial practices by a trader on the form and presentation of this information to the consumer.

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<sup>48</sup> See also section 4.1.1.1 of the DG Justice and Consumers [CRD Guidance](#) (version June 2014).

### 1.4.5 Interplay with the Unfair Contract Terms Directive

The Unfair Contract Terms Directive<sup>49</sup> applies to all business-to-consumer contracts and concerns contractual terms which have not been individually negotiated in advance (e.g. pre-formulated standard clauses). In contrast to the UCPD, breaches of the Unfair Contract Terms Directive have contractual consequences: under Article 6(1) of that directive, unfair terms used in a contract with a consumer must '*not be binding on the consumer*'.

The Court has clarified certain elements of the relationship between these Directives in the *Pereničová and Perenič* case,<sup>50</sup> which concerned a credit agreement where the annual percentage rate of charge indicated was lower than the actual rate.

The Court concluded that such erroneous information provided in the contract terms is 'misleading' within the meaning of the Unfair Commercial Practices Directive if it causes, or is likely to cause, the average consumer to take a transactional decision that he would not have taken otherwise.

Finding that such a commercial practice is unfair is one factor that can be cited when assessing the unfairness of contractual terms under the Unfair Contract Terms Directive. Such a finding, however, has no direct effect on whether the contract is valid under Article 6(1) of that Directive.<sup>51</sup>

In the UK, in *OFT v Ashbourne Management Services* it was found that it was contrary to the UCPD to include an unfair term in a contract, and also unfair to seek to enforce it by demanding sums payable under the term.<sup>52</sup>

Only a few Member States' consumer protection authorities have similar powers against unfair commercial practices and unfair contract terms, in order to prohibit the use of non-negotiated standard contract terms which they consider to be unfair without having to take the trader to court.<sup>53</sup>

### 1.4.6 Interplay with the Misleading and Comparative Advertising Directive

The Misleading and Comparative Advertising Directive (MCAD)<sup>54</sup> covers business-to-business (B2B) relations.

However, its rules on comparative advertising continue to provide a general test, based on fully harmonised criteria, for assessing whether comparative advertising is lawful also in business-to-consumer (B2C) transactions.<sup>55</sup>

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<sup>49</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21.04.1993.

<sup>50</sup> Case C-453/10 *Pereničová and Perenič*, 15 March 2012.

<sup>51</sup> Case C-453/10 *Pereničová and Perenič*, paragraph 46

<sup>52</sup> Office of Fair Trading v Ashbourne Management Services Ltd [2011] EWHC 1237 (Ch).

<sup>53</sup> See examples in Italy, Poland, Belgium and the Netherlands.

<sup>54</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376, 27.12.2006, p. 21.

Article 6(2)(a) of the UCPD qualifies as misleading a practice which, including through comparative advertising, creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor. At the same time, under Article 4(a) of the MCAD, comparative advertising is not permitted if it is misleading under Articles 6 and 7 of the UCPD.

Hence, these two Directives cross-reference each other.

Being relevant for both B2C and B2B transactions, the conditions for assessing the lawfulness of comparative advertising laid down by Article 4 of the MCAD are rather broad and include also some aspects of unfair competition (e.g. denigration of trade marks). Therefore, the MCAD will either provide conditions for such assessment under the UCPD for B2C transactions or impose additional requirements which are relevant for traders, mainly competitors, in B2B transactions.

For those Member States which have extended all (Austria and Sweden) or part (Denmark, France, Italy) of the provisions contained in the UCPD to B2B transactions, the UCPD provisions as transposed into national laws will in practice replace the relevant MCAD provisions in B2B relations. It should be noted that some countries (Belgium) have also adopted specific rules for B2B.

#### 1.4.7 Interplay with the Services Directive

Contrary to sector-specific legislation, the Services Directive<sup>56</sup> has a broad scope of application. It applies to services in general as defined in the Treaty on the Functioning of the European Union, with certain exceptions. It can therefore not be considered as *lex specialis* to the Unfair Commercial Practices Directive within the meaning of Article 3(4).

Accordingly, the information requirements in Article 22 of the Services Directive apply in addition to the information required for invitations to purchase under Article 7(4) of the UCPD.

#### 1.4.8 Interplay with the e-Commerce Directive

The e-Commerce Directive<sup>57</sup> applies to information society services, which can include the services provided by operators of websites and online platforms which allow consumers to buy a good or service.

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<sup>55</sup> The MCAD thus covers misleading advertising and unlawful comparative advertising as two independent infringements - see also the Court, Case C-52/13, Posteshop SpA, 13 March 2014.

<sup>56</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27/12/2006.

<sup>57</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17/08/2000.

Article 5 of the e-Commerce Directive lays down general information requirements for service providers, while Article 6 lays down information to be provided in commercial communications. The lists of items set out in these two articles are minimum lists.

Article 6 in particular requires Member States to ensure that traders clearly identify promotional offers, such as discounts, premiums and gifts, where permitted in the Member States where the service provider is established, and the conditions to qualify for such promotional offers.

The interplay between the UCPD and the e-Commerce Directive is further addressed, in particular, in section 5.2.2 on 'The applicability of the UCPD to online platforms'.

#### 1.4.9 Interplay with the Audiovisual Media Services Directive

The Audiovisual Media Services Directive<sup>58</sup> applies to linear and non-linear audiovisual media services (i.e. TV broadcasting and on-demand media services), which can include audiovisual commercial communications which directly or indirectly promote goods or services (e.g. television advertising, sponsorship, teleshopping or product placement).

Article 5 of the Audiovisual Media Services Directive lays down general information requirements for service providers, while Article 9 lays down requirements with which all audiovisual commercial communications must comply. Articles 10 and 11 respectively lay down the conditions which sponsorship and product placement in audiovisual media services must respect.

The Audiovisual Media Services Directive also provides for other stricter criteria which apply only to television advertising and teleshopping (Chapter VII on television advertising and teleshopping).

The UCPD applies to unfair commercial practices occurring in audiovisual media services, such as misleading and aggressive practices, to the extent that they are not covered by the provisions mentioned above.

#### 1.4.10 Interplay with the Data Protection Directive and the e-Privacy Directive

The protection of personal data is a fundamental right under Article 8 of the EU Charter of Fundamental Rights.

Article 8(2) of the Charter contains key data protection principles (fair processing, consent or legitimate aim prescribed by law, right to access and rectification). Article

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<sup>58</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

8(3) of the Charter requires that compliance with data protection rules be subject to control by an independent authority<sup>59</sup>.

The Data Protection Directive<sup>60</sup> regulates the protection of personal data and the free movement of such data. Data protection rules are enforced by national supervisory authorities and national courts.

The e-Privacy Directive<sup>61</sup> complements the Data Protection Directive regarding the processing of personal data in the electronic communication sector, as it facilitates the free movement of such data through electronic communication services. In particular, the e-Privacy Directive requires the user's consent when 'cookies' or other forms of accessing and storing information on an individual's device (e.g. tablet or smartphone) are used.<sup>62</sup>

The Data Protection Directive applies to the processing of 'personal data'.

Personal data means any information relating to an identified or identifiable natural person ('data subject'). An identifiable person is someone who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. A person or organisation who determines the purposes for processing personal data is a data controller (Article 2(a)). The data controller must comply with the legal obligations in the data protection rules.

Processing, which includes collecting and storing personal data, must be fair and lawful. One aspect of fair processing is that the data subject is given relevant information, including:

- the identity of the data controller and of his representative, if any;
- the purposes of that processing;
- any further information, such as:
  1. the categories of personal data being processed;
  2. the recipients of categories of recipients;

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<sup>59</sup> The right to the protection of personal data established in Article 8 may be limited in accordance with the law and for the respect of the principles of a democratic society: subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (Article 52 (2) of the Charter).

<sup>60</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995 - As of 2018, Directive 95/46/EC will be replaced by the General Data Protection Regulation adopted in 2016.

<sup>61</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) as amended by Directive 2006/24/EC and Directive 2009/136/EC.

<sup>62</sup> Article 5(3) of the e-Privacy Directive.



3. the existence of the right of access and the right to rectify the data concerning him;
4. whether the personal data will be provided to third parties, and;
5. information about whether replies to the questions are obligatory or voluntary and possible consequences of failure to reply, information on the existence of the right of access to and of the right to rectify own personal data;

in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.<sup>63</sup>

Fair and lawful processing of personal data requires that data protection principles are complied with and that at least one of the six grounds for legitimate processing applies to any processing activity. Consent by the individual is one of these criteria.

Other criteria will apply where necessary, depending on the circumstances and purposes of the processing.

Data protection principles require that personal data is:

- collected for specific and legitimate purposes and not further processed in a way incompatible with those purposes;
- adequate, relevant and not excessive for those purposes;
- accurate and, if inaccurate, erased or rectified;
- not stored for longer than necessary.

Data-driven business structures are becoming predominant in the online world. In particular, online platforms analyse, process and sell data related to consumer preferences and other user-generated content. This, together with advertising, often constitutes their main source of revenues.

The collection and processing of personal data in these types of situations must comply with the legal requirements under the Data Protection Directive mentioned above. Individuals must be able to exercise their rights in respect of such processing. These include:

- the right to access their personal data;
- the right to object to processing (e.g. direct marketing);
- the right to have their data erased.

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<sup>63</sup> See Articles 10, 11 and 14 of the Data Protection Directive 95/46/EC.

For example:

- *An app developer that decides on the collection and processing of personal data is the 'data controller' under the Data Protection Directive. Therefore, the app developer must inform consumers at least about what type of personal data is being processed, by whom and for what purposes. An app developer processing personal data for further purposes that are incompatible with the purposes notified to the consumer will be in breach of the Data Protection Directive. An app developer must also comply with his obligations under the e-Privacy Directive and ensure that the consumer's prior consent has been obtained if 'cookies' or some other forms of accessing and storing information on the individual's device (e.g. smartphone) are being used.*



As of 25 May 2018, Directive 95/46/EC will be replaced by the General Data Protection Regulation adopted in 2016.<sup>64</sup>

The new rules strengthen the existing rights and empower individuals with more control over their personal data.

Most notably, these include:

- establishment of a single, pan-European law for data protection: data subjects, public authorities and companies will have to simply deal with one EU Regulation, as opposed to 28 national laws;
- easier access to own personal data: individuals will have more information, on top of the existing requirements, as to how their personal data are processed, and this information will have to be made available in a clear and understandable way;
- the right to know, for instance, when personal data have been hacked: for example, companies and organisations must notify the national data protection supervisory authority of serious personal data breaches as soon as possible, so that users can take appropriate measures.

A trader's violation of the Data Protection Directive or of the ePrivacy Directive will not, in itself, always mean that the practice is also in breach of the UCPD.

However, such data protection violations should be considered when assessing the overall unfairness of commercial practices under the UCPD, particularly in the situation where the trader processes consumer data in violation of data protection requirements, i.e. for direct marketing purposes or any other commercial purposes like profiling, personal pricing or big data applications.

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<sup>64</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, p. 1.

From a UCPD perspective, the first issue to be considered concerns the transparency of the commercial practice.

Under Articles 6 and 7 of the UCPD, traders should not mislead consumers on aspects that are likely to have an impact on their transactional decisions. More specifically, Article 7(2) and No 22 of Annex I prevent traders from hiding the commercial intent behind the commercial practice.

The data protection information requirement of consumers about the processing of personal data, not limited only in relation to commercial communication, may be considered as material (Article 7(5)).

Personal data, consumer preferences and other user generated content, have a "de facto" economic value and are being sold to third parties.

Consequently, under Article 7(2) and No 22 of Annex I UCPD if the trader does not inform a consumer that the data he is required to provide to the trader in order to access the service will be used for commercial purposes, this could be considered a misleading omission of material information.

Depending on the circumstances, this could also be considered a violation of the EU data protection requirements to provide the required information to the individual concerned as to the purposes of the processing of the personal data.

#### 1.4.11 Interplay with Articles 101-102 TFEU (competition rules)

Regulation 1/2003<sup>65</sup> provides the legal framework for implementing the competition rules laid down in Articles 101 and 102 TFEU.

Article 101(1) TFEU prohibits in certain circumstances agreements between undertakings, decisions by associations of undertakings and concerted practices, such as fixing purchase or selling prices or other trading conditions, which have as their object or effect the prevention, restriction or distortion of competition in the EU. Its essential feature is that any collusive behaviour by two or more undertakings having anticompetitive object or effect is prohibited and automatically void.

Article 102 TFEU prohibits, in certain circumstances, the abuse of a dominant position by one or more undertakings. Its essential feature is to prohibit abusive conduct even by a single undertaking being dominant. Such an abuse may, for example, consist in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or directly or indirectly imposing unfair purchase or selling prices.

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<sup>65</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04/01/2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the TFEU. The two sets of provisions are, in substance, identical.

Although these practices are, under certain circumstances, prohibited under competition rules, they are not automatically considered as unfair under the UCPD. The breach of competition rules should, however, be taken into account when assessing their unfairness under the UCPD. In such situations, the general clause of Article 5(2) UCPD is relevant.

#### 1.4.12 Interplay with the EU Charter of fundamental rights

According to its Article 51(1), the EU Charter of fundamental rights applies to the Member States when they implement Union law, thus also when they implement the provisions of the UCPD. The Charter contains provisions, among others, on the protection of personal data (Article 8)<sup>66</sup>, the rights of the child (Article 24)<sup>67</sup>, consumer protection (Article 38) and the right to an effective remedy and a fair trial (Article 47).

The Court has stressed the significance of Article 47 of the Charter on access to justice in relation to remedies available to consumers in connection with consumer rights granted under EU directives. The principle of effectiveness, as referred to by the Court, means that national rules of procedure may not make it excessively difficult or impossible in practice for consumers to exercise rights conferred by EU law<sup>68</sup>.

#### 1.4.13 Interplay with Articles 34-36 TFEU

A national measure in an area which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of that harmonising measure and not those of the Treaty of the Functioning of the European Union (TFEU).<sup>69</sup> Thus, when a national measure falls within the scope of the UCPD (discussed in Sections 1.1 and 1.2 above), it should be assessed against the UCPD and not against the TFEU.

National measures that neither fall within the scope of the UCPD nor under any other harmonising instrument of secondary EU law are to be assessed under Articles 34-36 TFEU. The prohibition of measures having an effect equivalent to quantitative restrictions as laid down in Article 34 TFEU covers all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Union trade.<sup>70</sup>

The issue of when a national rule is capable of hindering intra-Union-trade has been dealt with extensively by the Court.

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<sup>66</sup> See below under 1.4.9.

<sup>67</sup> See below under 2.6.

<sup>68</sup> C-34/13 *Kušinová*, paragraphs 63 – 65 and C-169/14 *Sanchez Morcillo*, paragraph 35.

<sup>69</sup> Case C 322/01 *Deutscher Apothekerverband*, para. 64; Case C-205/07, *Gysbrechts* para. 33; Case C-37/92 *Vanacker and Lesage*, para 9; Case C-324/99 *DaimlerChrysler*, para. 32 and Case C-322/01 *Deutscher Apothekerverband*, para. 64.

<sup>70</sup> See Case 8/74 *Dassonville*, para. 5.

Notably, in *Keck*<sup>71</sup> the Court held that national provisions restricting or prohibiting certain selling arrangements are not such as to hinder directly or indirectly, actually or potentially trade between Member States, so long as, first, those provisions apply to all relevant traders operating within the national territory and, secondly, they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States.<sup>72</sup>

The Court includes in the list of selling arrangements, measures relating to the conditions and methods of marketing,<sup>73</sup> measures which relate to the time of the sale of goods,<sup>74</sup> measures which relate to the place of the sale of goods or restrictions regarding by whom goods may be sold<sup>75</sup> and measures which relate to price controls.<sup>76</sup>

Some of the examples of selling arrangements mentioned in the jurisprudence of the Court, notably national provisions that regulate the conditions and methods of marketing, would fall within the scope of the UCPD if they qualify as business-to-consumer commercial practices intended to protect the economic interest of consumers.

Many commercial practices that do not fall within the scope of the UCPD or other secondary EU law would appear to qualify as selling arrangements under *Keck*. Such selling arrangements fall within the scope of Article 34 TFEU if they, in law or in fact, introduce discrimination on the basis of the origin of products. Discrimination in law occurs when the measures are manifestly discriminatory, whilst discrimination in fact is more complex. Such measures would need to be assessed on a case-by-case basis.

If a measure or national practice violates Article 34 TFEU, it may in principle be justified under Article 36 TFEU or on the basis of one of the overriding requirements in the public interest recognised by the Court of Justice. It is for national authorities to demonstrate that the restriction on the free movement of goods is justified on one of these grounds.<sup>77</sup> Furthermore, the Member State must demonstrate that its legislation is necessary to effectively protect the public interests invoked<sup>78</sup>.

In order to be permissible, such provisions must be proportionate to the objective pursued and the objective must not be capable of being achieved by measures which are less restrictive of intra-EU trade.<sup>79</sup>

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<sup>71</sup> Cases C267/91 and 268/91 *Keck*.

<sup>72</sup> In *Keck*, the Court clarified its previous jurisprudence, in particular Case 8/74 *Dassonville*.

<sup>73</sup> See Case C-412/93 *Leclerc-Siplec*, para 22, and Case C-6/98 *ARD*, para. 46.

<sup>74</sup> See Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans*, para 14; Joined Cases C-69/93 and C-258/93 *Punto Casa and PPV* and Joined Cases C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno and Others*, paras. 9 –11, 14, 15, 23 and 24.

<sup>75</sup> See Case C-391/92 *Commission v Greece*, para. 15; Joined Cases C-69/93 and C-258/93 *Punto Casa and PPV*.

<sup>76</sup> See Case C-63/94 *Belgacom*.

<sup>77</sup> See Case C-192/01 *Commission v Denmark*.

<sup>78</sup> See, to that effect, Case C-333/08 *Commission v France*, para. 87.

<sup>79</sup> See, inter alia, Case C-313/94 *Graffione*, para. 17 and Case C-3/99 *Ruwet*, para. 50.

More recently the Court held that *"in determining whether the restriction at issue is proportionate, it is also important to ascertain whether the measures implemented in that context go beyond what is necessary to attain the legitimate objective being pursued. In other words, it is necessary to determine whether there exist alternative measures that are also capable of attaining that objective while at the same time having a less restrictive effect on intra-Community trade"*.<sup>80</sup>

Moreover, the Court held that *"it should be borne in mind in that context that a restrictive measure may be regarded as complying with the requirements of European Union law only if it genuinely reflects a concern to secure the attainment of the objective pursued in a consistent and systematic manner"*.<sup>81</sup>

## 1.5 The relationship between the UCPD and self-regulation

### Article 2 (f)



*'code of conduct' means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;*

### Article 10

#### Codes of conduct

*This Directive does not exclude the control, which Member States may encourage, of unfair commercial practices by code owners and recourse to such bodies by the persons or organisations referred to in Article 11 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article. Recourse to such control bodies shall never be deemed the equivalent of foregoing a means of judicial or administrative recourse as provided for in Article 11.*

The UCPD recognises the importance of self-regulation mechanisms and clarifies the role that code owners and self-regulatory bodies can play in enforcement. Member States may encourage code owners to check for unfair commercial practices, in addition to enforcing the UCPD.

When the rules in self-regulatory codes are strict and rigorously applied by code owners, they may indeed reduce the need for administrative or judicial enforcement action. Moreover, when the standards are high and industry operators largely comply

<sup>80</sup> Case C-161/09 *Kakavetsos-Fragkopoulos*, para. 39.

<sup>81</sup> Case C-161/09 *Kakavetsos-Fragkopoulos*, para. 42.

with them, such rules may be a useful reference point for national authorities and courts in assessing whether a commercial practice is unfair.

The UCPD contains several provisions which prevent traders from unduly exploiting the trust which consumers may have in self-regulatory codes. This is discussed in Section 3.3.3 on non-compliance with codes of conduct.

To improve compliance with the UCPD, in 2012 the European Commission launched two multi-stakeholder dialogue processes bringing together industry representatives, NGOs and national authorities. The multi-stakeholder group on environmental claims<sup>82</sup> and the multi-stakeholder group on comparison tools<sup>83</sup> provided useful input further discussed in sections 5.1 on Environmental Claims and 5.2.6 on Comparison Tools. In addition, these groups drew up:

- 'Compliance Criteria on Environmental Claims': multi-stakeholder advice to help traders apply the UCPD as regards environmental claims,
- a list of key principles for comparison tools.

These documents, which are not legally binding as such, are available at:

[http://ec.europa.eu/consumers/consumer\\_rights/unfair-trade/unfair-practices](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices).

The stakeholders involved in these multi-stakeholder groups have committed to disseminate, promote and implement the criteria/principles and/or support their implementation.

## 1.6 Application of the UCPD to traders established in third countries

The applicability of the UCPD to non-EU traders is regulated by Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II). This Regulation applies "in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters". Rome II is applicable in civil or commercial disputes.

Article 6(1) of the Rome II Regulation:



*The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.*

<sup>82</sup>

<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3327&NewSearch=1&NewSearch=1>

<sup>83</sup>

<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3325&news=1>

When the conditions of Article 6(1) of the Rome II Regulation are fulfilled, *e.g.* if misleading advertising is targeted to EU consumers and this harms the collective interests of EU consumers, the UCPD will be applicable.



## 2. General concepts

### 2.1 The notion of trader

#### Article 2(b)



*'trader' means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name or on behalf of the trader.*

This definition covers not only traders who act on their own account but also persons, including consumers, acting *'in the name of'* or *'on behalf of'* another trader.

#### For example:



- *A Latvian court held that a company that placed advertisements in the media on behalf of and in the interests of another company, which was the service provider, was considered as a trader in the meaning of the national provisions transposing the UCPD.<sup>84</sup>*
- *National consumer protection authorities acting through the European Consumer Protection Cooperation Network carried out a joint enforcement action on online games that offer in-app purchases. They clarified that, although liability for the content of an app primarily rests with the app developer, an app store provider could also be held responsible for ensuring that games on their platforms do not contain direct exhortations to children.<sup>85</sup>*

Hence, under Article 2(b) in conjunction with relevant national laws on liability and sanctions, a trader can be held jointly liable with another trader for infringements of the UCPD committed by the latter on his behalf.

There may be situations where individuals who appear to be consumers selling products to other consumers could in fact be either traders themselves or acting on behalf of traders ('hidden B2C' sales).

Whether a seller qualifies as a "trader" or a consumer must be assessed on a case-by-case basis. Different criteria could be relevant, such as:

<sup>84</sup> Administratīvās rajona tiesas spriedums lietā Nr. A420632710, 8 March 2012.

<sup>85</sup> See section 5.2.4 on App Stores.

- whether the seller has a profit-seeking motive, including the fact that he/she might have received remuneration or other compensation for acting on behalf of a given trader;
- the number, amount and frequency of transactions;
- the seller's sales turnover;
- whether the seller purchases products in order to resell them.

Persons whose main activity is to sell products online on a very frequent basis, purchasing products to resell them at a higher price, could for example fall within the definition of trader.

Organisations which pursue charitable or ethical goals may qualify as traders under the UCPD when they engage in commercial activities (e.g. the sale of products meeting certain ethical standards) towards consumers. Whenever they act as traders, they should comply with the UCPD insofar as their commercial activities are concerned. For instance, information about the origin of the product or its ethical aspects should not be misleading.

The fact that an organisation is structured as 'non-profit' is immaterial to the assessment of whether it qualifies as a trader.

The same applies to public authorities, which may, depending on the circumstances also qualify as a trader when carrying out commercial activities.

For example:

- *A municipality marketing discounted ticket prices for an art exhibition it organises could fall under the definition of trader in the UCPD.*



In the *BKK Mobil Oil* case, the Court confirmed that a public law body charged with a task of public interest such as managing a statutory health insurance fund, can qualify as a 'trader' as:

*'the EU legislature has conferred a particularly broad meaning on the term 'trader', which refers to 'any natural or legal person' which carries out a gainful activity and does not exclude from its scope either bodies pursuing task of public interest or those which are governed by public law'.<sup>86</sup>*

The Court also concluded that:

<sup>86</sup> Case C-59/12, *BKK Mobil Oil*, 3 October 2013, paragraph 32.

*'[...] BKK's members, who must manifestly be regarded as consumers within the meaning of the Unfair Commercial Practices Directive, could be deceived by the misleading information circulated by that body thus preventing them from making an informed choice [...] and leading them to take a decision they would not have taken in the absence of such information, as envisaged by Article 6(1) of that Directive. In those circumstances, whether the body at issue or the specific task it pursues are public or private is irrelevant'.<sup>87</sup>*

In particular, under Annex I of the UCPD (the 'black list') No 22, the following practice is prohibited:

#### No 22 of Annex I



*Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.*

#### For example:



- *A hotel website hosting positive reviews supposedly from consumers which are actually written by the hotel owner.*

## 2.2 The concept of commercial practice

#### Article 2(d)



*business-to-consumer commercial practices means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;*

The Court held that the sole criterion in Article 2(d) of the UCPD is that the trader's practice must be directly connected with the promotion, sale or supply of a product or service to consumers.<sup>88</sup>

<sup>87</sup> Case C-59/12, BKK Mobil Oil, 3 October 2013, paragraph 37.

<sup>88</sup> See, *inter alia*, Case C-388/13 UPC paragraph 35, with references.

A commercial practice can be ‘directly connected’ to the promotion of a product for example by providing *‘information relating to the availability of a product at an attractive price during a certain period’*.<sup>89</sup> Based on the case-law currently available, it is difficult to define a limit for when a commercial practice would no longer be ‘directly connected’ to the promotion of a product. However, as an example, where a trader sells a street map not containing any promotional messages, and the consumer subsequently uses that street map to find his way to a given shop, it would seem unreasonable to qualify the selling of that street map as a commercial practice ‘directly connected’ to the promotion of a product in that given shop.

The Court stated that the UCPD covers activities of a professional following on from a commercial transaction relating to any good or service and following the conclusion of a contract or during the performance of that contract.<sup>90</sup>

On this basis, the Court concluded that:

*‘[...] the fact that the action of the professional concerned took place on only one occasion and affected only one single consumer is immaterial in this context.*

*Neither the definitions set out in Articles 2(c) and (d), 3(1) and 6(1) of the Unfair Commercial Practices Directive nor the latter, considered as a whole, contain any indication that the act or omission on the part of the professional must be recurrent or must concern more than one consumer.’*

*‘[...] the communication, by a professional to a consumer, of erroneous information, such as that at issue in the main proceedings, must be classified as a ‘misleading commercial practice’, within the meaning of that directive, even though that information concerned only one single consumer.’*<sup>91</sup>

## 2.3 The concept of ‘transactional decision’

### Article 2(k)

*‘transactional decision’ means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.*

<sup>89</sup> Case C-281/12 *Trento Sviluppo*, 19 December 2013, paragraph 35. .

<sup>90</sup> Case C-388/13 *UPC*, 16 April 2015, paragraph 36.

<sup>91</sup> Case C-388/13, *UPC*, 16 April 2015, paragraphs 41, 42 and 60.

The UCPD's general provisions (Articles 5 to 9) cover unfair, misleading and aggressive commercial practices which are capable of distorting consumers' economic behaviour, thereby causing or being likely to cause them to take a transactional decision that they would not have taken otherwise.

The wording used in Article 2(k) suggests that the definition should be interpreted in a broad manner and that the concept of transactional decision should cover a wide range of decisions made by the consumer in relation to a product.

The Court held that 'transactional decision' covers not only the decision whether or not to purchase a product, but also decisions directly related to that decision, in particular the decision to enter the shop:

*'Since the commercial practice at issue in the main proceedings concerns information relating to the availability of a product at an attractive price during a certain period, it must be determined whether the acts preparatory to the purchase of a product, such as the consumer's trip to the shop or the act of entering the shop, may be regarded as constituting transactional decisions for the purposes of the directive.*

*[...] 'any decision taken by a consumer concerning whether, how and on what terms to purchase' is a transactional decision. That concept therefore covers not only the decision whether or not to purchase a product, but also the decision directly related to that decision, in particular the decision to enter the shop.*

*[...] Article 2(k) of the directive must be interpreted as meaning that any decision directly related to the decision whether or not to purchase a product is covered by the concept of 'transactional decision'.<sup>92</sup>*

In that sense, the notion of transactional decision also encompasses pre-purchase and post-purchase decisions.

There is a wide spectrum of transactional decisions a consumer may take in relation to a product or a service other than the decision whether to purchase.

These transactional decisions may result in actions which have no legal consequences under national contract law and may be taken at any time between the moment the consumer is initially exposed to the marketing and the end of a product's life or the final use of a service.

Many pre-purchase decisions could be considered transactional decisions.

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<sup>92</sup> Case C-281/12 *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. Arl v Autorità Garante della Concorrenza e del Mercato*, 19 December 2013, paragraphs 35, 36 and 38.

For example:



- *A decision to travel to a sales outlet or shop as a result of a commercial offer.*
- *A decision to agree to a sales presentation by a trader.*
- *A decision to click through a website as a result of a commercial offer.*

Many post-purchase decisions made after having purchased a product or subscribed to a service can qualify as transactional decisions.

For example:



- *A decision to withdraw from or terminate a service contract.*
- *A decision to switch to another service provider.*

For misleading practices committed by third parties, Article 14 of the e-Commerce Directive determines under which conditions certain online platforms are not liable for such third parties' illegal information stored on the platform, when acting as an intermediary providing 'hosting' services within the meaning of that provision.

From a UCPD perspective, what is decisive is whether the relevant on-line intermediary qualifies as a trader and has or not engaged in a business-to-consumer commercial practice directly connected with the promotion, sale or supply of a product to consumers. It is only if that on-line intermediary qualify as a trader and engages in such commercial practices and does so in a manner that is prohibited under the UCPD that it can be found in breach thereof. In this connection the intermediary cannot invoke the liability exemption of Article 14 of the e-Commerce Directive where those practices concern the intermediary's own activities and not the information stored, nor where the intermediary has knowledge of or control over such information.<sup>93</sup>

Many consumers first search for products using search engines or comparison tools or by studying online user reviews and subsequently move to the websites of the traders providing the best offers to make the actual purchase.

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<sup>93</sup> See e.g. Joined Cases C-236/08 to C-238/08, *Louis Vuitton*, para. 113.

For example:



- *Failure by a trader providing an online comparison tool to disclose paid placement adequately to consumers could be an unfair commercial practice, independently of whether the products compared by the consumer through the comparison tool are directly offered for sale by the comparison tool provider or by third party sellers. In this case, the non-transparent commercial practice by the comparison tool provider could lead the consumer to take a transactional decision he would not have taken otherwise.*

In addition, an unfair commercial practice directed at one consumer could lead to a transactional decision by another consumer, which the latter would not have taken otherwise.

For example:



- *Commercial practices by a trader offering online user reviews in which the trader screens negative reviews could be a misleading action or omission even though the relevant transactional decision relates to a decision by a different consumer than the one pressured into removing or not posting a negative review. In this situation, the trader's creation of a false or misleading overall impression about the nature of the review site, or how it operates, could cause the average consumer reading the online reviews to take a decision to contact a listed trader (and subsequently contract with him) which he would not have taken, had he known that negative reviews had been withheld.*

Commercial practices related to search engines, comparison tools and user reviews are further discussed in Chapter 5.2 'Online sector'.

## 2.4 To 'materially distort the economic behaviour of consumers'

The UCPD's general provisions (Articles 5 to 9) cover unfair, misleading and aggressive commercial practices which are capable of distorting consumers' economic behaviour. These provisions use slightly different wording to express these requirements.

Under Article 5(2) UCPD, a commercial practice is unfair if it is contrary to the requirements of professional diligence and '*materially distorts or is likely to materially distort*' the economic behaviour of the average consumer. However, Articles 6, 7 and 8 prohibit a misleading or aggressive commercial practice if it causes or is likely to cause the average consumer to '*take a transactional decision that he would not have taken otherwise*'.

The requirement that a commercial practice must be capable of distorting the consumer's economic behaviour in order to be unfair is worded differently in Article 5(2) than in Articles 6, 7 and 8. At first sight, this apparent contradiction could pose problems of interpretation. However, Article 5(2) should be read in conjunction with Article 2(e), which states:

#### Article 2(e)



*‘to materially distort the economic behaviour of consumers’ means using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.*

Consequently, on the basis of Article 5(2), what determines whether a commercial practice *‘materially distorts or is likely to materially distort’* the consumer's economic behaviour is whether the commercial practice causes or is likely to cause the consumer to *‘take a transactional decision that he would not have taken otherwise’*.

This is the same assessment that is to be made on the basis of Articles 6, 7 and 8. It follows that although the wording of Article 5(2) is different from the wording of the latter Articles, the requirement in relation to the material distortion of the consumer's behaviour is the same.

The broad concept of transactional decision developed by the Court (see section 2.3) allows for the UCPD to apply to a variety of cases where a trader's unfair behaviour does not cause the consumer to enter into a transaction or a service contract.

A commercial practice may be considered unfair not only if it is likely to cause the average consumer to purchase or not to purchase a product, but also if it is likely to cause the consumer to, for example:

- enter a shop;
- spend more time on the internet engaged in a booking process;
- decide not to switch to another service provider or product.

The UCPD does not limit this material distortion test to assessing whether the consumer's economic behaviour (i.e. its transactional decision) has actually been distorted. It also requires an assessment as to whether a commercial practice is ‘likely’ (i.e. capable) to have such an impact on the average consumer. National enforcement authorities should therefore investigate the facts and circumstances of the individual case (i.e. *in concreto*), but assess also the ‘likelihood’ of the impact of that practice on the transactional decision of the average consumer (i.e. *in abstracto*).



For example:



- *A commercial announcement claimed that a new model of a car was ‘the safest car in the world’. In deciding whether the claim had affected any consumer in regard to making a well-founded transactional decision, a Swedish Court<sup>94</sup> found that to qualify as a transactional decision, it was sufficient that the marketing was likely to raise an interest among the average consumer and trigger the consumer’s decision to take any further action (e.g. visit a store or website to obtain additional information on the product).*

## 2.5 ‘Average consumer’

### Recital 18



*It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group... The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgment, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.*

As indicated in Recital 18 and further specified in Articles 5 to 9, the UCPD’s benchmark for assessing the impact of a commercial practice is the notion of the ‘average consumer’, as previously developed by the Court: ‘...in order to determine whether a particular description, trade mark or promotional description or statement is misleading, it is necessary to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect.’<sup>95</sup>

<sup>94</sup> MD 2010:8, Marknadsdomstolen, Toyota Sweden AB v Volvo Personbilar Sverige Aktiebolag, 12 March 2010.

<sup>95</sup> Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, para 31.

This concept was indeed developed by the Court of Justice prior to the UCPD. It was codified then by the UCPD to give national authorities and courts common criteria to enhance legal certainty and reduce the possibility of divergent assessments. In the case-law of the Court, the average consumer is a reasonably critical person, conscious and circumspect in his or her market behaviour.

For example:



- *The ‘reasonably circumspect consumer’ will not believe that the size of a promotional marking on a package corresponds to the promotional increase in the size of that product.<sup>96</sup> Usually, the average consumer will not attribute to goods bearing the marking ‘dermatologically tested’ any healing effects which such goods do not possess.<sup>97</sup>*

The average consumer under the UCPD is in any event not somebody who needs only a low level of protection because he/she is always in a position to acquire available information and act wisely on it. On the contrary, as underlined in Recital 18, the test is based on the principle of proportionality. The UCPD adopted this notion to strike the right balance between the need to protect consumers and the promotion of free trade in an openly competitive market.

Therefore, the average consumer concept under the UCPD should always be interpreted having in mind Article 114 of the Treaty, which provides for a high level of consumer protection. At the same time, the UCPD is based on the idea that, for instance, a national measure prohibiting claims that might deceive only a very credulous, naive or cursory consumer (e.g. ‘puffery’<sup>98</sup>) would be disproportionate and create an unjustified barrier to trade.<sup>99</sup>

As explicitly mentioned by Recital 18, the average consumer test is not a statistical test. This means that national authorities and courts should be able to determine whether a practice is liable to mislead the average consumer exercising their own judgment by taking into account the general presumed consumers' expectations, without having to commission an expert's report or a consumer research poll<sup>100</sup>.

For example:



- *A decision by the UK High Court of Justice states that the term ‘average consumer’ relates to ‘consumers who take reasonable care of themselves, rather than the ignorant, careless or over-hasty’. The High Court also concluded*

<sup>96</sup> Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-01923, para 24.

<sup>97</sup> Case C-99/01 *Criminal proceedings against Gottfried Linhart and Hans Biffl* [2002] ECR I-09375, para 35.

<sup>98</sup> ‘Puffery’ is a subjective or exaggerated statement about the qualities of a particular product, which is not meant to be taken literally. This is the kind of practice referred to in the last sentence of Article 5(3) UCPD.

<sup>99</sup> For vulnerable consumers see 2.3 below.

<sup>100</sup> Case C-210/96 *Gut Springenheide and Tusky v Oberkreisdirektor Steinfurt* [1998] ECR I-4657, para 31, 32, 36 and 37. See also Case C-220/98, *Estée Lauder Cosmetics GmbH & Co. ORG, v Lancaster Group GmbH*, opinion of Advocate General Fennelly, para 28.

*that one cannot assume that the average consumer will read small print on promotional documents.*<sup>101</sup>

- *In Germany, the Oberlandesgericht Karlsruhe found that people with impaired eyesight can also be considered average consumers and printing information in a very small font can be considered a misleading commercial practice.*<sup>102</sup> *A similar decision was taken by the Slovak Trade inspection.*<sup>103</sup>
- *In Hungary the Metropolitan High Court of Appeal found that a reasonably acting consumer is not suspicious and tends to trust that the received information is valid and accurate. A reasonably acting consumer is not obliged to further search for the entire accurate content of the message delivered to him, unless the sender of the message emphatically draws his attention to, or there is strong reference to such an obligation in the text of the message.*<sup>104</sup>

Article 5(2)(b) of the UCPD further refines the average consumer test when the interests of specific groups of consumers are at stake. When the practice is directed at a particular group of consumers, its impact should be assessed from the perspective of the average member of the relevant group.

## Article 5(2)



*2. A commercial practice shall be unfair if:*  
*(...)*

*(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.*

For example:

- *In a case concerning misleading advertising of children's diapers, notably implying a correlation between allergies and the trader's diaper's, the Swedish Market Court identified the average consumer as parents with small children, not having any special knowledge about allergies.*<sup>105</sup>



<sup>101</sup> [2011] EWCH 106 (Ch).

<sup>102</sup> 4 U 141/11.

<sup>103</sup> P/0359/07/2010.

<sup>104</sup> Fővárosi Ítéltábla, Magyar Telekom Nyrt and others, case ID: 2.Kf.27.171/2012/4.

<sup>105</sup> Decision of 4 July 2012 of the Marknadsdomstolen: <http://www.marknadsdomstolen.se/Filer/Avgöranden/Dom2012-7.pdf>.

## Findings from the European Commission's study on consumer vulnerability across key markets<sup>106</sup>



A recent study on consumer vulnerability looked into the concepts of "average" and "vulnerable" consumer, as developed by the Court of Justice, with a particular focus on the UCPD. The study looked at how these legal concepts have been understood across Member States and found that, although used across a number of cases, some level of divergence in the interpretation exists.

The study furthermore investigated the concept of the average consumer in two ways – in relation to the indicators developed by the study to conceptualise consumer vulnerability and in relation to the definition of the average consumer in the UCPD, i.e. referring to the average consumer as reasonably "well informed", "observant" and "circumspect".

On whether the average consumer is "well informed", the study found that the average consumer, as represented by the median consumer response per indicator, feels quite informed about prices, declares that he/she reads communication from the internet, banking and energy providers (but admits to have only glanced over it or skim read it), and states that he/she does not rely on information from advertisements only. As regards the concept of being "observant" and "circumspect", the study found that the median consumer sees him/herself as quite careful in dealing with people and in making decisions, as not very willing to take risks and that he/she disagrees that advertisements report objective facts. The median consumer was also able to correctly identify the meaning of concepts such as KWh, Megabytes/per second and interest rate and to correctly answer questions measuring basic computational abilities<sup>107</sup> and credulity<sup>108</sup>. *Most of the above indicators reflect the self-reported average – as opposed to objective measures – of the concepts of being "well-informed", "observant" and "circumspect" and should hence be interpreted with caution, as they are likely to be influenced – at least in part – by behavioural biases such as consumer overconfidence<sup>109</sup>.*

This is underpinned by the fact that, when presented with complex offers in behavioural experiments<sup>110</sup>, the median consumer was actually not able to select the

<sup>106</sup> Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08). Available at: [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/vulnerability/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm)

<sup>107</sup> Consumers were asked the following questions: Suppose that the exact same product is on sale in shop A and shop B. Which shop is cheaper if...? 1) Shop A offers a TV set for 440 €. Shop B offers the exact same type of TV set at 500 €, but with a discount of 10%, 2) Shop A offers a TV set for 890 €. Shop B offers the exact same type of TV set at 940 €, but with a reduction of 60 € (currency adapted to county).

<sup>108</sup> Consumers were presented with the following radio ad: "Sign-up to BEACH BREAKS and receive a free pair of sunglasses. Sunglasses delivered when you purchase one of our beach holidays", and asked whether the advertisement in their opinion "1) Offers free sunglasses to all who sign-up to beach breaks, 2) Offers sunglasses only to those who buy a holiday from beach breaks, or 3) Don't know".

<sup>109</sup> Consumers' behavioural biases – in particular over-confidence – are highlighted in the study on consumer vulnerability in key markets across the EU ((EACH/2013/CP/08)) and widely documented in relevant literature (e.g. Lunn, P. and Lyons, S. (2010). 'Behavioural Economics and „Vulnerable Consumers”: A Summary of Evidence', Economic and Social Research Institute (ESRI); or Kahneman, D., Slovic, P., and Tversky, A. (Eds.) (1982). Judgement Under Uncertainty: Heuristics and Biases. Cambridge University Press).

<sup>110</sup> The behavioural experiments were conducted in five countries: Romania, Portugal, Lithuania, The United Kingdom and Denmark.

best deal in the experiments reflecting current marketing practices in the energy sector (complex pricing), the online sector (bundling of offers) and across sectors (teaser rates - initial rates below market rates that will be in effect for only a short time, following which the rate will gradually increase). Furthermore, the median consumer reports that he/she never compares deals by banks and energy providers, and that he/she has problems comparing deals from such providers. The median consumer also feels vulnerable to some extent due to personal characteristics, such as health problems, age, belonging to a minority group etc.

Overall, the majority of the indicators show a consistent picture of the average consumer across the 28 EU Member States, but some differences between countries have been found<sup>111</sup>. For example, 69% of consumers in Bulgaria find it either "very" or "fairly" difficult to compare energy deals, while 35% of consumers in Germany say the same. In Denmark, 63% of consumer finds it either "very" or "fairly" difficult to compare the services offered by banks, while this is the case for 33% of UK consumers. These findings point to the fact that the characteristics of the average consumer depend both on the situation he/she is in and how these characteristics are measured. The findings of this study can therefore guide the understanding of the average consumer, and country-specific findings can be found in the final report.

When designing their commercial messages, traders may, at times and in light of the specific nature of the products at stake, need to take certain social, linguistic and cultural features into account which are typical of the average consumers to which the products are targeted. In certain cases, such social, linguistic and cultural features, which can also be peculiar to a given Member State, may therefore also justify a different interpretation of the message communicated in the commercial practice by the competent enforcement authority or court. In a case relating to misleading cosmetics advertising, the Court held that:

*'In order to apply that test to the present case, several considerations must be borne in mind. In particular, it must be determined whether social, cultural or linguistic factors may justify the term 'lifting', used in connection with a firming cream, meaning something different to the German [average] consumer as opposed to consumers in other Member States, or whether the instructions for the use of the product are in themselves sufficient to make it quite clear that its effects are short-lived, thus neutralising any conclusion to the contrary that might be derived from the word 'lifting'.'*<sup>112</sup>

Moreover, the Court stated that:

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<sup>111</sup> When assessed against the indicators developed by the study to conceptualise consumer vulnerability, it was found that the countries where the median consumer shows somewhat less vulnerability than the average across the EU28 are: Austria, Belgium, the Czech Republic, Finland, Germany, Iceland, Ireland, Luxembourg, Malta, Norway, Poland, Slovakia, Slovenia, Sweden, the Netherlands and the United Kingdom. In contrast, countries where the median consumer is slightly more vulnerable than on average across the EU28 are Bulgaria, Cyprus, Greece, Hungary, Latvia, Lithuania, Portugal, Romania, and Spain. In the remaining countries, the median consumer's vulnerability pattern is similar to the EU-wide pattern. These countries are Croatia, Denmark, Estonia, France, and Italy.

<sup>112</sup> Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group*. [2000] ECR I-00117, para 29.

*‘a prohibition of marketing on account of the misleading nature of the trade mark is not, in principle, precluded by the fact that the same trade mark is not considered to be misleading in other Member States. [...] it is possible that because of linguistic, cultural and social differences between the Member States a trade mark which is not liable to mislead a consumer in one Member State may be liable to do so in another.’<sup>113</sup>*

Therefore, on the basis of the average consumer test and despite the UCPD’s full harmonisation character, it could be theoretically justified to require a foreign trader to provide additional information on social, cultural or linguistic grounds. In other words, the omission of such information could mislead consumers in the country of destination, unlike those in the country of origin.

## 2.6 Vulnerable consumers

### Article 5(3) — Prohibition of unfair commercial practices



*3. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.*

#### Recital 19

*Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.*

The UCPD is based on the idea that, whilst it is appropriate to protect all types of consumers from unfair commercial practices, consumers who qualify as members of one of the groups listed in Article 5(3) should be ensured a higher level of protection than ‘the average consumer’ referred to in Article 5(2).

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<sup>113</sup> Case C-313/94 *F.lli Graffione SNC v Ditta Fransa* [1996] ECR I-06039, para 22.



Recital 19 of the Preamble further clarifies the interpretation of Article 5(3): while Article 5(3) appears to exclusively qualify consumers as vulnerable because of their ‘*mental or physical infirmity, age or credulity*’, recital 19 provides a non-exhaustive list of characteristics that make a consumer ‘*particularly susceptible*’.

For example:



- *In a case involving the omission of material information by a credit institution, the Hungarian Competition Authority considered that consumers that had been banned by credit institutions due to poor ability to pay were particularly susceptible to a specific offer.*<sup>114</sup>

Findings from the European Commission's study on consumer vulnerability across key markets<sup>115</sup>:



Taking stock of various existing definitions and understandings of the concept of consumer vulnerability, the study establishes a broad definition, where being more susceptible to marketing practices represents one of five "dimensions" of consumer vulnerability. The study defines the "vulnerable consumer" as:

*"A consumer, who, as a result of socio-demographic characteristics, behavioural characteristics, personal situation or market environment:*

- *Is at higher risk of experiencing negative outcomes in the market;*
- *Has limited ability to maximise his/her well-being;*
- *Has difficulty in obtaining or assimilating information;*
- *Is less able to buy, choose or access suitable products; or*
- *Is more susceptible to certain marketing practices".*

From a UCPD point of view, the last of these "dimensions" is the most relevant, as Article 5(3) defines vulnerable consumers as consumers who are ‘*particularly vulnerable to the practice or the underlying product (...)*’.

Most consumers show signs of vulnerability in at least one dimension, while a third of consumers show signs of vulnerability in multiple dimensions. Less than a fifth of the consumers interviewed show no signs of vulnerability.

As consumer vulnerability is multi-dimensional, so is the impact of personal characteristics on the likelihood of being vulnerable as a consumer. For example, characteristics like age and gender can increase vulnerability in some dimensions, but not in others.

<sup>114</sup> Decision Vj-5/2011/73 by the Hungarian Competition Authority, 10 November 2011.

<sup>115</sup> Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08) - see: [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/vulnerability/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm)

### 2.6.1 The vulnerability criteria in Article 5(3)

Infirmity (mental or physical) includes sensory impairment, limited mobility and other disabilities.

For example:



- *The Italian AGCM considered advertising that misleadingly presented products as able to cure serious illness as particularly serious because it could cause vulnerable consumers, such as people affected by a serious illness, to take a transactional decision that they would not have taken otherwise.*<sup>116</sup>

In this respect, it is worth mentioning that the EU ratified the United Nations Convention on the Rights of Persons with disabilities in 2010<sup>117</sup>. In the UN Committee's first concluding observations in October 2015, a recommendation was made for the EU to "take appropriate measures to ensure that all persons with disabilities who have been deprived of their legal capacity can exercise all the rights enshrined in the European Union treaties and legislation, such as (...) consumer rights (...)".<sup>118</sup>

As regards age, it may be appropriate to consider a commercial practice from the perspective of consumers of various ages.

The Commission study on consumer vulnerability<sup>119</sup> found that age can, in some instances, be a driver of consumer vulnerability. For example, compared to middle aged consumers (34-44), young consumers (16-24 years) are:

- Less likely to take action when experiencing a problem;
- More likely to overpay for services because they cannot use certain payment methods.

On the other hand, the study found that elderly consumers (65-74 and 75+) find it more difficult than middle aged consumers (33-44) to compare offers and select deals in key markets.

Elderly people may be more vulnerable to certain practices because of their age. Aggressive door-to-door selling methods may not affect the average consumer but are

<sup>116</sup> PS6980 - Autorità Garante della Concorrenza e del Mercato

<sup>117</sup> <http://www.un.org/disabilities/convention/conventionfull.shtml>

<sup>118</sup> <http://www.eesc.europa.eu/?i=portal.en.events-and-activities-disabilities-convention>

<sup>119</sup> Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08) - see: [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/vulnerability/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm)



likely to intimidate a certain group of consumers, in particular the elderly, who may be more vulnerable to pressure selling.

Findings from the European Commission's study on online marketing to children:<sup>120</sup>



- Children have clear difficulties in recognising online advertising and consciously defending themselves against commercial persuasion and are affected in their choices and behaviour by such practices.
- The effects of embedded advertisements in games on actual behaviour can be clearly documented. A behavioural experiment investigating the effect of embedded advertisements in games (in this case an advergame) found that playing a game promoting energy-dense food induced higher energy-dense snack intake among children compared to children playing an advergame promoting a non-food product.
- A behavioural experiment investigating the effect of prompts to make in-app purchases in games found that such prompts influence children's consumer behaviour and several children report having bought extra features without fully realising that it would cost money. Many children find it difficult to make a decision when prompted to make in-app purchases.
- Children's vulnerability depends on several factors, including the medium in which the advertisement is sent. Children are more likely to understand the commercial intent of an advertisement shown on TV than advertisements in online games. Children are also less likely to notice and understand the commercial intent of 'embedded advertisements' as compared to more direct advertisements.

In addition to Article 5(3) of the UCPD, children benefit from specific protection through the ban on direct exhortations in Annex I No 28 to the UCPD. This ban, which includes putting pressure on children to buy a product directly or to persuade adults to buy items for them (the 'pester power'), is discussed in section 4.6.

As mentioned in section 2.5 on the average consumer, the capacities of children in understanding online and offline advertising will vary greatly from one child to the next and depending on age and maturity. To a certain extent, it is possible to take this into account under the UCPD, as Article 5(3) allows assessing a commercial practice from the perspective of an average member of a specific age group.

Teenagers represent another category of consumers often targeted by rogue traders. Promoting products which are particularly appealing to teenagers might exploit their

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<sup>120</sup> To be published in the second quarter of 2016.

lack of attention or reflection, as well as their risk-taking behaviour, due to their immaturity and credulity.

For example:



- *An advertisement for mobile phone services conveying the message that, by subscribing to a particular loyalty plan, you can easily make and maintain friends is likely to be taken more literally by teenagers. Depending on the circumstances, this could be taken into account under Article 5(3) UCPD.*

The concept of ‘credulity’ covers groups of consumers who may more readily believe specific claims. The term is neutral and circumstantial, so the effect is to protect members of a group who are for any reason particularly open to be influenced by a specific commercial practice. Any consumer could qualify as a member of this group.

The study on consumer vulnerability<sup>121</sup> found that people failing a credulity test are more likely than others to have problems choosing deals. Furthermore, people who consider themselves as credulous are less likely to complain when facing problems and are more likely to feel vulnerable as consumers.

For example:



- *A trader advertised the sale of bags of sweets by stating that for each bag sold, it would plant one tree. However, the trader had already agreed to plant a certain number of trees, independently from the number of candy bags sold. The Finnish Market Court upheld a claim by the Consumer Ombudsman that this statement took advantage of the credulity of consumers that were concerned about the environment.*<sup>122</sup>

## 2.6.2 ‘Foreseeability’ requirement

The ‘vulnerable consumer’ criteria apply if a commercial practice distorts the economic behaviour of a group of consumers who are particularly vulnerable ‘*in a way which the trader could reasonably be expected to foresee*’.

For example:



- *Online games or applications that are likely to concern children or teenagers, as a vulnerable group, are usually not solely targeted at children. Indeed, games can be very popular also among adults, although they often use cartoons or other features children or teenagers are typically attracted by. The*

<sup>121</sup> Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08). Available at: [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/vulnerability/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm)

<sup>122</sup> MAO: 157/11, the Market Court of Helsinki, 8 April 2011.

*‘foreseeability’ criteria becomes relevant each time one needs to establish whether a given trader could have reasonably expected this practice to appeal in particular to vulnerable groups.<sup>123</sup>*

This criterion adds an element of proportionality to the assessment of a commercial practice in relation to vulnerable consumers.

It aims at holding traders responsible only if the negative impact of a commercial practice on a category of vulnerable consumers could reasonably be considered foreseeable by the trader.

This means that traders are not required to do more than is reasonable, both in considering whether the practice would have an unfair impact on any clearly identifiable group of consumers and in taking steps to limit such impacts.

As a consequence, a commercial practice would not be likely to be considered misleading if some consumers, because of their extreme naivety or ignorance, are misled by, or otherwise act irrationally in response to, even the most honest commercial practice.

For example:

- *There may be a few consumers who may believe that ‘Spaghetti Bolognese’ is actually made in Bologna or ‘Yorkshire Pudding’ in Yorkshire. Traders, however, will not be held liable for every conceivable interpretation of or action taken in response to their commercial practice by certain consumers.*



## 2.7 Invitation to purchase — the concept

Article 2(i)

*‘invitation to purchase’ means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;*



<sup>123</sup> See for example the Common Position of the Consumer Protection Cooperation Network on in-app purchases, as discussed in section 5.2.1.3 on app stores.

For 'invitations to purchase', Article 7(4) of the UCPD regards certain pieces of information as 'material'. This means that traders will need to provide consumers with this information if it not otherwise apparent from the context.

The '*characteristics of the product*' are invariably present as soon as there is verbal or visual reference to the product. A different interpretation could incentivise traders to provide vague product descriptions or omit information in their commercial offers in order to circumvent the information requirements provided for by Article 7(4) of the UCPD.

The last part of the definition in Article 2(i) ('*and thereby enables the consumer to make a purchase*') does not require the commercial communication to provide the consumer with a mechanism to actually purchase (e.g. a phone number or a coupon). It means that the information given in the product marketing must be sufficient to enable the consumer to take the decision as to whether to purchase a specific product for a specific price.

In the *Ving Sverige* case, the Court held:<sup>124</sup>

*'It follows that, for a commercial communication to be capable of being categorised as an invitation to purchase, it is not necessary for it to include an actual opportunity to purchase or for it to appear in proximity to and at the same time as such an opportunity.'*

An invitation to purchase is a narrower concept than advertising, and not all commercial communications will qualify as an invitation to purchase within the meaning of Article 2(i).

However, an invitation to purchase is a wider concept than pre-contractual information. While pre-contractual information requirements refer to information that needs to be provided before the consumer enters into a contract, an invitation to purchase does not necessarily imply that the next step for the consumer is to enter into a contract with a trader.

For example:

- *Radio advertising that includes a product's characteristics and price is an invitation to purchase, but will normally not qualify as pre-contractual information.*



<sup>124</sup> Case C-122/10 *Konsumentombudsmannen v Ving Sverige AB*, Judgement of 12 May 2011, paragraph 32.

This distinction is particularly important in relation to the interplay between the UCPD and the Consumer Rights Directive. A wide variety of commercial communications would normally qualify as invitations to purchase.

For example:<sup>125</sup>



- *An airline website displaying offers for flights and their prices;*
- *A mail order advertisement;*<sup>126</sup>
- *A leaflet from a supermarket advertising for discounted prices on certain products.*

The UCPD leaves traders the choice as to whether to include the price in their commercial communications. A commercial communication or advertisement that includes an exhaustive description of a product or service's nature, characteristics and benefits but not its price cannot be considered an 'invitation to purchase' within the meaning of Article 2(i) of the UCPD. An example of commercial communications which are not invitations to purchase would be advertisements promoting a trader's 'brand' rather than any particular product (i.e. brand advertising).

For example:



- *A Belgian Court ruled that an advertisement inviting a consumer to visit a website to obtain an insurance offer does not constitute an invitation to purchase.*<sup>127</sup>

Information requirements set out in Article 7(4) are discussed in Section 3.4.5, which deals with material information in invitations to purchase.

<sup>125</sup> See also Guidance on the UK Regulation (May 2008) implementing the Unfair Commercial Practices Directive, 2008 *Consumer Protection from Unfair Trading*, Office of Fair Trading, 2008 ([http://www.offt.gov.uk/advice\\_and\\_resources/small\\_businesses/competing/protection](http://www.offt.gov.uk/advice_and_resources/small_businesses/competing/protection)) page 36.

<sup>126</sup> For example, an advertisement in a magazine features T-shirts for sale. The prices and sizes of the T-shirts available are given in the advertisement and the bottom half of the advertisement is an order form which can be filled in, with payment enclosed, and sent direct to the retailers.

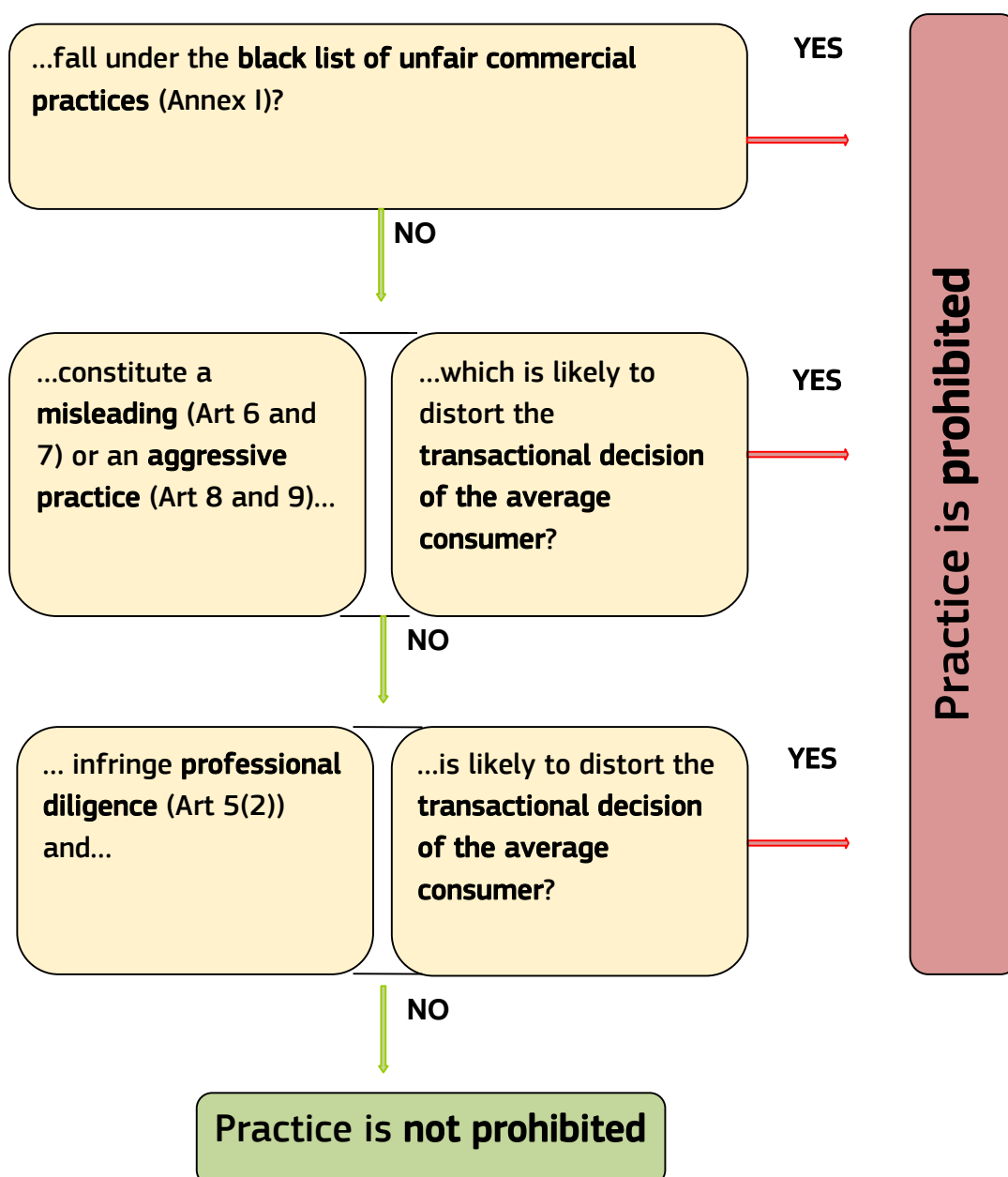
<sup>127</sup> Commercial Court of Antwerp, 29 May 2008, *Federatie voor verzekerings- en financiële tussenpersonen v ING Insurance Services NV and ING België NV*.

### 3. Provisions of the UCPD

#### 3.1 The functioning of the UCPD – Directive flowchart

This flowchart illustrates the relationship between the ‘black list’ of commercial practices in the Annex and the general clauses of the UCPD, namely Articles 6 to 9 and Article 5 respectively. In order to be considered unfair and therefore prohibited under the UCPD, it is sufficient that a commercial practice fulfils only one of these tests.

**Does the commercial practice:**



### 3.2 The general clause — the requirements of professional diligence

#### Article 5 — Prohibition of unfair commercial practices<sup>128</sup>



*1. Unfair commercial practices shall be prohibited.*

*2. A commercial practice shall be unfair if:*

*(a) it is contrary to the requirements of professional diligence, and*

*(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.*

#### Article 2 (h)

*‘professional diligence’ means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity;*

Article 5(2) provides a general clause setting two cumulative criteria for assessing whether commercial practices should be deemed unfair. It functions as a ‘safety net’ to make sure that any unfair practice which is not caught by other provisions of the UCPD (i.e. that is neither misleading, aggressive or listed in Annex I) can still be penalised. The provision is also future proof as it allows for emerging unfair practices to be tackled.

Article 5(2) prohibits commercial practices that are contrary to the requirements of professional diligence if they are likely to materially distort the economic behaviour of the average consumer. This is a self-standing criterion — it is not an additional cumulative test that needs to be met for a practice to be found in breach of any of the specific categories of unfair practices in Articles 6 to 9 or Annex I to the UCPD. This is illustrated by the UCPD flowchart.

This was confirmed by the Court:

*‘45 [...] having regard both to the wording and to the structure of Articles 5 and 6(1) of that directive, and to its general scheme, a commercial practice must be regarded as ‘misleading’ within the meaning of the second of those provisions if the criteria set out there are satisfied, and it is not necessary to determine*

<sup>128</sup> Likewise, Articles 6, 7 and 8 of Directive 2005/29/EC refer to the concept of average consumer.

*whether the condition of that practice's being contrary to the requirements of professional diligence, laid down in Article 5(2)(a) of that directive, is also met.*

*46 The interpretation above is the only one capable of preserving the effectiveness of the specific rules laid down in Articles 6 to 9 of the Unfair Commercial Practices Directive. Indeed, if the conditions for the application of those articles were identical to those set out in Article 5(2) of the directive, those provisions would have no practical significance, even though they are intended to protect the consumer from the most common unfair commercial practices [...]*<sup>129</sup>

The notion of 'professional diligence' encompasses principles which were already well-established in the laws of the Member States before the adoption of the UCPD, such as 'honest market practice', 'good faith' and 'good market practice'. These principles emphasise normative values that apply in the specific field of business activity.

For example:



- *The Polish Office of Competition and Consumer Protection acted against a trader providing satellite television services on the grounds that it had not shown professional diligence. Although contracts were limited in time, if the consumer did not take steps to prevent renewal at the time of expiry, the trader would automatically consider the contract renewed.*<sup>130</sup>

It follows from Article 5(2)(b) that in order to be found contrary to the requirements of professional diligence, a commercial practice must also be considered likely to 'materially distort the economic behaviour' of consumers. This concept is discussed in section 2.4 above.

For example:



- *In April 2015, the Italian AGCM took action against a debt collector. The authority found that the trader applied undue pressure and repeated aggressive practices against consumers. AGCM concluded that such behaviour was contrary to the requirements of professional diligence and impaired the freedom of choice of the average consumer, thus causing him to take a transactional decision that he would not have taken otherwise.*<sup>131</sup>

<sup>129</sup> Case C-435/11, *CHS Tour Services GmbH v Team4 Travel GmbH*, 19 September 2013; confirmed in Case C-388/13, *UPC*, 16 April 2015, paragraphs 61-63.

<sup>130</sup> Decision No DKK 6/2014.

<sup>131</sup> PS9540 – Euroservice-Recupero Crediti. Provvedimento n. 25425, 15 April 2015.



For specific issues concerning the professional diligence of online platforms see section 5.2 'Online sector'.

### 3.3 Misleading actions

#### Article 6 — Misleading actions



*1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:*

*(a) the existence or nature of the product;*

*(b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;*

*(c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;*

*(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;*

*(e) the need for a service, part, replacement or repair;*

*(f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;*

*(g) the consumer's rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (1), or the risks he may face.*

*2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:*

*(a) any marketing of a product, including comparative advertising, which creates*

*confusion with any products, trademarks, trade names or other distinguishing marks of a competitor;*

*(b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:*

*(i) the commitment is not aspirational but is firm and is capable of being verified,*

*and*

*(ii) the trader indicates in a commercial practice that he is bound by the code.*

Together with Article 7 on misleading omissions, Article 6 is by far the most frequently used provision for enforcement purposes.

Insights from behavioural economics show that not only the content of the information provided, but also the way the information is presented can have a significant impact on how consumers respond to it.

For this reason, Article 6 explicitly covers situations where commercial practices are likely to deceive consumers *‘in any way, including overall presentation’ ‘even if the information provided is factually correct’*.

It is for the national courts and administrative authorities to assess the misleading character of commercial practices by taking into account the most recent findings on behavioural economics.

For example, the use of default settings (choices consumers are presumed to make unless they expressly indicate otherwise) or providing unnecessarily complex information may be considered misleading.

### 3.3.1 General misleading information

Article 6(1)(a) to (g) prohibit misleading actions which are capable of deceiving the average consumer on a wide range of elements, including:

- the existence of the product;
- its main characteristics (e.g. its composition, method of manufacture, geographical or commercial origin, the risks and results to be expected from its use);
- the price or the manner in which it is calculated or the existence of a specific price advantage;
- the nature, attributes and rights of the trader.

Article 6 clearly covers any commercial practice which ‘contains false information and is therefore untruthful’.

For example:



- *The Polish Office of Competition and Consumer Protection acted against a trader who falsely claimed that its loans to consumers had the lowest interest rates on the market. In addition, the trader included incorrect information in advertisements by indicating that consumers would be granted loans regardless of their credit history.*<sup>132</sup>

For IT products, such as external hard disks, USB sticks, mobile phones and tablets, the storage capacity, or memory, indicated by traders does not always reflect reality.

While the Consumer Rights Directive<sup>133</sup> stipulates that the consumer must provide clear and comprehensible information about such main characteristics before the purchase, Article 6(1)(b) UCPD prohibits providing incorrect information about the main characteristics of a product if it is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

For example:



- *The Italian AGCM has taken action against a trader who promoted storage capacities of IT products that differed significantly from the actual storage capacity of the products.*<sup>134</sup> Also in Italy, the consumer association Altroconsumo has launched a class action on the basis of investigations among different brands of IT devices that revealed a difference on average of one third between advertised and actual memory.<sup>135</sup>

Information provided to consumers should also not deceive or be likely to deceive the consumer in any way, including in the overall presentation, even if the information is factually correct.

For example:



- *A financial institution promoted an investment product as a low risk five-year deposit with privileged interest and guaranteed capital return on its expiry date. In fact, investors lost the interest on the capital and an important part of the capital initially invested. The Greek Consumer Ombudsman found this commercial practice misleading, as investors had received inadequate and*

<sup>132</sup> Decision No RPZ 4/2015.

<sup>133</sup> Directive 2011/83/EU

<sup>134</sup> PS9678 - Samsung - Caratteristiche Tecniche Smartphone. Decision No. 25138, 19 December 2014.

<sup>135</sup> Launched on 8 March 2016

*misleading information about the financial product offered.*<sup>136</sup>

- *The Consumer Claims Tribunal in Malta considered as misleading the advertising by a mobile phone operator since the trader, while claiming 30% cheaper mobile rates than its competitors, failed to indicate in an unambiguous manner that the first minute of phone conversation was not on a per second basis. The Tribunal considered that, due to the ambiguous presentation of the offer, the consumer was not in a position to take an informed decision.*<sup>137</sup>

While the UCPD does not provide for any formal requirement to indicate the geographical (or commercial) origin of a product or its composition,<sup>138</sup> misleading the consumer on such elements could fall under the ban laid down in Article 6(1)(b) of the UCPD if such false or deceiving information is likely to make the consumer take a purchase decision he would not have taken otherwise.

For example:

- *German courts decided on two occasions<sup>139</sup> that it is misleading to market furniture that does not include any leather with claims that parts of the furniture are made of 'textile leather'. The courts stressed that the average consumer would presume a presence of leather in such furniture.*



Some decisions by national courts specifically relate to the application of the UCPD over misleading origin claims.

For example:

- *A company from the Dominican Republic was marketing its production of rum in the Union by making several references to Cuba on the bottles and in commercial materials. The Court of Appeal of Paris held that mentioning a famous geographical location on a product whereas the product does not originate from that location constitutes a misleading commercial practice.*<sup>140</sup>



Goods of the same brand and having the same or similar packaging may differ as to their composition depending on the place of manufacture and the destination market, *i.e.* they may vary from one Member State to another.

<sup>136</sup> Ombudsman of the Consumer, 25th February 2013 (No of protocol 4995), Bank of Cyprus.

<sup>137</sup> Melita mobile case issued on 17 April 2013.

<sup>138</sup> Although this could be deemed material information under Article 7 of the UCPD.

<sup>139</sup> Urteil Az. I-4 U 174/11\* OLG Hamm 8. März 2012 and Urteil Az. 3 U 219/11\* OLG Bamberg 21. März 2012.

<sup>140</sup> Cour d'appel de Paris, 10 May 2012, Société Havana Club International and SA Pernod v SAS Etablissements Dugas and Société 1872 Holdings VOF (ref 10/04016).

Under the UCPD, commercial practices marketing products with a different composition are not unfair per se. However, the UCPD needs to be considered in cases where traders promote a product as having the same quality and composition as the products of the relevant brand marketed in other Member States. If such commercial claims are incorrect or misleading, they could be considered misleading under Article 6(1)(b) of the UCPD if they could cause the average consumer to take a transactional decision that he would not have taken otherwise.

Under Article 6(1)(d), price information should not be misleading.<sup>141</sup>

Recommended retail prices and references to previous prices could be contrary to Article 6(1)(d) of the UCPD. This could be the case if a trader uses an unreasonably high or otherwise misleading recommended retail price or reference price for the purpose of price comparisons, giving consumers the impression that they are being offered a more significant discount than what is really the case.

For example:



- *A trader advertised sport equipment by comparing its price to the somewhat more expensive recommended retail price of the importer, although the importer was not directly selling such product to consumers. The Market Court of Finland found the practice misleading and prohibited the trader from comparing its price to the recommended retail price, unless such price matches the price actually generally charged by other retailers for the same product<sup>142</sup>.*

Under Article 6(1)(g), traders should not mislead consumers over their consumer rights.

For example:



- *The Prague City court ruled against an appeal by a trader who was fined by the Czech Trade Inspection Authority for misleading consumers over their right of withdrawal. Rather than making explicit reference to the fact that consumers had 14 days to withdraw from the contract, the contracts only included a reference to the relevant provisions of the Czech Civil Code, in unclear and misleading language.<sup>143</sup>*
- *A trader was prominently advertising a one-year free commercial guarantee in order to promote a payable extension of this commercial guarantee for up to three or five years. The company did not properly inform consumers about the existence of the legal guarantee of conformity to which they are entitled under the Consumer Sales and Guarantees Directive within two years of delivery of the*

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<sup>142</sup> MAO:829/15

<sup>143</sup> Prague City Court, 11 May 2015, Bredley and Smith vs Czech Trade Inspection Authority.

*product<sup>144</sup> The Italian AGCM found this commercial practice misleading, in particular on the basis of Article 6(1)(g) of the UCPD.<sup>145</sup> That decision was upheld by Italy's Highest Administrative Appeal Court on 22 September 2015.<sup>146</sup>*

A commercial practice, often referred to as 'up to claims', implies traders putting forward, as a marketing argument, the maximum benefit consumers can expect from the use of a product.

For example:



- *An advertisement for an internet service provider claiming 'up to 100 Mbit/s maximal speed';*
- *Advertising a promotion by saying 'up to 70% off' with the 'up to' in very small print, when most of the items are reduced by a lower percentage;*
- *Claiming that energy saving tyres will allow consumers to save 'up to 80 litres of petrol'.*

An 'up to claim' may be found misleading within the meaning of Articles 6 and 7 if it does not reflect the reality of the offer made by the trader and if it is likely to cause the consumer to take a transactional decision he would not have taken otherwise.<sup>147</sup>

'Up to' claims could be misleading if traders are not in a position to substantiate that consumers are likely to achieve the maximum results promised under normal circumstances.

For example:



- *Under Appendix 1 of the Guidelines on Best Practices in the Telecommunications Industry by the Danish Consumer Ombudsman: 'If the speed for broadband connections via fixed-line broadband (such as DSL and coaxial and optic fibre lines) cannot be guaranteed, the speed may instead be indicated as 'up to'. However, this indication may only be used if most (that is, 80 %) of the customers targeted by the marketing can obtain the speed indicated or a speed that does not differ materially from such speed.'<sup>148</sup>*

<sup>144</sup> Directive 1999/44/EC.

<sup>145</sup> PS7256, Autorità Garante della Concorrenza e del Mercato, 21 December 2011, COMET-APPLE-Prodotti in garanzia.

<sup>146</sup> Consiglio di Stato, N. 05253/2015REG.PROV.COLL. N. 05096/2012 REG.RIC.

<sup>147</sup> According to research published by the UK consumer association 'Which?' in November 2014, '88% of people consider speed to be an important factor influencing their decision to purchase internet broadband'.

<sup>148</sup>

<http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Guidelines/Marketing%20of%20broadband%20connections%20%20Danish%20Consumer%20ombudsman.pdf>.

Whether an 'up to' claim is misleading must be assessed on a case-by-case basis. Different criteria could be relevant, such as:

- Whether they clearly disclose results and benefits that the average consumer can reasonably expect to achieve, including any applicable condition or limitation. Not doing so could qualify as misleading in relation to the product's 'main characteristics':
  - by omitting material information within the meaning of Article 7(4)(a) (in the case of an invitation to purchase);
  - as a misleading action within the meaning of Article 6(1)(b) of the UCPD;
- Whether the trader has adequate evidence readily available to substantiate the claim within the meaning of Article 12 of the UCPD.

A useful definition of ethical claims is provided in the Danish Consumer Ombudsman's Guidance on the use of environmental and ethical marketing claims:<sup>149</sup>

*'Ethical claims' means in particular the use of statements, etc., which convey the impression that the manufacturing of a product or planning of an activity of a trader is made according to generally recognised and accepted standards, for example concerning child labour and general working conditions, nature protection, health, animal welfare, corporate social responsibility (CSR) initiatives and charity donations. Such claims are typically based on the trader's wish to accommodate general or specific developments and trends that can be inferred from consumers' behaviour.*

Corporate social responsibility refers to companies taking responsibility for their impact on society by having in place a process to integrate social, environmental, ethical and consumer concerns into their business operations and core strategy.

This has become a marketing tool used to meet the growing concern of consumers that traders comply with ethical standards. Companies use this approach to show that they take into account ethical and human rights concerns. This may have an impact on the transactional decision of a consumer who has to choose between two competing products of similar quality and price.

For this reason, such initiatives will, in most cases, be '*directly connected with the promotion, sale or supply of a product*' and therefore qualify as a commercial practice within the meaning of the UCPD.

Because there are often significant similarities between ethical/corporate social responsibility claims and environmental claims, the key principles applying to green

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<sup>149</sup> <http://www.consumerombudsman.dk/Regulatory-framework/dcoguides/Environmental-and-ethical-marketing#FIRE>.



claims should also apply to ethical and corporate social responsibility claims. These key principles are further discussed in section 5.1 on environmental claims.

For example:



- *The Danish Consumer Ombudsman's Guidance on the use of environmental and ethical marketing claims notes that ethical claims 'must only be used to the extent that such use is not misleading with regard to other generally accepted ethical standards, e.g. concerning working conditions. Example: 'Over the last ten years, we have built schools for the children at our five production sites in India' (but the company fails to mention that the children work eight hours a day at these factories)'.<sup>150</sup>*

### 3.3.2 Confusing marketing

Article 6(2)(a) of the UCPD addresses confusing marketing.

Article 6(2)(a):



*A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:*

*(a) any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor;*

For example:



- *The Swedish Market Court considered that sending out invoices that mimic another trader's branding (its name, marks and invoice design) and creating the impression that services were rendered by this other trader is an unfair commercial practice. This was also contrary to No 21 of Annex I to the UCPD (including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not).<sup>151</sup>*
- *The Swedish Market Court also considered the use of the indications 'Taxi' and 'Taxi Gothenburg', both in a yellow design on a taxi vehicle, to constitute*

<sup>150</sup> Guidance from the Consumer Ombudsman on the use of environmental and ethical claims, etc., in marketing, August 2014, page 21.

<sup>151</sup> MD 2009:36, Marknadsdomstolen, 19 November 2009.



*comparative advertising and create confusion with the distinguishing marks of a competitor. This was because another trader had performed taxi services in the Gothenburg area since 1922 using the words 'Taxi Gothenburg' and the colour yellow as its trademarks.*<sup>152</sup>

A practice which raises issues of compatibility with this provision is 'copycat packaging'. This refers to the practice of designing the packaging of a product (or its 'trade dress') to give it the general 'look and feel' of a competing well-known brand.

Copycat packaging is distinct from counterfeiting as normally it does not involve copying trademarks. The risk posed by copycat packaging is consumer confusion and, consequently, the distortion of their commercial behaviour.

Consumer deception caused by copycat packaging can take a number of forms:

- Outright confusion — the consumer buys the copycat product having mistaken it for the brand;
- Deception over origin — the consumer recognises the copycat product is different but believes, due to the similar packaging, that it is made by the same manufacturer;
- Deception over quality or nature — again, consumers recognise the copycat is different but believe, due to the similar packaging, that the quality is the same or closer to that of the copied product.

The similar packaging suggests to consumers that the quality or nature of the copycat product is comparable to the quality or nature of the brand in question or at least that it is more comparable than they might otherwise assume. As such, similar packaging gives the impression to consumers that the price alone is the only term of comparison between the products (rather than the combination of price and quality).

Several studies are available on the impact of copycat packaging.<sup>153</sup>

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<sup>152</sup> MD 2015:9, Marknadsdomstolen, 11 June 2015: <http://www.marknadsdomstolen.se/Filer/Avgöranden/Dom2015-11.pdf>.

<sup>153</sup> For example, a 2009 study by the British Brands Group looked into the impact on shoppers of similar packaging. This study found that one in three shoppers admitted to buying the wrong product because of its similar packaging, that as packaging becomes more similar to a familiar brand so more shoppers believe the products come from the same factory and that as packaging becomes more similar so more shoppers are likely to buy the product: <http://www.britishbrandsgroup.org.uk/pages/parasitic-copying>. A 2014 study published in the Journal of Marketing proposes a method and metric to quantify the consumer confusion between leading brands and copycat brands that results from the visual similarity of their packaging designs: <http://journals.ama.org/doi/abs/10.1509/jmr.11.0467>.

For example:



- *A trader names or brands its new sunglasses so as to very closely resemble the name or brand of a competitor's sunglasses. This practice is likely to be in breach of Article 6(2) of the UCPD if the similarity is close enough to confuse the average consumer, making him more likely to opt for the new sunglasses when, without such confusion, he otherwise would not have done so.*

Annex I to the UCPD prohibits in all circumstances some specific commercial practices that involve confusing marketing in relation to trade marks, brands and related features:

No 3 of ANNEX I



*Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.*

No 4 of ANNEX I

*Claiming that traders (including their commercial practices) or products have been approved, endorsed or authorised by a public or private body when they have not been or making such a claim without complying with the terms of the approval, endorsement or authorisation.*

No 13 of ANNEX I

*Promoting a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by that same manufacturer when it is not.*

### 3.3.3 Non-compliance with codes of conduct

Article 6(2)(b):



*2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:*

*(...)*

*(b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:*

*(i) the commitment is not aspirational but is firm and is capable of being verified,*

*and*

*(ii) the trader indicates in a commercial practice that he is bound by the code.*

The UCPD contains several provisions to prevent traders from unduly exploiting the trust which consumers may have in self-regulatory codes. It does not provide specific rules on the validity of a code of conduct, but relies on the assumption that misleading statements about a trader's affiliation or about an endorsement from a self-regulatory body may distort the economic behaviour of consumers and undermine the trust that consumers have in self-regulatory codes. Firstly, Article 6(2)(b) obliges traders to comply with codes of conduct to which they have committed themselves in commercial communications.

For example:



- *The Dutch Consumer Authority took action on the basis of this provision against a provider of energy supply services. The provider, which was a member of an association representing energy companies, claimed to be bound by a code of conduct issued by the association. The code of conduct stated that when consumers request information only, they should not be presented with product or service offers. In the case in point, however, consumers either did not receive the information requested or ended up bound by a contract to which they had not consented. The code of conduct also stated that a member should not take advantage of the inexperience or vulnerability (age) of the consumer. However, the energy provider in question had taken advantage of several elderly people who were contacted.<sup>154</sup>*

Secondly, Annex I to the UCPD prohibits certain practices in all circumstances to ensure that traders make responsible use of codes of conduct in marketing (Annex I points 1 and 3 on codes of conduct, point No 2 on trust marks and point No 4 on endorsement by a public or private body). Some examples are provided in Section 5.1.6 (application of Annex I to environmental claims).

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<sup>154</sup> CA/NB/527/29, 6 November 2010.

### 3.4 Misleading omissions

#### Article 7 — Misleading omissions



*1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.*

*2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.*

*3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.*

*4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:*

*(a) the main characteristics of the product, to an extent appropriate to the medium and the product;*

*(b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;*

*(c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;*

*(d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;*

*(e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.*

*5. Information requirements established by Community law in relation to commercial*

*communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.*

### 3.4.1 Material information

Articles 7(1) and (2) establish in very general terms a positive obligation on traders to provide all the information which the average consumer needs to make an informed purchasing decision. This is what is called ‘material information’ in Article 7.

The UCPD does not define ‘material information’, except for in the specific case of an ‘invitation to purchase’, which is dealt with in Article 7(4). Material information for an invitation to purchase is discussed in section 3.4.5. In addition, as discussed in Section 1.4.3, Article 7(5) UCPD clarifies that ‘information requirements established by EU law in relation to commercial communication, including advertising’, shall be regarded as material.

In order to assess on a case-by-case basis whether key items of information have been omitted, national authorities and courts need to take into account all features and circumstances of a given commercial practice, including the limitations of the medium used to communicate it.

For example:

- *The Polish Office of Competition and Consumer Protection acted against a trader who offered life insurance products without including material information in the advertising. The trader claimed that the relatives of a person covered by the insurance would obtain all insurance benefits if that person died. However, the trader omitted to inform consumers that if the person died within the first 24 months of the contract for reasons other than an accident, the relatives would only receive limited insurance benefits.*<sup>155</sup>



As noted in Section 1.4.9 on the interplay with EU data protection rules, there is an increasing awareness of the economic value of information related to consumers’ preferences, personal data and other user-generated content. If a trader fails to inform a consumer that such information will be used for commercial purposes going beyond the transaction at hand, this could possibly qualify as a misleading omission of material information.

<sup>155</sup> Decision No DDK 7/2014 by the Polish Office of Competition and Consumer Protection.

### 3.4.2 Hidden marketing/failure to identify commercial intent

Under Article 7(2), failing to identify the commercial intent of a commercial practice is regarded as a misleading omission, when this failure is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

The e-Commerce Directive<sup>156</sup>, the Audiovisual Media Services Directive<sup>157</sup> and the e-Privacy Directive<sup>158</sup> similarly lay down certain requirements in this regard with respect to commercial communications and the sending electronic mail for purposes of direct marketing.

Article 6(a) of the e-Commerce Directive:



*'Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:*

*(a) the commercial communication shall be clearly identifiable as such;'*

Article 9(1)(a) and (b) of the Audiovisual Media Services Directive:

*'Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements:*

*(a) audiovisual commercial communications shall be readily recognisable as such. Surreptitious audiovisual commercial communication shall be prohibited;*  
*(b) audiovisual commercial communications shall not use subliminal techniques;'*

Article 19(1) of the Audiovisual Media Services Directive:

*'Television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.'*

Article 13(4) of the e-Privacy Directive:

*'In any event, the practice of sending electronic mail for purposes of direct marketing disguising or concealing the identity of the sender on whose behalf the communication is made, or without a valid address to which the recipient may send a request that such communications cease, shall be prohibited.'*

<sup>156</sup> Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce.

<sup>157</sup> Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services,

<sup>158</sup> Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector.

A specific aspect of hidden marketing is also regulated by Article 8(5) of the Consumer Rights Directive.<sup>159</sup>

Article 8(5) of the Consumer Rights Directive:



*'(...) if the trader makes a telephone call to the consumer with a view to concluding a distance contract, he shall, at the beginning of the conversation with the consumer, disclose the identity and, where applicable, the identity of the person on whose behalf he makes that call, and the commercial purpose of the call'.*

While these provisions focus on specific commercial practices or sectors, Article 7(2) has a general and broader scope and addresses any commercial practice.

For example:



- *The Polish Office of Competition and Consumer Protection acted against a trader who invited consumers to meetings offering them a free health check-up as part of an 'I care for my health' programme. The trader failed to disclose the fact that the main purpose of the meetings was to present products in order to sell them to consumers.*<sup>160</sup>

In addition to Article 7(2), the UCPD bans in all circumstances certain specific practices that involve failure to disclose commercial intent.

Point No 11 of Annex I bans the use of *'editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)'.*

For example:



- *One of Sweden's major newspapers teamed up with a telecom operator who finances a particular section of the newspaper under the title "The Digital Life". This section and all of its material, including promotions of products which the telecom operator was about to launch, appear as the newspaper's editorial content; the only disclosure to the public about the commercial nature of the presented material is the discrete appearance of the text "in collaboration with" followed by the telecom operator's trademark. The Swedish Consumer Agency assessed that the practice was in breach of Point 11 of Annex I UCPD.*<sup>161</sup>

<sup>159</sup> Directive 2011/83/EU on consumer rights.

<sup>160</sup> Decision No RPZ 6/2015 by the Polish Office of Competition and Consumer Protection.

<sup>161</sup> Årenden 2016/53 and 2015/1000: <http://diabasweb.kov.se/arenlist.asp>



Point No 22 of Annex I prohibits *'falsely claiming or creating the impression that the trader is not acting for purposes related to his trade, business, craft or profession or falsely representing oneself as a consumer'*.

Article 7(2), together with points 11 and 22 of Annex I, can be particularly relevant for online traders. This is discussed further in Chapter 5.2 — Online Sector.

For example:



- *In its Guidance on Children, Young People and Marketing, the Danish Consumer Ombudsman comments that 'a game on the webpages of a company where it is obvious that marketing for the company's products takes place could be in line with the legislation. This is because it would be clear for a child that it has entered into a marketing universe and also which products are being marketed there. Therefore, a toy manufacturer may present a game on its webpages in which children can play with that company's products. On the other hand, if the game contains marketing for products that do not belong to the marketing universe of the game, this would be a breach of the legislation. An example could be a game on the webpages of a toy manufacturer in which a doll drinks a particular brand of soft drink or buys clothes from a specific company.'*<sup>162</sup>

### 3.4.3 Material information provided in an unclear manner

According to Article 7(2), providing material information *'in an unclear, unintelligible, ambiguous or untimely manner'* is a misleading omission, if this is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

For example:



- *A Hungarian Court concluded that a trader infringed Article 7 UCPD by informing consumers of their rights in an unclear, ambiguous and not reasonably understandable way. The trader had informed consumers about their right of withdrawal by providing the full text of a Government Decree. The Court found that the text indicated numerous provisions not applicable to the contracts at stake and that delivering the full text of the Government Decree did not qualify as information by which consumers could plainly and concretely become aware of the conditions governing their right to withdraw from the contract.'*<sup>163</sup>

<sup>162</sup> Cf. the Danish Consumer Ombudsman's Guidance on Children, Young People and Marketing, a revised version of which was made public 1 July 2014 and is so far only available in Danish at: <http://www.forbrugerombudsmanden.dk/Love-og-regulering/Retningslinjer-og-vejledninger/Markedsfoeringsloven/Boern-og-Unge-Markedsfoering>.

<sup>163</sup> Decision No K. 27.272/2014, Administrative and Labour Court of Győr.



- *A telephone operator advertised on TV a mobile phone subscription by highlighting the specific price benefits, whilst the restrictions and conditions of the offer were only presented in small print which appeared on the screen for a very short time. The Supreme Court of Finland held that, despite the limits of space and time of the medium used (TV), nothing prevented the trader to more clearly indicate such central facts. Hence, to the extent that material information had been omitted, the advertising was found to be misleading<sup>164</sup>.*

#### 3.4.4 The factual context and limits of the communication medium used

Article 7(1) underlines that to assess whether a commercial practice is misleading, it needs to be considered *‘in its factual context, taking account of all its features and circumstances and the limitations of the communication medium’*.

Article 7(3) should be read in conjunction with Article 7(1). Under Article 7(3), when assessing whether material information has been omitted, account should be taken of:

- the limits of space and time of the communication medium used;
- any measures taken by the trader to make the information available to consumers by other means.

The above provisions apply to all sections of Article 7. In addition, under the introductory part of Article 7(4), traders do not need to provide information in invitations to purchase that is already apparent from the context.

According to Article 7(2), providing material information *‘in an unclear, unintelligible, ambiguous or untimely manner’* is a misleading omission, if this is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

For example:



*A telephone operator advertised on TV a mobile phone subscription by highlighting the specific price benefits, whilst the restrictions and conditions of the offer were only presented in small print which appeared on the screen for a very short time. The Supreme Court of Finland held that, despite the limits of space and time of the medium used (TV), nothing prevented the trader to more clearly indicate such central facts. Hence, to the extent that material information had been omitted, the advertising was found to be misleading<sup>165</sup>.*

<sup>164</sup> KKO 2011:65

<sup>165</sup> KKO 2011:65

Article 7(4)(a) also states that, in invitations to purchase, account should be taken of ‘the medium and the product’ when clarifying whether the main characteristics of the product is one of the elements to be regarded as material information.

For example:



- *In the Ving Sverige case,<sup>166</sup> the Court found that ‘it may be sufficient for only certain of a product’s main characteristics to be given and for the trader to refer in addition to its website, on the condition that on that site there is essential information on the product’s main characteristics, price and other terms in accordance with the requirements in Article 7 of that directive.’*

Given their importance for the consumer’s purchasing decision, information about a product’s full price and main characteristics should be prominently displayed.

For example:



- *A Spanish court considered as misleading a leaflet claiming that 3% savings on purchases could have been made by consumers using the promoted credit card. The Court considered that the general statement in the leaflet led consumers to believe that savings would apply to any kind of purchase made with the credit card, whereas in reality important limitations applied. Such limitations were only specified in the contract terms: this was not deemed to be sufficient, as material information about the characteristics of the advertised product was omitted<sup>167</sup>.*

The overall extent of the required information on a product’s main characteristics must be assessed based on the context of the invitation to purchase, the typology of product and the communication medium used.

### 3.4.5 Material information in invitations to purchase — Article 7(4)

Article 7(4) lists a number of information requirements which are considered material. This is to ensure the maximum amount of legal certainty for consumers at this critical point.<sup>168</sup> Failing to provide consumers with information required by Article 7(4) in the case of an invitation to purchase is a misleading omission, if this failure is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

<sup>166</sup> Case C-122/10 *Konsumentombudsmannen v Ving Sverige AB*, Judgment of 12 May 2011, paragraph 59.

<sup>167</sup> Audiencia Provincial de Madrid Sentencia nº 270/2014. Similar conclusions were raised in another case handled by Spanish Court, Juzgado de lo Mercantil de Madrid Sentencia nº 704/2012.

<sup>168</sup> Recital 14 clarifies that ‘In respect of omissions, this Directive sets out a limited number of key items of information which the consumer needs to make an informed transactional decision...’.

The aim of Article 7(4) is to ensure that, whenever traders make commercial offers, they make available simultaneously, in an intelligible and unambiguous manner, enough information to enable the consumer to take an informed decision to purchase and do not mislead the consumer by the omission of important information.

However, in order not to place unnecessary or disproportionate information burdens on traders, the requirements of Article 7(4) are not static and require different pieces of information depending on the situation. This follows, in particular, from the clarifications made both in Articles 7(1), 7(3) and 7(4) that the factual context and limits of the communication medium used should be taken into account, as discussed in the previous section.

Article 7(4)(a) specifically clarifies that, when assessing whether there is an omission of material information as regards the main characteristics of the product, account should be taken of *'the medium and the product'*.

Establishing what constitutes a product's main characteristics as referred to in Article 7(4)(a) may vary. Firstly, it may depend on the product concerned.

For example:

- *A computer requires more product information than a drinking glass.*



Secondly, the amount and type of information on the product's main characteristics may vary depending on what can be considered 'appropriate' given the 'medium' used by the trader to make the commercial communication.

Certain restrictive conditions which limit the offer should in principle be considered as part of the product's main characteristics.

For example:

- *A very limited period during which a service is provided.*



Safety warnings may, subject to a case-by-case assessment, constitute a main characteristic of a product within the meaning of Article 7(4). Currently, EU sector-specific legislation on product safety usually requires traders to inform about safety issues on the product itself and/or on its packaging. In the case of online sales, it may therefore be difficult for consumers to take truly informed transactional decisions in case the relevant online website does not provide a legible picture of the product/package labelling. An important exception to this approach is contained in

Article 11(2) of the Toys Safety Directive 2009/48/EC<sup>169</sup>, which explicitly requires that safety warnings for toys, such as those specifying the minimum/maximum age of the user, must be clearly visible before the purchase, including where the purchase is made online. For most other products, the UCPD can be used as a legal basis to require traders, especially when promoting products on-line, to inform consumers about those safety aspects that can, taking into account the nature of the product, be considered as main characteristics within the meaning of Article 7(4).

Under Article 7(4)(b), failure to inform consumers of the trader's geographical address and identity can constitute a misleading omission.

For example:



- *In a case relating to an online dating service, the Swedish Market Court ordered a trader to post information about its name, address, registration number and email address in a direct and permanent manner when marketing the services it provided on the Internet. The court held that the trader's not posting its correct address or any email address on its website constituted a misleading omission likely to cause the consumer to take a transactional decision he would not have taken otherwise.<sup>170</sup>*

On the other hand, omitting to provide information about the identity of the trader could sometimes be considered as 'apparent from the context' within the meaning of Article 7(4).

For example:



- *The address of a shop or restaurant which the consumer is already in.*
- *For online shops, Article 5 of the e-Commerce Directive requires traders to make their name, address and other details including their electronic mail address easily, directly and permanently accessible. Furthermore, under Article 10 of the e-Commerce Directive, certain information (e.g. on the various technical steps necessary before the formal conclusion of a contract) must also be provided before the order is placed.*

Based on a case-by-case assessment, stating the commercial name of a trader could be enough to comply with the requirement in Article 7(4)(b) on the trader's identity.

<sup>169</sup> Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys, OJ L 170, 30.6.2009, p.1.

<sup>170</sup> MD 2015:2, 9 March 2015: <http://www.marknadsdomstolen.se/Filer/Avgoranden/Dom2015-2.pdf>.

The legal name must be stated in the terms and conditions of sale, but it may not necessarily be considered material information within the meaning of Article 7(4).

For example:



- *In its advertising material, a fast food company will not need to specify its legal status such as Ltd, SA, SARL, Inc.*

In addition to the requirement in Article 7(4)(b), the Consumer Rights Directive lays down further information requirements on the trader's contact details, specifically in:

- Article 5(1) (on-premises sales) and Article 6(1) (off-premises and distance sales) of the Consumer Rights Directive<sup>171</sup>.

Article 5(1)(c) of the e-Commerce Directive requires online service providers to render accessible to recipients of their services and competent authorities information about *'the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner'*.

E-commerce traders' email addresses may therefore be material information under Article 7(5) of the Unfair Commercial Practices Directive. This information should be easy to find (i.e. not only in the general terms and conditions) and directly and permanently accessible.

Also, under the Data Protection Directive 95/46/EC (and the future General Data Protection Regulation), a data controller must provide to the data subject certain mandatory information, which *inter alia* includes the identity (and the contact details) of the controller and of his representative, if any (except where the data subject already has that information) (see for details section 1.4.10).

Article 7(4)(c) requires traders to state the total (or final) price in an invitation to purchase. This must include all applicable taxes (e.g. VAT) and charges. The final price must include applicable charges and taxes which are unavoidable and foreseeable when the offer is published. When the nature of the product means that the price cannot reasonably be calculated in advance, consumers should be properly informed about the manner in which the price is calculated, as well as, where appropriate, about all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, about the fact that such additional charges may be payable (see also Articles 5(1) and 6(1) of the Consumer Rights Directive).

Experience shows that these requirements are not always complied with.

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<sup>171</sup> See the DG Justice and Consumers [CRD guidance](#).

In 'drip pricing', traders add costs along the purchase process for example by first showing the price exclusive of taxes, fees or charges or by adding charges which are unavoidable after first having presented them as 'optional'. This can lead consumers to take transactional decisions they would not have taken, had the full price been provided as the first 'invitation to purchase'. Such practice may hence amount to a misleading action or omission in breach of the UCPD.

For example:



- *The Polish Office of Competition and Consumer Protection took action against a telecom operator who did not inform consumers that they would have to pay an activation fee in order to use the services provided. Consumers were only informed about this fee after the contract had been signed.*<sup>172</sup>
- *The Maltese Competition and Consumer Affairs Authority imposed administrative fines against a telecom operator who applied charges, of which the consumers were not informed, to provide services that the company could not deliver/supply*<sup>173</sup>.
- *A Spanish court ruled in favour of a decision by the Municipality of Madrid imposing a fine on an internet provider who had failed to display the full price of its services in its commercial offers, notably by omitting to include network charges and taxes*<sup>174</sup>.

The issue of drip pricing is further discussed in section 5.3 on Travel and Transport.

Under Article 7(4)(c) of the UCPD, using 'entry-level prices', i.e. indicating the price 'as from' a specific minimum amount, is permitted if the final price cannot 'reasonably be calculated in advance' due to the nature of the product.

For example:



- *A travel agency indicated prices 'as from' for given flights and travel packages. The Court ruled that the UCPD does not rule out the use of entry-level prices, as long as the information provided meets the Directive's requirements, taking into account the circumstances of a real case. It held that: 'A reference only to an entry-level price may, therefore, be justified in situations where the price cannot reasonably be calculated in advance, having regard, inter alia, to the nature and characteristics of the product.'*<sup>175</sup>

<sup>172</sup> Decision No RBG 38/2014.

<sup>173</sup> 16 July 2015 - Administrative Decision with regard to Stoppa Telefonforsaljning Limited

<sup>174</sup> Tribunal Superior de Justicia de Madrid Sala de lo Contencioso Administrativo Sección 10, No 112/2014

<sup>175</sup> Case C-122/10 Konsumentombudsmannen/Ving Sverige AB, Judgment of 12 May 2011, para. 64.

The minimum price should, however, be a real price applicable to certain products, in accordance with the advertisement.

For example:



- *A company advertised the sale of apartments using statements such as 'It's cheaper than you might think. Prices starting from € 2 150 per square metre'. However, it turned out that there were no apartments available at the price indicated. Moreover, the price indicated did not include VAT. This commercial practice was found to be misleading by the Polish Office of Competition and Consumer Protection.*<sup>176</sup>

Commercial practices where traders advertise prices that do not exist could also be in breach of points 5 and 6 of Annex I to the UCPD, as they may be considered instances of bait advertising (point 5) or bait and switch (point 6).

Under Article 7(4)(d), traders must provide information about arrangements for payment, delivery, performance and complaint handling policy if these depart from the requirements of professional diligence. This means that such information only needs to be displayed if such arrangements are to the consumer's disadvantage compared with the standard of special skill and care a trader may be reasonably expected to exercise towards consumers.

Under Article 7(4)(e), the existence of a right of withdrawal or cancellation must be mentioned in invitations to purchase whenever applicable. Under this requirement, traders are only required to inform consumers about the existence of such rights, without detailing the conditions and procedures to exercise them.

The Consumer Rights Directive lays down more rules on the pre-contractual information to be provided to the consumer before the contract is signed, for example on e-Commerce websites, during a seller's home visit or during a sales call over the telephone<sup>177</sup>

For example, that Directive requires the trader to provide information about 'the total price' before the consumer is bound by a contract.<sup>178</sup> In addition, the consumer is entitled to the reimbursement of any extra payment where the consumer has not given express consent for such a payment, but the trader has inferred it by using default options e.g. by using 'pre-ticked boxes'.<sup>179</sup>

<sup>176</sup> Decision no. RWA-25/2010, Prezes Urzędu Ochrony Konkurencji i Konsumentów, Delegatura w Warszawie, 28 December 2010, Eko-Park S.A.

<sup>177</sup> See Articles 5(1)(d) and 6(1)(g) of the Consumer Rights Directive.

<sup>178</sup> See Articles 5(1)(c) and 6(1)(e) of the Consumer Rights Directive.

<sup>179</sup> See Article 22 of the Consumer Rights Directive.



For distance or off-premises contracts, the trader must provide information about the conditions, time limit and procedures for exercising the right of withdrawal. It must also provide the model withdrawal form set out in Annex I(B) to the Consumer Rights Directive.<sup>180</sup>

### 3.4.6 Free trials and subscription traps

Free trials are marketing tools that allow consumers to order a product or subscribe to a service without costs or for a small amount (i.e. postage of the sample).

Findings from the European Commission's study on misleading "free" trials and subscription traps for consumers in the EU<sup>181</sup>



A study funded by the European Commission has found that 66% of the consumers surveyed had ordered free trials online. Of these consumers, 21% had experienced one or more problems. The study found that of the consumers who had experienced a problem 34% had had difficulties to unsubscribe, 22% could not return a sample product and 18% had not been aware that they had entered into a subscription.

Among the consumers who had experienced a problem, 43% had done so in relation to cosmetics and healthcare products, 32% in relation to food and health supplements, 25% in relation to dating services, 24% in relation to music and films and 21% in relation to cloud based storage services.

The study found that an important reason why consumers find it difficult to unsubscribe is that they cannot identify the traders' contact details. Another reason is that the 'pop-up' nature of free trial offers means that they often disappear quickly: within an eight week period, 25% of the websites screened in the study were no longer available.

In 60% of screened offers, one or more contact details of the trader could not be found or were false or unclear. At the moment of ordering only 7% of mystery shoppers found it unclear who was offering the free trial, but when trying to contact traders to cancel the subscription 27% did not find contact information and 54% of the consumers attempting to contact the trader did not succeed.

Other significant issues identified were:

- Consumers sometimes do not realise that they enter into a subscription when signing up for a free trial.
- Traders sometimes omit or provide information about the true costs of free trial offers in an unclear manner.
- Trials and subscriptions are sometimes presented as free, although they involve costs.

<sup>180</sup> See Article 6(1)(h) of the Consumer Rights Directive.

<sup>181</sup> Study expected to be published in 2016.



If a trader fails to provide his geographical address and identity in an invitation to purchase it can be contrary to Article 7(4)(b) UCPD. In addition, Article 6(1) of the Consumer Rights Directive and Article 5(1)(c) of the e-Commerce Directive require online traders to render accessible information that allows consumers to contact them. The requirements of these Directives qualify as material information under Article 7(5) UCPD.

If a trader does not make it clear to consumers that they may enter into subscriptions by signing up to a free trial, he may infringe Article 7(1), 7(2) and 7(4)(a) (in the case of an invitation to purchase) of the UCPD by omitting material information. Depending on the circumstances, there may also be an infringement of Article 6(1)(a) UCPD.

Omitting or providing information about the true costs of free trial offers in an unclear manner may be contrary to Articles 6(1)(d) and/or 7(1), 7(2) and 7(4)(c) UCPD.

For example:



- *Atelecom operator in Poland advertised on billboards that consumers could receive either two tablets or one mobile phone and a tablet for the price of PLN 1,-. However, the trader did not clearly inform consumers that, in order to take advantage of this offer, they would have to sign both a subscription contract for 24 months and a purchase contract for the products with 36 monthly instalments. The Polish Office of Competition and Consumer Protection found this advertising misleading within the meaning of Article 6(1)(d) of the UCPD.<sup>182</sup>*

Moreover, the Consumer Rights Directive contains a specific rule to improve the transparency of subscription offers on the internet in its Article 8(2). According to this rule, in distance contracts, information relating to the main characteristics of the service, the price inclusive of taxes, the duration of the contract and of the consumers' obligations must be provided in a clear and prominent manner, and directly before the consumer places his order. In addition, the consumer must be given the possibility to explicitly acknowledge that the order implies an obligation to pay, e.g. by activating an unambiguously labelled ordering button.

In addition, describing a products as '*gratis*', '*free*', '*without charge*' or *similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item*' is a commercial practice which is in all circumstances considered unfair and thus prohibited under the UCPD. This follows from No 20 of Annex I of the Directive, which is further explained in Section 4.4.

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<sup>182</sup> Decision No RBG 32/2014.

Inertia selling (demanding payment for or the return or safekeeping of products not solicited by the consumer) is also a commercial practice which is in all circumstances prohibited under the UCPD. This follows from No 29 of Annex I of the Directive.

#### 3.4.7 Provision of certain information in another language

Under Article 7(2) of the UCPD, the trader has to provide material information in a clear, intelligible and unambiguous manner. This requirement can come into play where part of the material information is displayed on a website in a particular language targeting consumers in a specific country, as assessed on a case by case approach, while other pieces of material information are only available in a different language in the standard terms and conditions.

The Consumer Rights Directive allows Member States to require contractual information to be provided in their national language.<sup>183</sup> Article 7(5) of the UCPD confirms that information requirements in other EU legislation on commercial communications '*shall be regarded as material*'. Therefore, in countries that have taken up this option, a trader could be in breach of both the Consumer Rights Directive and the UCPD if it fails to provide the consumer with, for example, confirmation of the contract in the national language of the consumer's country. In such a situation, the Consumer Rights Directive would prevail as sector-specific legislation as concerns failure to provide information in the relevant language at the pre-contractual stage of transactions, whilst the UCPD would apply at the advertising stage.

Section 1.4.3 contains further discussion of other EU information requirements regarded as 'material information' on the basis of Article 7(5).

#### 3.4.8 Planned obsolescence

Planned obsolescence, or built-in obsolescence in industrial design, is a commercial policy involving deliberately planning or designing a product with a limited useful life so that it will become obsolete or non-functional after a certain period of time.

From the UCPD point of view, planned obsolescence is not unfair per se. However, under Article 7, a trader who fails to inform the consumer that a product has been designed with a limited lifetime might, according to the specific circumstances of the individual case, be considered to have omitted to provide material information.

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<sup>183</sup> Information about the Member States' use of the regulatory choices under the Consumer Rights Directive is published on the [Commission's website](#).

For example:



- *Omitting information that:*
  - *washing machines that are designed with a weak drum suspension to 'make sure' that these break after a number of washing cycles, or*
  - *the functional lifetime of a refrigerator is planned to be significantly shorter than for comparable products*

*could be in breach of Article 7 of the UCPD.*

Existing EU legislation provides means of combating planned obsolescence.

The Ecodesign Directive<sup>184</sup> allows the Commission to establish mandatory minimum requirements for reparability, the life-time of products as well as information requirements on their estimated life-time.

There are Ecodesign requirements on life-time in place for a limited number of product categories, such as components of vacuum cleaners<sup>185</sup> and light bulbs<sup>186</sup>. Moreover, the Commission proposal for a revised Energy labelling framework<sup>187</sup> enables the future inclusion of information on the durability of products in the EU Energy label.

The EU Action Plan on Circular Economy, adopted in December 2015<sup>188</sup>, highlighted that the Commission will promote reparability, upgradability, durability, and recyclability by developing further product requirements in its future work under the Ecodesign Directive, as appropriate and taking into account the specificities of different product groups.

Where a lack of conformity with the contract, i.e. a defect, becomes apparent within two years from delivery of the good, the consumer can invoke the legal guarantee under the Consumer Sales and Guarantees Directive<sup>189</sup>. This also applies where the defect is caused by planned obsolescence practices, if this planned obsolescence is not in conformity with the contract. Under this Directive, within the first six months after delivery it is the seller who has to prove that no lack of conformity existed at the time of delivery.

<sup>184</sup> Directive 2009/125/EC establishing a framework for the setting of eco-design requirements for energy-related products.

<sup>185</sup> Commission Regulation (EU) No 666/2013 of 8 July 2013 implementing Directive 2009/125/EC with regard to eco-design requirements for vacuum cleaners.

<sup>186</sup> Commission Regulation (EU) No 1194/2012 of 12 December 2012 implementing Directive 2009/125/EC with regard to eco-design requirements for directional lamps, light emitting diode lamps and related equipment.

<sup>187</sup> [http://ec.europa.eu/energy/sites/ener/files/documents/1\\_EN\\_ACT\\_part1\\_v6.pdf](http://ec.europa.eu/energy/sites/ener/files/documents/1_EN_ACT_part1_v6.pdf)

<sup>188</sup> COM(2015)/0614 final; see also [https://ec.europa.eu/priorities/jobs-growth-and-investment/towards-circular-economy\\_en](https://ec.europa.eu/priorities/jobs-growth-and-investment/towards-circular-economy_en)

<sup>189</sup> Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. In its proposal of 9 December 2015 for a Directive on online and other distance sales of goods the Commission proposed to apply the reversed burden of proof during the entire legal guarantee period of two years. Such a rule would strengthen the consumer protection under the legal guarantee and would give incentives to produce higher quality and more durable products.

### 3.5 Aggressive commercial practices

#### Article 8 — Aggressive commercial practices



*A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken.*

#### Article 9 — Use of harassment, coercion and undue influence

*In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of:*

- (a) its timing, location, nature or persistence;*
- (b) the use of threatening or abusive language or behaviour;*
- (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;*
- (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;*
- (e) any threat to take any action that cannot legally be taken.*

The UCPD provides a single definition of aggressive commercial practices that can be applied across the EU. The Directive prevents traders from adopting selling techniques which limit the consumer's freedom of choice or conduct with regard to the product, thereby distorting their economic behaviour.

For example:



- *In a decision by the Latvian Consumer Protection Authority<sup>190</sup> and confirmed by Latvian courts,<sup>191</sup> an airline's use of pre-ticked boxes was considered unfair on the grounds that it was aggressive and not in compliance with professional diligence.<sup>192</sup> This decision was taken before the entry into application of the Consumers Rights Directive, which has a specific provision on the use of pre-ticked boxes in its Article 22.*

Aggressive commercial practices are those which make use of harassment, coercion, physical force or undue influence. They can involve behaviour at the marketing stage but also practices which occur during or after a transaction has taken place.

For example:



- *According to the Italian Council of State, in order to qualify as aggressive and unfair, a commercial practice should not only influence the consumer's transactional decision, but also be carried out using specific methods. This implies that an aggressive practice should entail active conduct by the trader ('harassment, coercion including the use of physical force, or undue influence') which limits the consumer's freedom of choice.<sup>193</sup>*

Aggressive practices can involve conducts already covered by other national legislation, including contract and criminal law. The UCPD adds an additional layer of protection which can be activated by public enforcement means without necessarily having to start criminal or civil law proceedings.

Article 9(c) outlaws practices which exert undue influence on consumers, such as where a trader exploits a specific misfortune or circumstance of which it is aware to influence a consumer's decision on a product.

Article 9(d) prevents traders from imposing disproportionate non-contractual barriers that are detrimental to consumers who wish to exercise their rights under a contract, including the right to terminate the contract or switch to another product or trader. This provision is important in particular to prevent non-contractual barriers to switching in telecoms and energy utilities contracts.

<sup>190</sup> CRPC decision No.E03-PTU-K115-39 of 23.10.2012 against AirBaltic.

<sup>191</sup> Decision of the Latvian Consumer Rights Protection Authority of 23 October 2012:

[http://www.ptac.gov.lv/sites/default/files/lieta\\_air\\_baltic\\_keksi\\_lemums\\_izraksts\\_23\\_10\\_12\\_2\\_.pdf](http://www.ptac.gov.lv/sites/default/files/lieta_air_baltic_keksi_lemums_izraksts_23_10_12_2_.pdf)

<sup>192</sup> As of 13 June 2014, Article 22 of the Consumer Rights Directive does not allow traders to use default options the consumer has to reject (such as pre-ticked boxes) in order to avoid additional payments, rather than requesting the consumer's express consent for extra payments.

<sup>193</sup> Consiglio di Stato, Adunanza Plenaria - Sentenza 11 maggio 2012, n.14 - Pres. Coraggio – est. Greco.

For example:



- *The Supreme Court of Bulgaria found that the practice where a trader made it particularly burdensome for its customers to terminate their service contracts with it to the point that they were often trapped in de facto automatic renewals amounted to an aggressive commercial practice.*<sup>194</sup>

Article 9(e) covers any threat to take any action that cannot legally be taken. Aggressive practices often occur in doorstep sales or other off-premises sales of consumer goods and in the timeshare sector. Aggressive practices can also occur in debt recovery, where third parties are mandated to collect debts. Onerous or disproportionate switching barriers should also be regarded as aggressive practices.

For example:



- *The Italian Antitrust Authority ruled that sending a notice to a consumer to appear before a judge who had no jurisdiction and who had not received any application from the trader was an aggressive practice. The purpose of the practice was to intimidate consumers through undue influence.*<sup>195</sup>

The general rules in Articles 8 and 9 are complemented by eight specific aggressive practices described in the ‘black list’, which are banned in all circumstances. Some of these practices are further discussed in Chapter 4 on ‘the black list of commercial practices’. Certain practices towards elderly people, such as aggressive door-to-door selling methods, are discussed in Chapter 2.6 on vulnerable consumers.

<sup>194</sup> Supreme Court of Bulgaria, 3 November 2011, 15182/2011, VII d: <http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/4ade3b5386f5ef2cc225793b003048b3?OpenDocument>.

<sup>195</sup> See for example PS8215, decision no 24117 of 12 December 2012.

## 4. The black list of commercial practices (Annex I)

### Article 5(5)



*Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.*

### Recital 17

*It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive.*

The list in Annex I was drawn up to enable enforcers, traders, marketing professionals and customers to identify certain practices and give a more immediate enforcement response to them. It therefore leads to greater legal certainty. If it can be proved that the trader has carried out a blacklisted commercial practice, national enforcers can take action to sanction the trader without having to apply a case-by-case test (*i.e.* assessing the likely impact of the practice on the average consumer's economic behaviour).

In addition to the blacklisted commercial practices described below, Section 5.1.6 describes some practices listed in Annex I to the UCPD that could be particularly relevant to environmental claims.

### 4.1 Products which cannot legally be sold — banned commercial practice No 9

#### Point No 9 of ANNEX I



*'Stating or otherwise creating the impression that a product can legally be sold when it cannot.'*

This practice has been banned to prevent situations where a trader markets a product or a service and omits to clearly inform the consumer that there are legal rules which may restrict the sale, possession or use of a given product. This involves products or services for which the sale is banned or illegal in all circumstances, such as the sale of

illegal drugs. Since such practices often involve criminal activities and/or dishonest operators, they are easy to identify.

Such practices are usually also serious violations of other laws that usually are more specific and which take precedence over the UCPD.

For example:



- *A trader offers goods for sale that the consumer cannot legally own because, for instance, the goods have been stolen.*

A second category of practices concerns products or services which are not illegal but which may be legally marketed and sold only under certain conditions and/or subject to certain restrictions.

For example:



- *Package travel, which can only be marketed by traders that have lodged a guarantee deposit, as required by the Package Travel Directive.<sup>196</sup> The Swedish Market Court found that a travel agency marketing such packages despite having failed to lodge a guarantee deposit with the Swedish Legal, Financial and Administrative Services Agency, had infringed point 9 of Annex I in that consumers were given the false impression that the offer was legal.<sup>197</sup>*

## 4.2 Pyramid schemes — banned commercial practice No 14

Point No 14 of ANNEX I



*'Establishing, operating, or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.'*

This practice has been banned to prevent traders from luring consumers into a scheme promising them compensation when in fact the consumer will actually be compensated primarily for bringing new members into the scheme, rather than from the sale or

<sup>196</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 26.06.1990, p. 59. To be repealed and replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements, OJ L 326, 11.12.2015, p. 1 with effect from 1 July 2018.

<sup>197</sup> 2009:17, Marknadsdomstolen (Stockholm), The Consumer Ombudsman v Casa Nordica Altavista C AB, 26 June 2009.



consumption of products. The pyramid structure of the scheme is generally devised in such a way that it will deliver benefits only to the organisers at the top, whereas recruited consumers usually do not stand any reasonable chance to recover what they have invested. The Court has clarified the conditions under which a system of trade promotion can be considered a 'pyramid promotional scheme' within the meaning of Point No 14 of Annex I. The Court noted that:

*'the prohibition of pyramid promotional schemes is based (...) on three common conditions. First, such a promotion is based on the promise that the consumer will have the opportunity of making a commercial profit. Next, the realisation of that promise depends on the introduction of other consumers into the scheme. Finally, the greater part of the revenue to fund the compensation promised to consumers does not result from a real economic activity'.<sup>198</sup>*

In the same case, the Court clarified that:

*'a pyramid promotional scheme constitutes an unfair commercial practice only where such a scheme requires the consumer to give financial consideration, regardless of its amount, for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products'.<sup>199</sup>*

In the case at hand, a company had advertised a bonus to new customers for every other customer they would recruit. Any newly recruited customer had to pay a registration fee. The Court expressed doubts as to whether the possibility for the consumer to receive compensation was derived primarily from the introduction of other consumers into the scheme, noting that the bonuses paid to existing members were funded only to a small extent by the financial consideration required from new members. The Court also recalled that, if a given practice is not prohibited by the provisions of Annex I, it may still be concluded that the practice is unfair within the meaning of the Directive's general provisions (Article 5 to 9).

For example:

- *The Italian Competition Authority took action in three cases involving pyramid schemes:*



*- One case involved a sales scheme where the compensation system was based not on the sales volumes, but on the number of new sales agents that each of the resellers was able to attract to the system.<sup>200</sup>*

*- Another case involved a sales scheme where the rewards structure was aimed*

<sup>198</sup> Case C-515/12 '4finance' UAB v Valstybinė vartotojų teisių apsaugos tarnyba and Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos, 3 April 2014, paragraph 20.

<sup>199</sup> Case C-515/12 '4finance', paragraph 34.

<sup>200</sup> PS6425 Xango-Prodotti Con Succo Di Mangostano. Provvedimento n. 21917, 15 December 2010.

*mainly at attracting new consumers by recovering the registration fee from the entry of other agents.*<sup>201</sup>

*- In a third case, consumers were proposed to purchase products through mechanisms aimed at recruiting other sellers who were asked for an initial contribution or subscription to a program of personal purchases.*<sup>202</sup>

*The Authority also took into account how the schemes worked in practice. It focused on the number of agents who actually generated sales compared with the total number of recruited consumers and to the varying significance of the revenues/acquisitions from the agents or from sales to outsiders.*

*Investigations showed that the mechanisms involved that the consumer could not make a contribution in exchange for the opportunity to receive compensation that was derived primarily from the introduction of other consumers into the scheme rather than from the sale/consumption of products.*

Hierarchical structures such as pyramid schemes are complex and it may be difficult to quantify the benefits of new members for the company. There may also be different methods for calculating the compensation received by existing members.

For example:



- *The Polish Office of Competition and Consumer Protection took action against a pyramid scheme in which the organiser offered participants opportunities to receive cash donations in return for introducing new members into the scheme.*<sup>203</sup> *To obtain such financial gains, the participants had to: pay a registration fee, make a cash donation to another participant, make other donations to another participant and pay a commission to the organiser of the system. The opportunity to obtain cash donations from a new participant would appear only when a 'Blue Circle' was in place, consisting of participants introduced by people previously introduced by a new participant.*

It seems necessary to distinguish between banned commercial practice No 14, where participants make money mostly or solely by recruiting new participants into the programme, and multilevel marketing, where the sales force is compensated mostly for sales they personally generate and also for the sales of the other salespeople they recruit.

It is also difficult to draw the line between consumers and traders: after a consumer has entered into a scheme, that person could, from the moment he starts promoting it

<sup>201</sup> PS4893 Agel Enterprises-Integratori. Provvedimento n. 23789, 2 August 2012.

<sup>202</sup> PS7621 – Vemma Italia – Prodotti con succo di mangostano, Provvedimento n. 24784, 5 February 2014

<sup>203</sup> Decision No RKR 34/2014.

, be considered as a trader and become subject to the prohibition of the UCPD himself, as regards the professional conducts carried out in the framework of the scheme.<sup>204</sup>

#### 4.3 Products which cure illnesses, dysfunctions and malformations — banned commercial practice No 17

Point No 17 of ANNEX I



*'Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.'*

This ban covers situations where a trader claims that its product or service can improve or cure certain physical or psychological ailments.

For example:



- *The Polish Office for Competition and Consumer Protection ruled that claims that a massage armchair had healing effects on human health (including curing spine and blood circulation diseases) fell under the ban imposed in point No 17 of Annex I.*<sup>205</sup>

Such claims are already partly covered under specific EU legislation. The UCPD is also without prejudice to EU rules on the health properties of products. Point 17 therefore applies only in addition to existing EU rules on health and wellness claims. However, any misleading practices with regard to health and wellness products can still be assessed in the light of Article 6 of the UCPD (e.g. where the overall presentation is deceptive).

The prohibition relates first of all to claims regarding physical states classified as pathologies, dysfunctions or malformations by medical science. However, as such claims are also regulated by sector-specific EU legislation, the practical utility of point 17 in relation to these practices is marginal.

Indeed, under Article 7(3) of the Food Information Regulation,<sup>206</sup> information about a food provided by a trader to a consumer *'shall not attribute to any food the property of preventing, treating or curing a human disease, nor refer to such properties'*. This general provision applies to food business operators at all stages of the food chain, where their activities concern the provision of food information to consumers.

<sup>204</sup> For an example, see <https://www.gov.uk/government/news/three-sentenced-following-cma-prosecution-of-multi-million-pound-pyramid-promotional-scheme>

<sup>205</sup> Decision of the President of the Office for Competition and Consumer Protection, Ref. RPZ 2/2012 ZdroWita of 13 March 2012.

<sup>206</sup> Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

The term '*food information*' means information concerning the food and made available by means of labelling other accompanying material, or any other means including technology tools or verbal communication.

In addition, the EU's Nutrition and Health Claims Regulation lays down detailed rules on the use of nutrition and health claims on foods in commercial communications such as advertising.<sup>207</sup> Under the Regulation, claims which imply that a food has particular beneficial nutritional properties ('*nutrition claims*') or that a relationship exists between health and a food category, a food or one of its constituents ('*health claims*') cannot be made without prior EU authorisation. The Regulation also specifically bans the following health claims:<sup>208</sup>

- claims which suggest that health could be affected by not consuming the food;
- claims which make reference to the rate or amount of weight loss;
- claims which make reference to recommendations of individual doctors or health professionals and other associations.

Health-related claims are also covered by EU health and pharmaceutical legislation. Article 6(1) of Directive 2001/83/EC on medicinal products<sup>209</sup> makes it clear that no medicinal product may be placed on the market of a Member State unless a marketing authorisation has been issued. This Directive also sets out specific provisions on advertising medicinal products to the general public, which must:<sup>210</sup>

- be set out in such a way that it is clear that the message is an advertisement and that the product is clearly identified as a medicinal product;
- include the following minimum information:
  - the name of the medicinal product, as well as the common name if the medicinal product contains only one active substance,
  - the information necessary for the correct use of the medicinal product,
  - an express, legible invitation to read carefully the instructions on the package leaflet or on the outer packaging, as the case may be.

In addition, Article 90(a) to (k) of Directive 2001/83/EC bans certain specific advertising techniques. For example, the advertising of a medicinal product to the general public must not contain any material which;

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<sup>207</sup> Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods.

<sup>208</sup> Article 12 of Regulation (EC) No 1924/2006.

<sup>209</sup> Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use.

<sup>210</sup> Article 89 of Directive 2001/83/EC.

- a) gives the impression that a medical consultation or surgical operation is unnecessary, in particular by offering a diagnosis or by suggesting treatment by mail;
- b) suggests that the effects of taking the medicine are guaranteed, are unaccompanied by adverse reactions or are better than, or equivalent to, those of another treatment or medicinal product;
- c) suggests that the health of the subject can be enhanced by taking the medicine.

In addition, specific limits (i.e. bans) exist on promoting pharmaceuticals and medical treatments. These mainly concern relations between professionals i.e. traders and doctors. The choice of the product/treatment depends on the doctor or specialist who prescribes it. Any misleading advertising in this area (whether it concerns an authorised trader or not) will trigger the relevant EU or national rules and be subject to the respective systems of enforcement and sanctions. These will take precedence over the UCPD.

Banned commercial practice No 17 also applies to products or services such as cosmetics, aesthetic treatments, wellness products and similar. Based on the way they are marketed, such products and services are intended to produce certain improvements in the physical conditions of human or animal bodies but their marketing is not necessarily covered by sector-specific EU legislation.

As regards cosmetic products, Article 20(1) of Regulation 1223/2009 on cosmetic products<sup>211</sup> requires Member States to prohibit the wording, use of names, trademarks, images or other signs (figurative or otherwise) suggesting a characteristic the products in question do not possess in the labelling, making available on the market and advertising of cosmetic products.

A trader's failure to produce the appropriate and relevant evidence on the physical effects a consumer can expect from a product's use will fall under banned commercial practice No 17 on the grounds that a false claim has been made, if it is not covered by sector-specific EU legislation.

In order to avoid the ban, traders must be able to substantiate any factual claims of this type with scientific evidence.

The fact that the burden of proof rests on the trader reflects the principle, more broadly formulated in Article 12 of the UCPD, which states that *'Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings [...]: (a) to require the trader to furnish evidence as to the*

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<sup>211</sup> Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products, OJ L 342, 22.12.2009, p. 59.

*accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case’.*

For example:



- *An online trader advertised a number of products on its website, including clothes and cosmetics, as having various positive effects on health (e.g. reducing pain, improving sleep and decreasing wrinkles). However, it could not substantiate its claims with appropriate evidence. The Competition Council of the Republic of Lithuania considered this to be an example of the misleading commercial practice banned under Annex I to the UCPD.<sup>212</sup>*

#### 4.4 Use of the word ‘free’ — banned commercial practice No 20

Point No 20 of ANNEX I



*‘Describing a product as ‘gratis’, ‘free’, ‘without charge’ or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.’*

This ban is based on the idea that consumers expect a ‘free’ claim to be exactly that, meaning they receive something without giving money in exchange. This means that an offer can be described as free only if consumers pay no more than:

- a) the minimum, unavoidable cost of responding to the commercial practice (e.g. the current public postage rates, the cost of telephoning up to and including the standard national rate or the minimum, unavoidable cost of sending a text message);
- b) the true/real cost of freight or delivery;
- c) the cost, including incidental expenses, of any travel involved if consumers collect the offer.

As a consequence, traders should not charge for packaging, handling or administration of a product marketed as "free". When traders make ‘free’ offers, they should also state clearly in all material what the consumer’s liability is for any unavoidable costs, as referred to above.

<sup>212</sup> 25-17, Lietuvos Respublikos konkurencijos taryba (Vilnius), 04.07.2011.

It is harder to determine whether the commercial practice is unfair when the word 'free' is used in combined offers, which are commercial offers involving more than one product or service. Combined offers are usually conditional purchase promotions or package offers.

The following are some principles which national authorities could take into account when assessing combined offers. They are already largely reflected in some advertising regulatory codes:

- Traders must not try to recover their costs by reducing the quality or composition or by inflating the price of any product that must be bought as a pre-condition for obtaining a separate, free item.
- Traders should not describe an individual element of a package as 'free' if the cost of that element is included in the package price.

For example:



- *In a combined offer for a mobile phone with a subscription, a Swedish telecom operator marketed the price as '0 kr'. However, once consumers accepted the offer, the monthly instalments for the subscription increased. A court agreed with the Consumer Ombudsman that this fell under point No 20 in Annex I to the UCPD.*<sup>213</sup>
- *In the case of an offer for a "free credit", the Hungarian Competition Authority found that it falls under point No 20 in Annex I to the UCPD if the consumer may have to sign a credit insurance contract with additional costs to get the loan granted.*

The ban does not prevent traders from using the word 'free' in conditional purchase promotions where customers are required to buy other items (i.e. 'buy one get one free'-type offers), provided that:

- i. it is made clear to consumers that they have to pay all costs;
- ii. the quality or composition of the paid-for items has not been reduced; and
- iii. the price of the paid-for items has not been inflated to recover the cost of supplying the free item.

For example:



- *A trader launched a promotional campaign on the internet and in newspapers offering two free car tyres when buying two new ones. In reality, the price stated for the two tyres in the campaign was twice as high as the*

<sup>213</sup> Joint Judgments Dnr B 2/11 and B 3/11 by Marknadsdomstolen, 11 May 2012.

*previously applied retail price. The Competition Council of the Republic of Lithuania ruled that this conditional purchase promotion was prohibited under point No 20 of Annex I.<sup>214</sup>*

The key distinguishing feature of a conditional purchase promotion is that the item described as 'free' must be genuinely separate from and additional to the item(s) that the customer is required to pay for.

Hence, in such conditional purchase promotions, traders must be able to show:

- i. that the free item is genuinely additional to the item(s) usually sold for that price or that the free item is genuinely separable from the paid-for item(s);
- ii. that they only supply the 'free' item with the paid-for item(s) if the consumer complies with the terms of the promotion; and
- iii. that consumers are aware of the stand-alone price of the item(s) they are paying for and that that price remains the same with or without the free item.

For example:

- *A 'free wall-chart when you buy Thursday's paper' claim is legitimate if the paper is sold without a wall-chart on other days for the same price;*
- *A claim of 'free travel insurance for customers who book their holiday online' is legitimate if customers who book the same journey by telephone are offered the same price but not offered free insurance;*



Point 20 of Annex I prohibits the use of the word 'free' to describe an individual element of a package offer if the cost of that element is included in the package price. A 'package offer' here means a pre-arranged combination of features offered for a single, inclusive price where customers cannot exercise genuine choice on how many elements of the package they receive for that price.

For example:

- *If a car is advertised with leather seats, air conditioning and a CD player for a standard price of € 10 000, that combination of features is a package. The consumer pays one all-inclusive price for the car as advertised. If any of the advertised features were to be removed, the quality and composition of the car the customer is paying € 10 000 for would be diminished. In order to claim that*



<sup>214</sup> 25-27, Lietuvos Respublikos konkurencijos taryba (Vilnius), 11 November 2010.



*the CD player is free and that the € 10 000 relates to the other elements, the trader needs to demonstrate either (a) that the requirements of a conditional purchase promotion are satisfied, or (b) that the CD player was a new additional feature and that the price of the car had not increased (see below).*

However, traders sometimes add new elements to existing packages without increasing the overall price of the package or reducing the quality or composition of the elements included.

In those circumstances, consumers are likely to regard the element that has been added to the package as additional to the established package for a period after its introduction. However if the price of a package increases or its quality or composition is reduced after a new element is added, the new element may not be described as 'free'.

One-off up-front costs incurred, for example, to buy or install equipment, do not negate claims that products or services supplied without subscription are 'free' within the meaning of No 20 of Annex I.

For example, digital free-to-air television channels are available only to consumers who have the necessary digital receiving equipment; similarly, call packages are available only to consumers who have a telephone line.

Likewise, connection fees payable to a third party to activate an internet service will not negate claims that the internet service is free, provided the connection fee has not been inflated to recover the cost of supplying the free internet service. Traders must always adequately inform consumers about the requirement for any of such up-front payments. Products presented as 'free' are especially common in the online sector. However, many such services are only accessible for consumers on the condition that they provide personal data such as their identity and email address. This is an area where there is interplay between European data protection legislation and the UCPD.

As noted in Section 1.4.9 on the interplay with EU data protection rules, there is an increasing awareness of the economic value of information related to consumers' preferences, personal data and other user-generated content. The marketing of such products as 'free' without telling consumers how their preferences, personal data and user-generated content are going to be used could in some circumstances be considered a misleading practice.

For example:



- *An internet service provider in Italy was prevented from claiming in an advertisement that the services it offered were for 'free', because in exchange for these services consumers had to agree to a number of onerous conditions, involving tracking and receiving commercial communications. The Italian authorities concluded that information on all the conditions of the service was material and observed that the contractual clauses for membership, which imposed onerous conditions to benefit from the offer, were decisive for the recipients when deciding whether the advertised service was actually convenient or not. The fact that such conditions were not mentioned in the advertisement was likely to lead consumers into error and unduly affect their economic behaviour.*<sup>215</sup>
- *The Federation of German Consumer Organisations (VZBV), on the basis of point No 20 of ANNEX I UCPD, has been seeking an injunction against an internet company for its claim that its service is 'for free' or 'without charge', because the company derives its revenues from analysing users' private data and selling the information to third party traders in the form of advertising space*<sup>216</sup>.

The application of the UCPD to games advertised as 'free' but also offering in-app purchases is discussed more in detail in Section 5.2.4 on 'App stores'.

#### 4.5 Persistent marketing by a remote tool — banned commercial practice No 26

Point No 26 of ANNEX I



*'Making persistent and unwanted solicitations by telephone, fax, email or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC and 2002/58/EC.'*

This ban aims to protect consumers against pestering by distance marketing tools. Point No 26 of Annex I does not prohibit distance marketing per se but rather persistent and unwanted solicitations.

<sup>215</sup> Decision PI2671 – Libero Infostrada paraa. 6, 5<sup>th</sup> indent by the AGCM. It was taken in the year 2000 before the adoption of the UCPD and based on the national provisions implementing Directive 84/450/EEC on misleading advertising.

<sup>216</sup> Case Verbraucherzentrale Bundesverband/Facebook, Landgericht Berlin, Az. 160341/15.

For example:



- *An insurance adviser searched online and offline newspapers for reports of accidents and then sent standard letters to the victims, offering advice on and help with compensation issues. The Austrian Supreme Court ruled that sending a single letter to a person does not qualify as 'persistent and unwanted solicitations' within the meaning of point 26 of Annex I.<sup>217</sup>*

Specific rules on unsolicited communications using electronic communications networks (i.e. by telephone or email) are laid down in Article 13 of the e-Privacy Directive 2002/58/EC. Automatic calling machines, fax machines or email may be only used for the purposes of direct marketing to contact users who have given their prior consent. These sector-specific provisions prevail over the UCPD, meaning that such solicitations do not have to be persistent and that Member States must penalise solicitations from the first call or email.

There are no similar sector-specific EU rules for marketing by post and other printed advertising. These are exhaustively regulated by the UCPD, and by point No 26 of the Annex in particular. Therefore, national provisions prohibiting all kinds of unaddressed printed advertising go beyond the fully harmonised provisions of the UCPD, unless consumers give prior consent (opt-in).

Such a prohibition would be allowed only if it falls outside the scope of the Directive, i.e. it does not have the aim of protecting the economic interest of consumers.

Some Member States have defended such prohibitions on different grounds, e.g. protecting the environment (reducing paper wasted on marketing material).

If for marketing purposes a controller uses personal data (e.g. the name and/or address of the recipient or other data relating to an identifiable person), this constitutes processing of such data under EU data protection law.

The safeguards and obligations under the Data Protection Directive (95/46/EC) must be complied with, including informing individuals that processing will be carried out before any marketing taking place and allowing individuals to object to having their personal data processed for this purpose.<sup>218</sup>

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<sup>217</sup> 4 Ob 174/09f, OGH (Oberster Gerichtshof), 19 January 2010.

<sup>218</sup> Articles 10, 11 and 14 of Directive 95/46/EC.

## 4.6 Direct exhortations to children — banned commercial practice No 28

### Point No 28 of ANNEX I



*'Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.'*

This ban includes putting pressure on children to buy a product directly or to persuade adults to buy items for them ('pester power'). A recurrent claim made by many traders about this ban is that it can be difficult to distinguish marketing directed at children from marketing directed at other consumers. Similarly, it could sometimes be unclear whether a commercial practice includes a direct exhortation to children.

Nevertheless, the check to determine whether a commercial practice falls under point 28 of Annex I must be carried out on a case-by-case-basis. A national enforcement authority or court is not bound by the trader's own definition of the target group for the commercial practice in question, although that definition may be taken into account.

### For example:



- *An online commercial practice involving a gaming community in which children dress virtual dolls invited children to 'buy more', 'buy here', 'upgrade now' and 'upgrade to Superstar'. The Swedish Market Court banned such practices on the grounds that the statements were direct exhortations to children within the meaning of No 28 Annex I.<sup>219</sup>*
- *A concert organiser had advertised tickets for a Justin Bieber concert on his Facebook page using phrases such as 'Belibers — there are still RIMI-cards available at many stores. Run, jump on your bike or get someone to drive you' and 'Remember to also buy tickets for the Bieberexpress when you buy concert tickets at RIMI today'. The Norwegian Market Council found this to be in breach of point No 28 of Annex I, taking the above decision by the Swedish Market Court in the 'Stardoll case' into account.*
- *The UK Advertising Standards Authority ruled against two online games providing in-app purchases containing direct exhortations to children. Participation in the game as such was free. However, certain activities required participation in a paid-membership system, which entitled members to additional benefits. The authority found that several statements promoting*

<sup>219</sup> MD 2012:14, Marknadsdomstolen, 6 December 2012, Stardoll: <http://www.marknadsdomstolen.se/Filer/Avg%c3%b6randen/Dom2012-14.pdf>

*membership or the purchase of in-game currency were phrased as commands to the players. These were statements such as 'JOIN NOW',<sup>220</sup> 'The Super Moshis need YOU' and 'Members are going to be super popular', which the authority considered as putting pressure on children to make a purchase.<sup>221</sup>*

- *The Finnish Consumer Ombudsman found that when a bank addressed direct marketing letter to children turning 10, this was an aggressive practice. In the letter, the children were welcomed to a branch office of the bank to obtain a personal Visa Electron card to mark their 10th birthday.*

Some national authorities have developed criteria to guide case-by-case assessments of whether commercial practices include direct exhortations to children.

As an example, the 'Principles for online and app-based games' published by the UK Office of Fair Trading in January 2014,<sup>222</sup> contain the following example of commercial practices that are 'less likely or unlikely to comply' with the prohibition on direct exhortation to children:

*'A game that is likely to appeal to children requires the consumer to 'spend' in-game currency, which may be either earned through gameplay or bought for real money. When the consumer runs out of that in-game currency, he/she is prompted — or encouraged or incited through in-game statements or images — to, for example, 'buy more', visit the shop to 'get more' or 'become a member'.*

These UK principles include the following criteria to determine whether games are likely to appeal to children:

*'It may be reasonably foreseeable that a game is likely to appeal to children through its content, style and/or presentation. Consideration should be given to the likely audience before designing commercial messages communicated to consumers and deciding whether a direct exhortation is to be included. A significant determinative factor is whether children are known to play the game or if the game is marketed to children. However, other factors or attributes that may mean a game is likely to appeal to children are set out in this indicative and non-exhaustive list:*

- *inclusion of characters popular with or likely to appeal to children*
- *cartoon-like graphics*
- *bright colours*

<sup>220</sup> [https://www.asa.org.uk/Rulings/Adjudications/2015/8/55-Pixels-Ltd/SHP\\_ADJ\\_305045.aspx#.VjnevP7luUk](https://www.asa.org.uk/Rulings/Adjudications/2015/8/55-Pixels-Ltd/SHP_ADJ_305045.aspx#.VjnevP7luUk).

<sup>221</sup> [https://www.asa.org.uk/Rulings/Adjudications/2015/8/Mind-Candy-Ltd/SHP\\_ADJ\\_305018.aspx#.VjnfC\\_7luUk](https://www.asa.org.uk/Rulings/Adjudications/2015/8/Mind-Candy-Ltd/SHP_ADJ_305018.aspx#.VjnfC_7luUk).

<sup>222</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288360/oft1519.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf).

- *simplistic gameplay and/or language*
- *the game concerns an activity that is likely to appeal to or be popular with children*
- *the game is available to be downloaded, signed up to or purchased by anyone and is not age-restricted*
- *the game is featured in a children's section of an app store'*

According to the Nordic Consumer Ombudsmen:<sup>223</sup>

*'Traders must not directly exhort or invite children to buy or persuade their parents or other adults to buy the traders' products. Whether the marketing exhorts or invites children to buy must be assessed in each case. Such assessment must be made from the individual child's perspective by taking into consideration its age, development and other factors rendering children particularly vulnerable. Importance will be attached, among others, to:*

- *How clearly the exhortation to buy has been phrased, including the impression created. Marketing containing text such as: 'go buy the book' or 'ask your mum to pick up the product in the nearest shop' will be a direct exhortation to buy.*
- *How the marketing is directed at children. Has the marketing been sent through a medium targeting children directly and individually, for example?*
- *How easy it is to buy the product marketed. As an example, is it possible to click a link, thereby making a purchase? Marketing with a text stating 'buy here' and linking to a page on which a purchase can be made will be a direct exhortation to buy.'*

In 2013 and 2014, European national consumer protection authorities, acting through the Consumer Protection Cooperation (CPC) Network, carried out a joint enforcement action on online games that offer possibilities to make purchases while playing (in-app purchases) and that are likely to appeal to or to be played by children.<sup>224</sup>

In their common position paper of July 2014, the CPC authorities considered that Article 5(3) and (5) and point Nr 28 Annex I to the UCPD apply to games that are likely to appeal to children, not only those solely or specifically targeted at children. A game or application, and the exhortation contained within it, may be considered as directed at children within the meaning of point Nr 28 of Annex I if the trader could reasonably be expected to foresee that it is likely to appeal to children.

<sup>223</sup>

<http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Guidelines/Position%20of%20the%20Nordic%20Consumer%20ombudsmen%20on%20social%20media%20marketing.pdf>

<sup>224</sup> [http://ec.europa.eu/justice/newsroom/consumer-marketing/news/1401222\\_en.htm](http://ec.europa.eu/justice/newsroom/consumer-marketing/news/1401222_en.htm) and [http://europa.eu/rapid/press-release\\_IP-14-847\\_en.htm](http://europa.eu/rapid/press-release_IP-14-847_en.htm)

## 4.7 Prizes — banned commercial practice No 31

### Point No 31 of ANNEX I



*‘Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:*

*— there is no prize or other equivalent benefit,*

*or*

*— taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.’*

The assessment of the first category of situations (i.e. no prize) is fairly straightforward. In order not to breach the ban, traders must always be able to demonstrate that they awarded the prize/s or equivalent benefit/s in the exact terms stated in their announcement to the consumer. Failing this, the practice would fall under the ban.

### For example:



- *In the Czech Republic, a trader created the false impression that consumers could win a prize by stating that everyone who participated in a specific lottery would have the chance to win a laptop computer. In reality, no such computer could be won.<sup>225</sup>*
- *In Spain, a trader created the false impression that a consumer had won a prize by stating unequivocally in a letter to the consumer that he had won a prize of 18.000 euros, when in fact there was no such prize. A Spanish court clarified that this commercial practice was contrary to the national law transposing Annex I No 31 of the UCPD<sup>226</sup>.*

The second part of point No 31 (i.e. the prize or benefit is subject to the consumer paying money or incurring a cost) covers dishonest practices where, for instance, consumers are informed that they have won a prize but have to call a premium rate line to claim it, or where consumers are initially informed that they have won a prize but then learn that they must order another good or service to receive the advertised prize or the equivalent benefit.

<sup>225</sup> Prague City Court, 29 October 2014, Golden Gate Marketing v Czech Trade Inspection Authority.

<sup>226</sup> Audiencia Provincial de Barcelona, 26 June 2014, 323/2014.

The Court has clarified that even when the cost imposed on the consumer for claiming the prize (i.e. requesting information on the nature of that prize or taking possession of it) is minimal, as in the case of a stamp, compared to the value of the prize, and regardless of whether the payment of such costs procures any benefits to the trader, such practices are prohibited by point No 31 of Annex I.<sup>227</sup>

For example:



- *A mail order company sent promotional advertising by post stating that the consumer 'is guaranteed 100 % that he/she is one of the selected people to receive an electronic product. This product is free of charge!' In fact, consumers had to respond within two days and pay € 19.99 to cover 'administration and transport costs'. The Netherlands Authority for Consumers and Markets found that giving consumers the false impression that they have already won a prize while requiring them to pay a fee within two days of receiving notice of the promotional action fell under point No 31 of Annex I (and also other blacklisted actions such as No 20 owing to the use of the word 'free').<sup>228</sup>*

<sup>227</sup> Case C-428/11, Purely Creative e.a. v Office of Fair Trading, Judgment of 18 October 2012.

<sup>228</sup> CA/NB/544/10, Consumentenautoriteit, 21 September 2010, Garant-o-Matic B.V.



## 5. Application of the UCPD to specific sectors

### 5.1 Environmental claims

The expressions 'environmental claims' and 'green claims' refer to the practice of suggesting or otherwise creating the impression (in a commercial communication, marketing or advertising) that a good or a service has a positive or no impact on the environment or is less damaging to the environment than competing goods or services.

This may be due to its composition, how it has been manufactured or produced, how it can be disposed of and the reduction in energy or pollution expected from its use.

When such claims are not true or cannot be verified, this practice is often called 'greenwashing'.

'Greenwashing' can relate to all forms of business-to-consumer commercial practices concerning the environmental attributes of goods or services. According to the circumstances, this can include all types of statements, information, symbols, logos, graphics and brand names, and their interplay with colours, on packaging, labelling, advertising, in all media (including websites) and made by any organisation, if it qualifies as a "trader" and engages in commercial practices towards consumers.

The UCPD does not provide specific rules on environmental claims. However, it provides a legal basis to ensure that traders do not present environmental claims in ways that are unfair to consumers. It does not discourage the use of 'green claims'.

On the contrary, the UCPD can help traders investing in the environmental performance of their products by enabling them to communicate these efforts to consumers transparently and by preventing competitors from presenting misleading environmental claims.

#### 5.1.1 Interplay with other EU legislation on environmental claims

As pointed out in Section 1.4, Article 3(4) and Recital 10 are key features of the UCPD.

They set out the principle that the UCPD is designed to complement other EU legislation as a 'safety net' ensuring that a high common level of consumer protection against unfair commercial practices is maintained in all sectors.

Examples of specific EU legislation concerning environmental claims are:

- Directive 2012/27/EU on energy efficiency;<sup>229</sup>
- Directive 2010/31/EU on the energy performance of buildings;<sup>230</sup>
- Regulation (EC) No 1222/2009 on the labelling of tyres with respect to fuel efficiency and other essential parameters;<sup>231</sup>
- Directive 2009/72/EC on common rules for the internal market in electricity;<sup>232</sup>
- Directive 2009/125/EC establishing a framework for the setting of eco-design requirements for energy-related products;<sup>233</sup>
- Regulation 834/2007 on organic production and labelling of organic products.<sup>234</sup>

Here are a few examples of the interplay between the UCPD and specific EU legislation concerning environmental claims:

For example:



- *Under the framework established by the Directive 2010/30/EU on Energy Labelling,<sup>235</sup> requirements have, amongst others, been established for the energy labelling of electric household refrigerating appliances.<sup>236</sup>*

<sup>229</sup> Notably, Article 9(2) of this Directive stipulates that, where consumers have ‘smart meters’ for natural gas and/or electricity, ‘metering systems shall provide to final customers information on the actual time of use’ and Article 10(1) stipulates that, ‘where final customers do not have smart meters’, billing information shall be ‘accurate and based on actual consumption’.

<sup>230</sup> According to Article 10 of this Directive, energy performance certificates shall make it possible for owners and tenants to compare and assess the energy performance of buildings. The energy performance certificate shall provide, e.g., ‘an indication as to where the owner or tenant can receive more detailed information (...) of the recommendations made in the energy performance certificate’. According to Article 12(2) and (3), the energy performance certificate must be ‘showed to the prospective new tenant or buyer and handed over to the buyer or new tenant’ when the building is constructed, sold or rented out, and when this is done before a building is constructed, the seller must ‘provide an assessment of its future energy performance’. Notably, according to Article 12(4), when buildings having an energy performance certificate are offered for sale or for rent, the energy performance indicator of the energy performance certificate of the building must be ‘stated in the advertisements in commercial media’.

<sup>231</sup> This Regulation establishes a framework for the provision of harmonised information on tyre parameters through labelling, allowing end-users to make an informed choice when purchasing tyres.

<sup>232</sup> According to Article 3(5)(b) of this Directive, consumers shall be provided with all relevant data for their electricity consumption. According to Article 3(9)(a) and (b), electricity suppliers shall specify ‘the contribution of each energy source to the overall fuel mix of the supplier (...)’ and ‘the reference to existing reference sources (...) where information on the environmental impact (...) is publicly available’. Annex I specifies which consumer protection purposes the provisions of Article 3 are intended to ensure.

<sup>233</sup> On the basis of this framework Directive, minimum requirements are established via product specific implementing measures, e.g. for light bulbs and household appliances. According to Article 14 of this Directive, in accordance with the applicable implementing measure, manufacturers shall ensure that consumers are provided with ‘information on the role that they can play in the sustainable use of the product’ and ‘when required by the implementing measures, the ecological profile of the product and the benefits of eco-design’.

<sup>234</sup> Articles 23 and 24 of this Regulation provide rules on the use of terms referring to organic production. Article 25 provides rules on the use of organic production logos.

<sup>235</sup> Notably, under Article 3(b) of this Directive, the display of labels, marks, symbols or inscriptions which do not comply with the requirements of the Directive is prohibited, if it is likely to mislead or confuse end-users with respect to the consumption of energy. Under Article 4(a), information relating to the consumption of electric energy, other forms of energy and, where relevant, other essential resources during use shall be brought to the attention of end-users by means of a fiche and a label related to products offered for sale, hire, hire-purchase or displayed to end-users by any means of distance selling, including the Internet.

*That Directive prohibits additional labels and symbols that in themselves may mislead consumers with regard to energy consumption.<sup>237</sup> However, it does not include specific rules on what is considered misleading. On this point, the UCPD can come into play. A German court considered the use of the slogan ‘very energy saving’ for a refrigerator/freezer in energy efficiency class ‘A’ a misleading commercial practice under the UCPD. 308 out of 543 appliances on the German market at the time belonged to class ‘A+’ and 17 % of all available appliances belonged even to energy efficiency class ‘A++’.<sup>238</sup>*

- *Nokian Tyres had used the company’s own tyre label for marketing tyres. The label is intended to depict a tyre’s driving capabilities in winter conditions. The company’s own label is very similar to the official EU tyre label<sup>239</sup>, which has been compulsory as of the November 2012. Nokian Tyres has marketed its tyres using a proprietary label, which may have given consumers the misleading impression that the tyres met with the testing and classification demands required by the EU tyre label. Additionally, the Nokian Tyres tyre label did not give a reliable picture of the tyres’ properties, in comparison to the tyres of other manufacturers that carried the EU label. The Market Court of Finland prohibited Nokian Tyres from using the company’s own tyre labels in marketing that targets consumers, unless the company clearly distinguished this label from the EU’s tyre label<sup>240</sup>.*
- *In 2011, the Romanian National Authority for Consumers’ Protection carried out an enforcement action on environmental claims used in cleaning services for clothes, carpets and cars. It initially considered basing its action on the requirements of the Ecolabel Regulation.<sup>241</sup> However, as no EU Ecolabel criteria had at that time been developed for cleaning services<sup>242</sup>, the national authority treated the matter as a misleading commercial practice and applied the UCPD instead.*

### 5.1.2 Main principles: Articles 6, 7 and 12 of the UCPD applied to environmental claims

The application of the UCPD to environmental claims can be summarised in two main principles:

<sup>236</sup> Commission Delegated Regulation (EU) No 1060/2010 supplementing Directive 2010/30/EU with regard to energy labelling of household refrigerating appliances.

<sup>237</sup> Cf. Article 3(1)(b) of Directive 2010/30/EU.

<sup>238</sup> Report from the Multi-Stakeholder Dialogue on Environmental Claims, March 2013, page 18.

<sup>239</sup> Regulation (EC) No 1222/2009 on the labelling of tyres with respect to fuel efficiency and other essential parameters

<sup>240</sup> MAO:185/13

<sup>241</sup> Regulation (EC) No 66/2010 on the EU Ecolabel. Under Article 10(1), false or misleading advertising or use of any label or logo which leads to confusion with the EU Ecolabel is prohibited.

<sup>242</sup> Criteria for cleaning services are currently under development. See <http://susproc.jrc.ec.europa.eu/cleaning%20services/index.html>

- I. Based on the general clauses of the UCPD, particularly Articles 6 and 7, traders must present their green claims in a clear, specific, accurate and unambiguous manner, to ensure that consumers are not misled.
- II. Based on Article 12 of the UCPD, traders must have the evidence to support their claims and be ready to provide it to competent enforcement authorities in an understandable way if the claim is challenged.

These principles are also reflected in several national guidance documents on environmental claims, notably the Danish Guidance on the use of environmental and other claims in marketing,<sup>243</sup> the UK Green Claims Guidance<sup>244</sup> and the French Practical Guide to Environmental Claims for traders and consumers.<sup>245</sup>

### Compliance Criteria on Environmental Claims – Multi-stakeholder advice to support the implementation of the Unfair Commercial Practices Directive



A multi-stakeholder group on environmental claims<sup>246</sup>, coordinated by the European Commission<sup>247</sup> and composed of representatives of national authorities, European business organisations, consumer associations and environmental NGOs, has identified different challenges in this area, made recommendations and provided input to an EU-wide ‘Consumer Market Study on Environmental Claims for Non-Food Products’.<sup>248</sup> Moreover, following the findings of this study, the multi-stakeholder group developed multi-stakeholder advice, ‘Compliance Criteria on Environmental Claims’, which reflects its common understanding on the application of the Unfair Commercial Practices Directive in this area. This is intended to support traders and enforcement authorities when applying the UCPD as regards environmental claims. This advice is not legally binding, but has fed into the revision of this updated guidance document as helpful advice to stakeholders.<sup>249</sup>

<sup>243</sup> By the Danish Consumer Ombudsman; <http://www.consumerombudsman.dk/Regulatory-framework/dcoguides/Environmental-and-ethical-marketing>.

<sup>244</sup> By the Department for Environment, Food and Rural Affairs; [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69301/pb13453-green-claims-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69301/pb13453-green-claims-guidance.pdf).

<sup>245</sup> By the Ministry for Ecology, Sustainable Development, Transport and Housing and the Ministry for Commerce, Trades, Small and Medium-sized Enterprises, Tourism and Consumer Affairs; [http://www.economie.gouv.fr/files/files/directions\\_services/cnc/docs/the\\_practical\\_guide\\_to\\_environmental\\_claims\\_2012.pdf](http://www.economie.gouv.fr/files/files/directions_services/cnc/docs/the_practical_guide_to_environmental_claims_2012.pdf).

<sup>246</sup> [http://ec.europa.eu/consumers/consumer\\_rights/unfair-trade/environmental-claims](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/environmental-claims)

<sup>247</sup> <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3325&news=1>

<sup>248</sup> [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/environmental\\_claims/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/environmental_claims/index_en.htm)

<sup>249</sup> The multi-stakeholder advice was drafted as a follow-up to a 2013 report of the multi-stakeholder group and a consumer market study on environmental claims for non-food products published in 2015. The 2013 report of the multi-stakeholder group on environmental claims identified a range of challenges, best practices and put forward recommendations – see [http://ec.europa.eu/consumers/archive/events/ecs\\_2013/docs/environmental-claims-report-ecs-2013\\_en.pdf](http://ec.europa.eu/consumers/archive/events/ecs_2013/docs/environmental-claims-report-ecs-2013_en.pdf). The Consumer Market Study on Environmental Claims for non-food products examined the presence of environmental claims in different markets, aspects of consumer understanding and behaviour, the level of compliance with EU legal requirements and different enforcement and self-regulatory instruments in a selection of EU and non-EU countries. It is available at [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/environmental\\_claims/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/environmental_claims/index_en.htm)

Other useful criteria and examples can be found in the Commission's guidelines published in 2000 for making and assessing environmental claims.<sup>250</sup> The guidelines, which are consistent with the international standard ISO 14021-1999, contain references to environmental claims which should be deemed misleading.

### 5.1.3 Application of Article 6 of the UCPD to environmental claims

Article 6 of the UCPD implies that consumers must be able to trust environmental claims put forward by traders. Consequently, in order not to be misleading, environmental claims should be presented in a clear specific, unambiguous and accurate manner.

An environmental claim can be misleading if it *'contains false information and is therefore untruthful'* in relation to one of the elements listed in Article 6(1)(a) to (g).

For example:



- *Using the term 'biodegradable' for a product which is not actually biodegradable or for which no tests have been carried out;*
- *Presenting small electrical appliances such as irons, vacuum cleaners, coffee machines, as 'environmentally friendly' ('eco'), although tests show that they frequently do not perform better than similar products;*<sup>251</sup>
- *Presenting car tyres as 'eco tyres' and promoting their environmental performance and impact on fuel consumption, although tests show mixed results.*<sup>252</sup>
- *Presenting a product as being made of "eco-leather", when actually it is not made of animal origin material, but rather of other comparable materials for which no tests have been carried out demonstrating its environmental performance.*

An environmental claim can also be misleading if it *'deceives or is likely to deceive the average consumer, even if the information is factually correct'* in one of the items referred to in Article 6(1)(a) to (g).

<sup>250</sup> Guidelines for making and assessing environmental claims, December 2000, European Commission – ECA SA, Dr Juan R Palerm; [http://ec.europa.eu/consumers/archive/cons\\_safe/news/green/guidelines\\_en.pdf](http://ec.europa.eu/consumers/archive/cons_safe/news/green/guidelines_en.pdf).

<sup>251</sup> See p. 12 of the Report of the Multi-stakeholder Dialogue on Environmental Claims, cf. Greenwash claims investigated, Which?, August 2012.

<sup>252</sup> See p. 12 of the Report of the Multi-stakeholder Dialogue on Environmental Claims, cf. Institut national de la Consommation (2012, November). Les pneus verts tiennent ils leurs promesses? 60 millions de consommateurs, edition n °476, p. 40.

For example:



- *According to the 'Compliance Criteria' developed by the multi-stakeholder group on environmental claims, the wording, imagery and overall product presentation (i.e. layout, choice of colours, images, pictures, sounds, symbols or labels), should be a truthful and accurate representation of the scale of the environmental benefit, and should not overstate the benefit achieved.*<sup>253</sup>

Environmental claims can be misleading if they are based on vague and general statements of environmental benefits such as 'environmentally friendly', 'green', 'nature's friend', 'ecological', 'sustainable', 'environmentally correct', 'climate friendly', or 'gentle on the environment'.

Such claims could fall under Article 6(1)(a) and 6(1)(b) UCPD if they are likely to deceive the average consumer and to cause him to take a transactional decision he would not have taken otherwise.

Vague and general claims could be difficult, if not impossible, to substantiate. At the same time, they could convey the impression to consumers that a product or an activity of a trader has no negative impact or only a positive impact on the environment. Some action has been taken on the national level against unsubstantiated vague and general environmental claims.

For example:



- *An advertisement stated 'Bamboo V's [sic] Organic Cotton. 100 % eco-friendly. Find out why it's better than cotton and good for you'. A complainant argued that the claims that the products were made from bamboo and '100 % eco-friendly' were misleading and questioned whether they could be substantiated. The complaint was upheld by the UK Advertising Standards Authority (ASA), which noted that the trader had provided copies of two scientific articles they believed substantiated the claims. The ASA noted that the articles described the manufacture of bamboo from its raw state to its use in clothing but did not provide sufficient evidence that manufacturing bamboo clothing had little or no impact on the environment or that the clothing sold by the trader was actually made from bamboo.*<sup>254</sup>
- *Several claims that electric cars are 'ecological' have been found misleading by a French self-regulator. This was the case for a misleading advertisement promoting the eco-friendly character of electric cars for hire, without providing information to put the claim into perspective. The self-regulator found that,*

<sup>253</sup> The non-legally binding advice of the multi-stakeholder group is available at: [http://ec.europa.eu/consumers/consumer\\_rights/unfair-trade/unfair-practices](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices)

<sup>254</sup> ASA Adjudication on Bamboo Textiles Ltd 15 December 2010. [https://www.asa.org.uk/Rulings/Adjudications/2010/12/Bamboo-Textiles.Ltd/TF\\_ADJ\\_49509.aspx#VZ1RiP774ps](https://www.asa.org.uk/Rulings/Adjudications/2010/12/Bamboo-Textiles.Ltd/TF_ADJ_49509.aspx#VZ1RiP774ps).

*since it could not be established that the electricity needed to recharge the cars would entirely derive from renewable energy sources, using the service would have a negative impact on the environment.*<sup>255</sup>

When assessing an environmental claim, the product's main environmental impacts over its lifecycle, including its supply chain are relevant. An environmental claim should relate to aspects that are significant in terms of the product's environmental impact<sup>256</sup>.

Moreover, claims should be clear and unambiguous regarding which aspect of the product or its life cycle they refer to.<sup>257</sup> If a trader makes an environmental claim by highlighting just one of several impacts the product has on the environment, the claim could be misleading within the meaning of Article 6 of the UCPD.

For example:



- *According to the Compliance Criteria' developed by the multi-stakeholder group on environmental claims, the benefit claimed should not result in an undue transfer of impacts, i.e. the creation or increase of other negative environmental impacts at other stages of the product's life cycle should be avoided, unless the total net environmental benefit has been significantly improved, for example according to a life-cycle assessment.*
- *A manufacturer claims that its product is low in water use. However, at the same time the product consumes more energy than a comparable product of the same category, which increases the product's overall environmental impact significantly. Under such circumstances, the claim could be misleading either in relation to the nature of the product (Article 6(1)(a)) or its main characteristics (Article 6(1)(b) UCPD).*

Codes of conduct may include commitments in relation to environmental protection or "green behaviour". If a trader that has undertaken to be bound by such a code breaches it he may perform a misleading action. This situation is covered by Article 6(2)(b).

<sup>255</sup> Jury de déontologie publicitaire (JDP), 26 June 2014.

<sup>256</sup> If traders do not know the most significant environmental aspects of a product, they could perform a life cycle assessment (LCA) taking into account the Commission Recommendation on the use of common methods to measure and communicate the life cycle environmental performance of products and organisations (2013/179/EU) and the pilot phase of the Product Environmental Footprint and the Organisation Environmental Footprint in 2013-2016. See <http://ec.europa.eu/environment/eussd/smqp/>

<sup>257</sup> See also the compliance criteria of the multi-stakeholder group on environmental claims, paragraph 2.1: [http://ec.europa.eu/consumers/consumer\\_rights/unfair-trade/unfair-practices](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices)



For example:



- *A trader has subscribed to a binding code of practice that promotes sustainable use of wood and displays the code's logo on its website. The code of practice contains a commitment that its members will not use hardwood from unsustainably managed forests. However, it is found that the products advertised on the website contain wood from exactly such a forest.*<sup>258</sup>

The average consumer would expect code signatories to sell products which comply with that code. National enforcement authorities may then assess whether the average consumer is likely to take his or her purchase decision on this basis.

Certain misleading commercial practices in relation to codes of conduct are considered unfair per se under Annex I to the UCPD. These practices are treated in Section 5.1.6 – 'Application of Annex I to environmental claims'.

In their 'Compliance Criteria', the multi-stakeholder group on environmental claims consider that:

*'If a trader or industry chooses to use own labelling schemes, symbols or certificates for marketing purposes, these labels must only be applied to the products/services or traders which meet the criteria set to qualify for use. The criteria should demonstrate clear environmental benefits compared with competing products or traders and should be easily publicly accessible. Otherwise, the labelling is likely to be misleading. Moreover, traders should consider third party verification to ensure the credibility and relevance of the label. The meaning or significance of the label must also be made clear to the consumer. Finally, such labels must not be capable of being confused with other labels, including, for example, labels of publicly run labelling schemes or schemes of competitors.'*

#### 5.1.4 Application of Article 7 of the UCPD to environmental claims

Article 7 UCPD lists specific elements that are relevant when assessing whether a commercial practice involves a misleading omission.

Green claims can be misleading if based on vague and general statements of environmental benefits. Such claims could be less likely to be misleading under Article 7 if they are supplemented by prominent specifications or explanatory statements on the product's environmental impact, for example by limiting the claim to specific environmental benefits.

<sup>258</sup> From the Guidance on the UK Regulation (May 2008) implementing the Unfair Commercial Practices Directive – Consumer Protection from Unfair Trading – Office of Fair Trading/Department for Business Enterprise and Regulatory Reform (2008).



If traders provide such supplementary information, they could ensure that they do not act in breach of Article 7(4)(a) (in the case of an invitation to purchase) by hiding or providing material information related to the *'main characteristics of the product'* in *'an unclear, unintelligible, ambiguous or untimely manner'*.

For example:



- *A claim in an advertisement, such as 'Eco-friendly: made with recycled materials,' could be less likely to be misleading if, for example:*
  - (1) the statement 'made with recycled materials' is clear and prominent;*
  - (2) the trader can substantiate that the entire product, excluding minor, incidental components, is made from recycled material;*
  - (3) making the product with recycled materials makes the product more environmentally beneficial overall;*
  - (4) the advertisement's context does not imply other misleading claims.*

In their 'Compliance Criteria', the multi-stakeholder group on environmental claims considers that:

*'Some products may be subject to detailed and ambitious rules and achieve such an excellent environmental performance that the use of a general benefit claim (presented without further qualifications) may be justified.*

- *This could be the case if a product is covered by a license to use the ecolabel of a publicly run ecolabel scheme (such as the Nordic Ecolabel 'the Swan', the German 'Blue Angel' or the European Union Ecolabel 'the Flower') or other robust and reputable labelling schemes subject to third party verification.<sup>259</sup>*
- *This could also be the case if the life cycle assessment studies of the product have proven its excellent environmental performance. These studies should be made according to recognised or generally accepted methods applicable to the relevant product type and should be third-party verified.<sup>260</sup> If such methods have not yet been developed in the relevant field, traders should refrain from using general benefit claims (...).*

*For such products, traders should nevertheless ensure transparency concerning the relevant environmental aspects, and make sure that such information is easily available to consumers, including by displaying the relevant logo.'*

<sup>259</sup> For example, "ISO-Type I" labels according to the definition given by the International Organisation for Standardisation: ISO (standard 14024:1999) Type I: a voluntary, multiple-criteria based, third party program that awards a license that authorises the use of environmental labels on products indicating overall environmental preferability of a product within a particular product category based on life cycle considerations.

<sup>260</sup> A pilot phase on Product Environmental Footprint and Organisation Environmental Footprint is ongoing between 2013 – 2016. In case the claim for environmental excellence requires a comparison to an "average" competing product or a specific product of competitors, the study could follow either:  
- an existing Product Environmental Footprint Category Rule (PEFCR) that allows comparisons between products (through benchmarking and performance classes), or  
- the rules established in ISO 14040 series regarding comparative assertions.

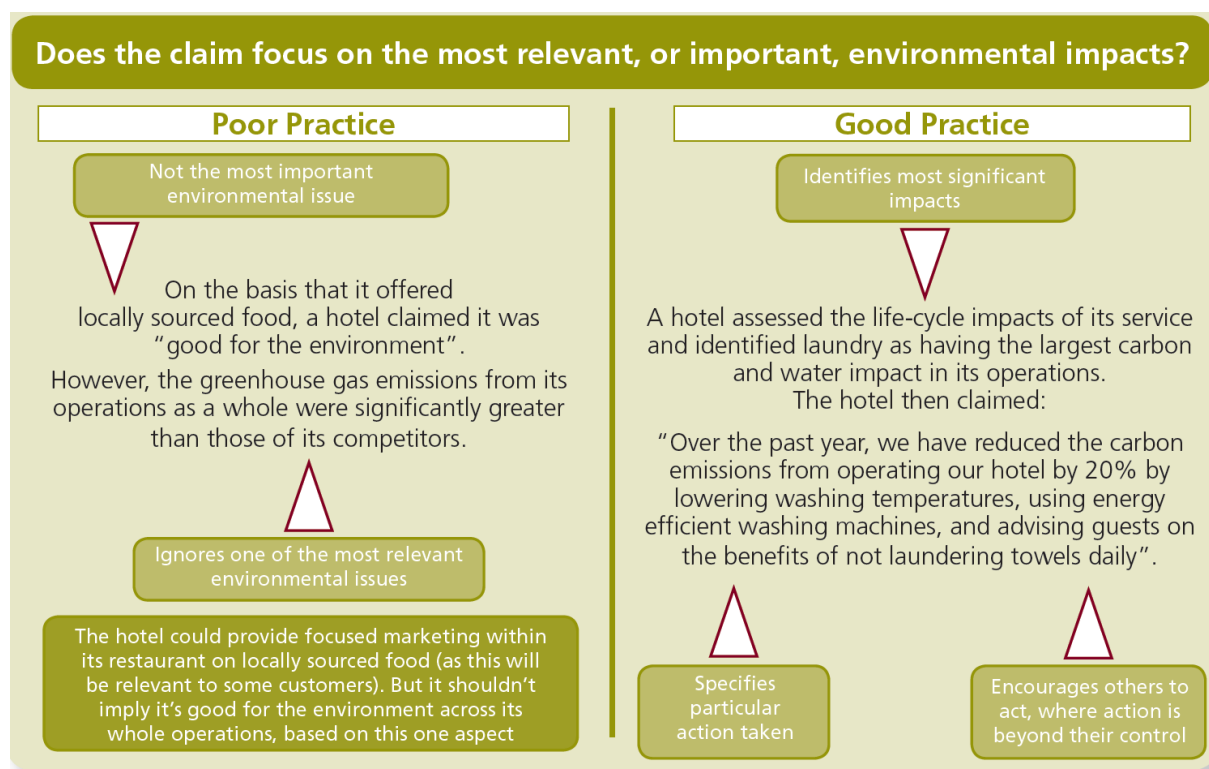
Similarly, an environmental claim could be misleading under Article 7(2) if it is presented in an unclear, unintelligible or unclear manner. On the basis of a case-by-case assessment, this could be the case if the scope and boundaries of the claim are not made clear.

For example:



- *It is not clear whether the claim covers the whole product or only one of its components, or the company's overall environmental performance or only certain of its activities or which environmental impact or process the claim addresses.*

When making an environmental claim, the product's main environmental impacts are relevant. The UK Department for Environment, Food and Rural Affairs 'Green Claims Guidance'<sup>261</sup> provides the following examples:



<sup>261</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69301/pb13453-green-claims-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69301/pb13453-green-claims-guidance.pdf), p. 12.

### 5.1.5 Application of Article 12 of the UCPD to environmental claims

#### Article 12:



*‘Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 11:*

*(a) to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case;*

*(b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority.’*

Article 12 of the UCPD clarifies that any claim (including environmental claims) should be based on evidence which can be verified by the relevant competent authorities.

Traders must be able to substantiate environmental claims with appropriate evidence. Consequently, claims should be based on robust, independent, verifiable and generally recognised evidence which takes into account updated scientific findings and methods.

The fact that the burden of proof rests on the trader reflects the principle in Article 12(a) of the UCPD that enforcement authorities should have the power *‘to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice’*.

#### For example:



- *A mineral water company presented its products with the claim ‘Zero Impact’, stating that the manufacture and sale of the bottles of water had no impact whatsoever on the environment. However, the company could not demonstrate that it was involved in specific activities reducing the environmental impact of its products, other than participating in a project to compensate environmental damage. On this basis, the Italian Competition Authority (AGCM) concluded that the ‘Zero Impact’ campaign constituted an unfair commercial practice capable of influencing consumers’ transactional decisions.<sup>262</sup>*
- *An advertisement stated ‘This is a revolutionary new paint stripper that is safer to its user and the environment’. The trader believed that the extremely low*

<sup>262</sup> Decision by the Italian Competition Authority, 8 February 2012, ref. PS7235.

*level of VOC content in its product meant that it was safe for the environment. However, the UK Advertising Standards Authority (ASA) considered that the claim needed to be supported by a high level of substantiation. As the ASA had not seen such evidence, they concluded that the claim was misleading.*<sup>263</sup>

In order to ensure that environmental claims are substantiated, traders should either have the evidence necessary to support their claims from the time the claims are put into use or be certain that it can be obtained and presented upon request.

A Memorandum by the Danish Consumer Ombudsman laying down documentation requirements applicable to Section 3(3) of the Danish Marketing Practices Act reads:

*‘A trader must be able to substantiate factual statements made in marketing communications by documentation. However, the time when the documentation must be available does not explicitly follow from the provision.*

*(...)*

*The requirement of section 3(3) of the Marketing Practices Act is: ‘must be capable of being substantiated by documentation’. The wording thus does not expressly determine when the documentation substantiating the factual statements must be available. Neither does this appear explicitly from the travaux préparatoires of the Marketing Practices Act or from the Directives on Misleading and Comparative Advertising or the Unfair Commercial Practices Directive, to which the travaux préparatoires of the Marketing Practices Act referred. Nor is the Consumer Ombudsman aware of any case-law determining whether the documentation must be available at the time of marketing. However, in the Consumer Ombudsman’s opinion, the wording implies a requirement of certainty that the claims made in the marketing communication are capable of substantiation by documentation.*

*Moreover, the provision must be interpreted in the light of Article 12 of the Unfair Commercial Practices Directive. In the Consumer Ombudsman’s opinion, the purpose of the documentation requirement has to be that a trader must be certain that factual statements are true at the time of marketing so as not to mislead consumers. This means that the trader must either have the documentation ready when the marketing communication is published or be*

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<sup>263</sup> ASA Adjudication on Eco Solutions 31 August 2011: [https://www.asa.org.uk/Rulings/Adjudications/2011/8/Eco-Solutions/SHP\\_ADJ\\_156247.aspx#.VZ1Rw\\_774ps](https://www.asa.org.uk/Rulings/Adjudications/2011/8/Eco-Solutions/SHP_ADJ_156247.aspx#.VZ1Rw_774ps).

*certain that it can be presented upon request. Otherwise, there is a substantial risk that the trader will market his product by means of false claims.*

*In this light, and as also reflected in Article 8 of the Consolidated ICC Code of Advertising and Marketing Communication Practice (2011), it must be considered good marketing practice if a trader is in possession of the documentation at the time of marketing or is certain that it can be obtained and presented.'*

Although a claim may be correct and relevant to a product when the claim is first made, it could become less meaningful with time. In order to ensure that they are in a position to provide necessary documentation to national authorities in line with Article 12 of the Directive, traders should make sure that documentation for claims is up to date for as long as the claims remain in use in marketing.

In their 'Compliance Criteria', the multi-stakeholder group on environmental claims considers that:

*'If a trader uses environmental statements in its company name, product name etc., and the name is used for marketing purposes, such marketing is subject to the same documentation requirements as those which apply to other environmental claims in marketing communications, unless the company can prove that this name has no environmental connotation or existed already before environmental issues were taken up on the political/business agenda. However, in order to be contrary to the UCPD, a name used in marketing will need to mislead the average consumer and be likely to cause him to take a transactional decision he/she would not have taken otherwise.'*

For example:

- *The Swedish Market Court has addressed the marketing of an oil product called Hydro Miljö Plus (Hydro Environment Plus). The Market Court stated that the terms "environmental" together with "plus" in the product name gave the impression that the product had certain environmental advantages, even though fuel oil always causes damage to the environment. In this respect, the Swedish Market Court judged that the term "Environment" could not be used in the product name.<sup>264</sup>*



In their 'Compliance Criteria', the multi-stakeholder group on environmental claims considers that:

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<sup>264</sup> The Swedish Market Court, 1990:20 Norsk Hydro Olje AB

*'Evidence should be clear and robust, and claims should be measured using the most appropriate methods. Independent third party testing should be made available for the competent bodies if the claim is challenged. If expert studies give rise to significant disagreement or doubt over environmental impacts, the trader should refrain from marketing the message altogether.'*

*The content and scope of the documentation will depend on the specific content of the statement. The complexity of the product or activity will be of relevance in this respect.*

*Claims should be reviewed and updated regularly to ensure that they remain relevant. Claims should be reassessed and updated as necessary, in view of technological development, and the emergence of comparable products or other circumstances that may affect the accuracy or currency of the claim.'*

*'Environmental claims should not relate to an improvement compared to a product from the same trader or a competitor that is no longer available on the market or the trader no longer sells to consumers, unless this improvement is significant and recent.'*

#### 5.1.6 Application of Annex I to environmental claims

The following practices listed in Annex I are particularly relevant to environmental claims:

##### Point No 1 of ANNEX I



*'Claiming to be a signatory of a code of conduct when the trader is not.'*

For example:



- *A trader falsely displaying on its website that it is a signatory of a code of conduct on the product's environmental performance.*

##### Point No 2 of ANNEX I



*'Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.'*

For example:



- *Using any EU or national label (e.g.: EU Ecolabel, Nordic Swan Label, Blue Angel or logo) without authorisation.*

Point No 3 of ANNEX I



*'Claiming that a code of conduct has an endorsement from a public or other body which it does not have.'*

For example:



- *A trader falsely claiming that the code of conduct of its car-manufacturing company is endorsed by the national environment agency, ministry or consumer's organisation.*

Point No 4 of ANNEX I



*'Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.'*

For example:



- *Falsely claiming that a product has been approved by an environmental agency, NGO or standardisation body.*

Point No 10 of ANNEX I



*'Presenting rights given to consumers in law as a distinctive feature of the trader's offer'.*

This provision clarifies that traders should not mislead consumers by unduly emphasising attributes that come from regulatory requirements.

For example:



- *Traders should not claim that a product is free of certain substances if such substances are already prohibited by legislation.*

### 5.1.7 Comparing environmental claims

Environmental claims may suggest that a product has a more positive impact on the environment or is less damaging to the environment than competing goods or services. Products bearing such comparative should be assessed against similar products.

National enforcers and self-regulatory bodies usually interpret this principle to mean that comparisons should refer to products within the same product category.

However, it would seem equally important that the method used to produce the information is the same, that it is applied in a consistent manner (i.e. the same methodological choices and rules are applied, results are reproducible), and that the method applied allows comparisons, otherwise any comparison becomes less meaningful.<sup>265</sup>

Directive 2006/114/EC on misleading and comparative advertising lays down the conditions under which comparative advertising is permitted. Comparisons of the environmental benefits of products should, among other things:

1. not be misleading within the meaning of Articles 6 and 7 of the UCPD;
2. compare goods or services meeting the same needs or intended for the same purpose;
3. objectively compare one or more material, relevant, verifiable and representative features of those goods and services.

For example:



- *In the UK, a press advertisement for a gas company was headed 'A step forward to greener living'. It stated 'When you install a high efficiency gas condensing boiler you reduce your carbon footprint compared to using oil or electricity'. A sub-heading stated 'The facts show which fuel is greener' followed by data that compared the amount of carbon dioxide that the trader claimed was needed to produce a kWh of energy from different fuels.*

<sup>265</sup> This principle is reflected in the ongoing work on environmental footprints led by the Commission in collaboration with industry stakeholders, NGOs and Member States: [http://ec.europa.eu/environment/eussd/smgp/product\\_footprint.htm](http://ec.europa.eu/environment/eussd/smgp/product_footprint.htm).



*A complaint about the ad was upheld by the UK Advertising Standards Authority (ASA). The ASA considered that, because the claim was not based on the most relevant comparison data, the advertisement was misleading.*<sup>266</sup>

- *A Spanish court considered misleading an advertising claiming that filtered water was more environmental friendly than mineral bottled water, giving consumers the impression that consuming filtered water instead of mineral water would contribute to the protection of the environment. In particular, the reference to greater protection of the environment was deemed misleading since the comparison was not based on any objective basis such as an impact study*<sup>267</sup>.

## 5.2 Online sector

As pointed out in Section 1, the Directive has a very broad scope of application as it covers the totality of business-to-consumer transactions, whether offline or online.

It is technology neutral and applies regardless of the channel, medium or device used to implement a business-to-consumer commercial practice.

### 5.2.1 Online platforms

The term "platform" is not defined in the UCPD and its use has no impact on the application of the Directive. However, the term can be useful in order to describe some of the business models that are emerging along with the digital economy.

Platforms generally provide infrastructure and enable interactions between suppliers and users for the provision of goods, services, digital content and information online.

On-line platforms work according to many different business models: their behaviours range from merely allowing users to look for information supplied by third parties to facilitating, often against remuneration, contractual transactions between third party traders and consumers or advertising and selling, in their own name, different kinds of products and services including digital content. This box provides some examples of business models often referred to as "platforms".

- *Search engines (e.g. Google, Yahoo!)*
- *Social media (e.g. Facebook, Twitter)*
- *User review tools (e.g. Tripadvisor)*



<sup>266</sup> ASA Adjudication on Guernsey Gas Ltd; 7 July 2010: [https://www.asa.org.uk/Rulings/Adjudications/2010/7/Guernsey-Gas-Ltd/TF\\_ADJ\\_48712.aspx#VZ1SDP774ps](https://www.asa.org.uk/Rulings/Adjudications/2010/7/Guernsey-Gas-Ltd/TF_ADJ_48712.aspx#VZ1SDP774ps).

<sup>267</sup> Juzgado de lo Mercantil de Barcelona, Sentencia 63/2014.

- *Comparison tools* (e.g. Trivago.com, Rentalcars.com, Kayak.com, Booking.com)
- *Collaborative economy platforms* (e.g. Airbnb, Uber, BlaBlaCar)
- *E-commerce platforms (marketplaces)* (e.g. Zalando, Amazon, Alibaba, Ebay)
- *App stores* (e.g. Apple App Store, Google Play, Amazon App Store)
- *Collective buying websites* (e.g. Groupon)

### 5.2.2 The applicability of the UCPD to online platforms

Given that the UCPD only applies in B2C situations, the first step in assessing whether this Directive is applicable to any given online platform provider should be to evaluate whether it qualifies as a *"trader"* under Article 2(b) UCPD.

According to a case-by-case assessment, a platform provider may be acting for purposes relating to its business whenever, for example, it charges a commission on the transactions between suppliers and users, provides additional paid services or draws revenues from targeted advertising.

For example:

- *In a decision of 19 December 2014, the Italian Consumer and Competition Authority decided that an online travel intermediary was a "trader", in relation to certain claims it had provided on its Italian website. The company's role was not limited to storing information on its platform, but it involved an activity of classification and systematization of information related to hotel facilities, restaurants and tourist attractions. In particular, the company provided a comparison service of tourist facilities.*<sup>268</sup>



The second step in assessing whether the UCPD is applicable should be to evaluate whether the platform provider engages in *"business-to-consumer commercial practices"* within the meaning of Article 2(d), towards users (suppliers and recipients) who qualify as *"consumers"* within the meaning of Article 2(a) UCPD.

A platform qualifying as a *"trader"* must always comply with EU consumer and marketing law as far as its own commercial practices are concerned. In particular,

<sup>268</sup> Autorità Garante della Concorrenza e del Mercato) Decision PS9345 *Tripadvisor* of 19 December 2014, Paragraphs 87-89. This specific part of the decision by the AGCM was confirmed by the Tribunale Amministrativo Regionale per il Lazio on 13 July 2015; Sezione I, Sentenza n. 09355

traders are subject to the transparency requirements of Articles 6 and 7 UCPD, which requires them to refrain from misleading actions and omissions whenever engaging in the promotion, sale or supply of a product to consumers.

Furthermore, under Article 5(2) UCPD, no platform provider qualifying as a "trader" should act contrary to the requirements of professional diligence in its commercial practices towards consumers. Under Article 2(h) UCPD, 'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith *in the trader's field of activity*.

The professional diligence duties of these traders vis-à-vis consumers under the UCPD is different from, whilst complementary to, the regime on exemptions from liability established under Article 14 of the e-Commerce Directive for illegal information hosted by service providers at the request of third parties.

In particular, Article 14(1) is often invoked by some platforms, which argue that they merely act as intermediaries providing hosting services, as defined in that provision, and that they are thus not liable for the information stored.

Article 14(1) of Directive 2000/31/EC (the e-Commerce Directive)



#### *Hosting*

*1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:*

*(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or*

*(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*

Furthermore, Article 15(1) of the e-Commerce Directive prevents Member States from imposing on such "hosting service providers" a general obligation to monitor the stored information or to actively engage in fact-finding.

Article 15(1) of Directive 2000/31/EC (the e-Commerce Directive)

*No general obligation to monitor*

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.



The above provisions of the e-Commerce Directive have a broad scope of application and are relevant in relation to different kinds of illegal information hosted by platforms, including information in breach of consumer law, information infringing copyright rules, hate speech, criminal content (terrorism, child sexual abuse), defamatory statements, etc, as well as information regarding illegal activity.

This Guidance document is not meant to provide clarification of the relevant provisions of the e-Commerce Directive. The role of platforms in general has been assessed within the framework of a comprehensive analysis on the role of intermediaries.<sup>269</sup>

This Guidance only refers to provisions of the e-Commerce Directive in relation to their interplay with the UCPD. Its sole purpose is to clarify and facilitate enforcement of the UCPD vis-à-vis online platforms against the background that they often argue that they can invoke, in particular, Article 14 of the e-Commerce Directive.

The Court of Justice has interpreted Article 14(1) of the e-Commerce Directive as regards the liability of hosting providers in several cases, notably, Joined Cases C-236/08 to C-238/08, *Louis Vuitton*, (para. 113-119) and Case C-324/09, *L'Oreal* (para. 123-124, emphasis added), where it concluded that this provision:

*"must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored. The operator plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them.*

*Where the operator of the online marketplace has not played an active role within the meaning of the preceding paragraph and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31."*

<sup>269</sup> See the Communication Online Platforms and the Digital Single Market, Opportunities and Challenges for Europe, adopted on 25 May 2016.

On the one hand, *"the mere fact that the operator of an online market place stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers"* does not prevent that provider from relying on this exemption from liability (see para. 115 of the *L'Oreal* judgment).

On the other hand, the hosting service provider does play an active role, which prevents it from being able to rely on this exemption, inter alia, when *"it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting"* those offers (see para. 116 of that judgment).

Similar conclusions were drawn in Joined Cases C-236/08 to C-238/08, *Louis Vuitton*, concerning the sale by Google of keywords containing trademarks ('adwords').<sup>270</sup>

Whether a hosting service provider plays an active or a passive role, as explained by the Court of Justice, must be assessed on a case-by-case basis. While it is ultimately only for the Court of Justice to rule on the interpretation of this provision of Union law, it can be noted that there is substantial case law from national courts on this issue, but going in often opposite directions.<sup>271</sup>

In accordance with the case law of the Court of Justice,<sup>272</sup> the key element in these rulings relates to the platform provider's capacity to have knowledge of or control over the stored data.

For example:

- *In a case involving a price comparison website offering to top rank the products of traders that paid an additional fee, the French Supreme Court rejected the argument that this comparison site qualified as a mere hosting service provider. Instead, the Court found that the platform, by top ranking products against remuneration by third party traders, was indirectly promoting these products and thus acting as an active provider of a commercial service for these traders*<sup>273</sup>.
- *In a ruling of 19 March 2015, the German Federal Court of Justice decided that a hotel review site was not responsible for a review posted by a user stating*



<sup>270</sup> Case C-238/08, *Louis Vuitton*, 23 March 2010, paragraphs 114 to 119 (emphasis added): "in order to establish whether the liability of a referencing service provider may be limited under Article 14 of Directive 2000/31, it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores." The Court also clarified that, in the context of this examination, "the role played by Google in drafting the commercial message which accompanies the advertising link or in the establishment or selection of keywords [is] relevant".

<sup>271</sup> See for example the differences between the German Federal Court of Justice judgment *Stokke vs eBay*, I ZR 216/11, 16 May 2013, where an online market place was considered to have taken an active role by directly offering the possibility to buy from the online advertisement links it displayed, and the Leeuwarden Court of Appeal judgement *Stokke vs Marktplaats B.V.*, 106031/HA ZA 05211, of 22 May 2012, where the Dutch Court established, under identical circumstances, that a similar online market place did not play an active but a neutral role between its customers-sellers and the potential buyers and that it consequently offered a hosting service, as referred to in article 14 Ecommerce Directive).

<sup>272</sup> Joined Cases C-236/08 to C-238/08, *Louis Vuitton*, para. 113.

<sup>273</sup> Cass. Com. 4 décembre 2012, 11-27729, *Publicité Sté Pewterpassion.com c/ Sté Leguide.com*

*that "For €37.50 per person per night there were bedbugs" in a specific hotel. The hotel owner took legal action against the hotel review site, claiming damages. However, the court found that the review site had not actively promoted or disseminated the user review, but rather had a neutral role in relation to it. Given this situation, the court concluded that the review site would only be liable for the content of the user review if it had breached specific duties to carry out checks.<sup>274</sup>*

In addition, Article 1(3) of the e-Commerce Directive also makes it clear that the e-Commerce Directive "complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services". This means that the e-Commerce Directive and relevant EU consumer acquis apply in principle in a complementary manner.

From a UCPD perspective, whenever an online platform can be considered a "trader" in the sense of the UCPD (Article 2(b) UCPD) it is required to act with a degree of professional diligence (Article 5(2) UCPD), commensurate to its specific field of activity (Article 2(h) UCPD) and not to mislead their users/consumers by either action or omission (particularly with reference to Articles 6(1)(f) and 7(1) and (2) UCPD).

Platforms which are considered "traders", should take appropriate measures which – without amounting to a general obligation to monitor or carry out fact-finding (see Article 15(1) e-Commerce Directive) – enable relevant third party traders to comply with EU consumer and marketing law requirements and users to clearly understand with whom they are possibly concluding contracts. For example, such measures could imply:

- Enabling relevant third party traders to clearly indicate that they act, vis-à-vis the platform users, as traders;
- Clearly indicating to all platform users that they will only benefit from protection under EU consumer and marketing laws in their relations with those suppliers who are traders;
- Designing their web-structure in a way that enables third party traders to present information to platform users in compliance with EU marketing and consumer law – in particular, information required by Article 7(4) UCPD in the case of invitations to purchase.

If on-line intermediaries falling within the scope of the UCPD fail to comply with such professional diligence requirements or otherwise promote, sell or supply a product to

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<sup>274</sup> German Federal Court of Justice, I ZR 94/13, 19 March 2015.

users in an unfair manner, they can be found in breach of EU consumer and marketing law – and cannot invoke the intermediary liability exemption under the e-Commerce Directive as far as their own failures are concerned, considering that that exemption relates only to illegal information stored at the request of third parties.

The following sections deal with additional issues of compliance with UCPD requirements which take into account the specific business models developed by the different kinds of on-line platforms which have so far emerged.

### 5.2.3 E-commerce platforms (marketplaces)

E-commerce platforms, also referred to as ‘marketplaces’, enable customers to buy products offered by third party traders directly online, in some cases in addition to their own products (e.g. Amazon, Pixmania). Some marketplaces only have offers by third party professional sellers; others have a mixture of offers from private individuals and professional sellers (e.g. Ebay).

A specific issue for marketplaces is whether they are liable in cases of non-conformity of goods supplied by third party sellers, including non-delivery. Non-conformity is covered by the Consumer Sales and Guarantees Directive.<sup>275</sup> Under Articles 3 and 5 of that Directive, the *‘seller shall be liable for any lack of conformity which exists at the time the goods were delivered’* and which *‘becomes apparent within two years from delivery’*, i.e. within the two-year legal guarantee period. Liability for lack of conformity with the contract rests with the ‘seller’. Under Article 1(2)(c) of the Consumer Sales and Guarantees Directive, a seller is a *‘natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession’*.

Therefore, the party who has to remedy the non-conformity (through repair, replacement, reduction of the price or rescission of the contract) is the person with whom the consumer concludes the sales contract on the marketplace. Who this is will depend on the specific circumstances of the individual contract.

Nonetheless, as described in the previous section, under the professional diligence and transparency requirements laid down by Articles 5(2), 2(h), 6 and 7 UCPD, any e-commerce platform, insofar as it can be considered a “trader”, should take appropriate measures enabling, amongst others, its users to clearly understand who their contracting party is – and the fact that they will only benefit from protection under EU consumer and marketing laws in their relations with those suppliers who are traders.

A case currently pending before the Court will determine whether an intermediary – which, in the case at stake, is an off-line one – can be deemed liable for the lack of conformity of the good and the possible detriment suffered by the consumer if it has

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<sup>275</sup> Directive 1999/44/EC on the sale of consumer goods and associated guarantees.



misled, by action or omission, the consumer to believe that the contract was concluded with itself rather than with a third party seller.

The decisive issue in this case is whether a professional intermediary can itself be considered a party to a sales contract between two consumers under the Consumer Sales and Guarantees Directive 1999/44/EC if it does not adequately inform the consumer-buyer about the identity and status of the actual consumer-seller.<sup>276</sup>

For example:



*A consumer buys a new laptop computer on an online marketplace. In both the invitation to purchase and the pre-contractual information, it is clearly stated that the seller is not the marketplace itself, but a third party trader. The ensuing contract is clearly stipulated between the consumer and the third party trader. If subsequently the consumer discovers a lack of conformity of the delivered product with the contract, the claim should be directed at the third party trader and not at the marketplace.*

- *In a ruling of 18 November 2015, a Danish High Court considered an online travel agency, that had acted as an intermediary between a consumer who bought a flight ticket and an airline, to be the seller of the tickets and responsible for compensating the consumer for failure by the airline to provide the flight. The court found that the consumer had reason to assume that he had bought the ticket directly from the travel agency, given that the latter had been his only contact point during the purchase, had received the payment and provided the tickets. The general impression provided by the webpage of the travel agency also made it reasonable for the consumer to assume that he was buying the tickets directly from them. This ruling was based on Danish contract law.<sup>277</sup>*

Another practice that may mislead consumers is the sale by e-commerce market places of brand names as keywords in cases where this can be deceptive as regards the identity of the trader actually offering the product. .

<sup>276</sup> See the Advocate General's Opinion of 7 April 2016 in the pending preliminary ruling in case C-149/15, where the intermediary (a car garage) had failed to properly inform the consumer buyer, before the purchase of the car, about the status and identity of the actual seller:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=175623&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=712468#Footref19>

<sup>277</sup>

<https://www.domstol.dk/oestrelandsret/nyheder/domsresumeer/Pages/RejsebureauersstatningsansvarforforbrugerstabvedaflystflyrejseianledningafCimberSterlingskonkurs.aspx>



For example:



- *In the eBay vs L'Oréal<sup>278</sup> case, the Court found that, while an online market place's practice of allowing advertisers to purchase keywords corresponding to their competitors' trademarks did not infringe trademark law, companies that use trademarked brand keywords to push sales must also, under Article 6 of the e-Commerce Directive, be transparent about who the seller is, so as to allow internet users to easily establish from which undertaking the goods or services covered by the advertising in question originate.*

The UCPD, in particular Articles 6(1)(a) and 6 (2)(a), will come into play if the results displayed are likely to deceive consumers as to the nature of the product or create confusion between trade names or other distinguishing marks of competitors.

Companies using trademarked brand keywords to sell counterfeited products could potentially be found in breach of point No 9 of Annex I to the UCPD, which prohibits 'stating or otherwise creating the impression that a product can legally be sold when it cannot'.

#### 5.2.4 App stores

An 'app store' (or application store) is a portal for the supply of software programmes for smart devices (e.g. smartphones and tablets), which are referred to as applications (apps). The software programmes can be games or other products, such as digital newspapers.

App stores generally distribute apps developed by either the app store provider or third party app developers.

'In-app purchases' are purchases that can be made from within apps. By making in-app purchases, consumers can typically buy special content or features that can enhance the experience of games or other digital content that may be free to download as such.

For example:



- *In the game 'X's Village', the objective is for the player to build a virtual village for X from scratch. The game is free to download and play, but it offers the possibility for the player to buy additional content, notably different amounts of 'X berries', which the player can use to progress faster in the game.*

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<sup>278</sup> Case C-324/09, L'Oreal, 12 July 2011.

In 2013 and 2014, European national consumer protection authorities, acting through the Consumer Protection Cooperation (CPC) Network, carried out a joint enforcement action on online games (apps) that offer in-app purchases and that are likely to appeal to or to be played by children.<sup>279</sup> In this joint action, the national enforcement authorities (CPC authorities) applied the UCPD and other relevant EU law to digital games offering in-app purchases. The action was triggered by national investigations which had identified the following concerns with respect to such games:

- misleading presentations of games as ‘free’;
- direct exhortations to children;
- lack of information about payment settings and insufficient consent by consumers for purchases;
- lack of information about traders’ email addresses.

In December 2013, several CPC authorities agreed on a common position on these legal issues.<sup>280</sup> The assessment made in this common position applies both to app stores as platforms, as discussed in general in Section 5.2.2, and to individual app developers.

As regards misleading presentations of games as free, the CPC authorities identified No 20 of Annex I and Article 7(4)(c) UCPD, in addition to Article 6(1)(e) of the Consumer Rights Directive, as the main legal basis for assessing traders’ compliance with EU consumer and marketing law.

On the basis of those provisions, the CPC authorities clarified that only games where in-app purchases are optional can be presented as ‘free’ without misleading consumers. According to the common position, an online game cannot be marketed as ‘free’ if the consumer cannot play the game in a way that he/she would reasonably expect without making in-app purchases. This is to be assessed on a case-by-case basis for each app that includes in-app purchases.

The CPC authorities also underlined that a game found to be in compliance with point No 20 of Annex I as concerns the use of the word ‘free’ can still be assessed under other provisions of the UCPD, such as Articles 6 to 9, to make sure that other elements, like how price information is displayed, are not misleading or aggressive.

As regards direct exhortations to children, the CPC authorities identified point No 28 of Annex I and Article 5(3) UCPD as the main legal basis for assessing traders’ compliance with EU consumer and marketing law.

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<sup>279</sup> [http://ec.europa.eu/justice/newsroom/consumer-marketing/news/1401222\\_en.htm](http://ec.europa.eu/justice/newsroom/consumer-marketing/news/1401222_en.htm) and [http://europa.eu/rapid/press-release\\_IP-14-847\\_en.htm](http://europa.eu/rapid/press-release_IP-14-847_en.htm).

<sup>280</sup> [http://ec.europa.eu/consumers/enforcement/documents/common\\_position\\_on\\_online\\_games\\_en.pdf](http://ec.europa.eu/consumers/enforcement/documents/common_position_on_online_games_en.pdf).

The CPC authorities clarified that games targeted at children, or which traders can reasonably foresee to be likely to appeal to children, must not contain direct exhortations to children to buy additional in-game items. This includes putting pressure on a child to buy an item directly or to persuade an adult to buy items for them. Please see Section 4.6 for examples of commercial practices that have been considered by national authorities to include direct exhortations to children.

As regards information about payment settings and consent by consumers for purchases, the CPC authorities clarified that, under Articles 7(2) and 7(4)(d) of the UCPD and Article 6(1)(g) of the Consumer Rights Directive, consumers must be clearly informed about the arrangements for payment before each purchase.

Under the Consumer Rights Directive, any purchase requires the consumer's express consent and the trader needs to provide the consumer with the necessary information.

Reference is also made to Article 54 of the Payment Services Directive which requires payer's consent to execute the payment transaction and states that, in the absence of such consent, a payment transaction is considered to be unauthorised<sup>281</sup>.

The CPC authorities noted that default setting for payments should not allow purchases to be made without the consumer's explicit consent (e.g. via a password). When the system provides for time slots for the validity of consent (e.g. a 15 minutes slot), traders should request consumer's explicit consent in relation to the applicable duration.

The CPC authorities stressed that information about the identity of the trader should be easy to find, clear, comprehensive and provided in a timely fashion before the consumer decides to play, download or make a purchase.

As regards information about traders' email addresses, the CPC authorities applied Article 5(1)(c) of the e-Commerce Directive, under which, in combination with Article 7(5) UCPD, this information qualifies as material within the meaning of the UCPD.

Following the entry into application of the Consumer Rights Directive in June 2014, traders are also required to provide consumers with their email address on the basis of its Article 6(1)(c).

#### 5.2.5 Collaborative economy<sup>282</sup>

Online platforms also act as central elements in the collaborative economy bringing together suppliers and users of different services, such as transport and

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<sup>281</sup> The Payment Services Directive 2007/64/EC will be replaced, as from 13 January 2018, by Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market. Similar rules are provided in its Article 64.

<sup>282</sup> The European Commission has launched a study to analyse, amongst others, national rules applicable to suppliers in the sharing economy context. See: *Call for tender n° Chafea/2015/CP/02 concerning "The exploratory Study of Consumer Issues in the Sharing Economy"*. Available at [http://ec.europa.eu/chafea/consumers/tender-2015-cp-02\\_en.html](http://ec.europa.eu/chafea/consumers/tender-2015-cp-02_en.html)

accommodation. As an intermediary, the online platform enables suppliers to make their offers available to users and may also intermediate the placing and fulfilment of orders on their behalf. As regards users, such intermediaries enable them to benefit from the offers provided by the suppliers. There are various types of collaborative platforms, including purely private non-for-profit initiatives.

The Commission will adopt in June 2016 a Communication on the Collaborative economy with guidance on how EU law applies to collaborative economy business models. Generally speaking, whenever a collaborative economy platform qualifies as a "trader" and engages in commercial activities towards consumers, it must respect the professional diligence and transparency requirements of the Directive as described in Section 5.2.2.

In particular, with a view to avoid omitting material information, the collaborative economy platform should, under Articles 6(1)(f) and 7(1) and (2) of the UCPD, enable relevant third party traders to indicate to users that they are traders, and the platform should inform consumers whether and if so what criteria it applies to select the suppliers operating through it and whether and if so what checks it performs in relation to their reliability.

"Collaborative economy" often, but not exclusively, refers to transactions between peer consumers – suppliers and users having as their object the sharing of assets, resources, time and skills (e.g. car rides by splitting the costs). However, depending on the circumstances of the suppliers and the associated activities, they could also qualify as traders for the purposes of the UCPD. Where the supplier is a "trader" and the user is a "consumer", the UCPD will apply directly to the commercial practices of the supplier on the platform.

A supplier will qualify as a "trader" under the UCPD if he is *acting for purposes relating to his trade, business, craft or profession* (Article 2(b)). According to this definition, the mere fact that a person engages in an activity in the collaborative economy will not mean that that person automatically qualifies as a "trader": under the UCPD, the qualification of whether a person is a "trader" or not is the outcome of a case-by-case assessment, which has to take all factual aspects into account, such as whether an essential part of that person's income stems from a given collaborative economy activity.

#### 5.2.6 Search engines

Search engines allow searching for information on the internet according to a specific algorithm. Consumers will expect search engines to display 'natural' or 'organic' results relevant for their search query, and based on sufficiently impartial criteria. However, evidence shows that search engines may, for example, include lists of search results based on relevance criteria linked to the level of payment they receive from third party

traders. Typical examples are 'paid placement' and 'paid inclusion', which are forms of advertising within the meaning of the UCPD.

In 'paid placement', individual traders (websites or URLs) pay for a higher ranking in a search results list so that relevance criteria alone will not determine their rank.

In 'paid inclusion', third party traders pay to be included in a list of search results in situations where they might not otherwise have been included or might not have been included at a particular point in time if relevance to the search query had been the only criteria for arranging search results.

Although the ways in which search engines retrieve and present results and the devices on which consumers view these results are constantly evolving, the main UCPD principles remain the same: unless consumers are informed otherwise, they will ordinarily expect natural search results to be included and ranked based on relevance to their search queries and not based on payment by third party traders.

The UCPD does not ban business practices whereby inclusion or ranking in whole or in part is based on payment from another trader, but requires the search engine provider, to the extent that it qualifies as a "trader under the UCPD", to clearly distinguish such search results from natural search results. The purpose of such disclosures is to inform consumers when they are being solicited as opposed to being impartially informed.

Article 6(1)(c) prevents traders from misleading consumers on the motives for commercial practices, the nature of the sales process and direct or indirect sponsorship or approval of traders or products. In addition, Article 7(2) prevents traders from hiding the commercial intent of a commercial practice.

Therefore, any search results showing the websites or URLs of traders who have paid to be included or ranked higher than they would be ranked by relevancy or other objective criteria should be clearly and prominently labelled to show that the ranking or inclusion is paid for. Such labels need to convey that the sites listed are placed higher, or otherwise presented more prominently, because they have paid for their ranking or position.

In recent years, the features put in place by some widely used search engines to differentiate advertising from natural search results seem to have become less noticeable to consumers. This applies especially to advertising located immediately above the natural results ('top ads'). Recent evidence suggests that searchers often do

not recognise top ads as distinct from natural search results, especially when the contrast and background shading used to distinguish ads is weak.<sup>283</sup>

Many search engines offer specialised or vertical search services in addition to their general search service. This allows consumers to narrow their search down to specific categories of information, such as news, images, local businesses or consumer goods. In certain situations, the results of a specialised search are based at least in part on payments from a third party. This should be identified as such to consumers.

#### 5.2.7 Comparison tools

A multi-stakeholder group on comparison tools bringing together industry representatives, operators of comparison tools, NGOs and national authorities was set up by the European Commission<sup>284</sup> to develop principles specifically aimed at helping comparison tool operators to comply with the UCPD. This group has agreed on a list of ‘*Key principles for comparison tools*’, which is consistent with this Section. The principles<sup>285</sup> are not legally binding as such.

As part of these *Key principles*, the multi-stakeholder group also agreed on the following definition of comparison tools:

*‘For the purposes of this document the term ‘comparison tool’ should be understood as including all digital content and applications developed to be used by consumers primarily to compare products and services online, irrespective of the device used (e.g. laptop, smartphone, tablet) or the parameter(s) on which the comparison is based (e.g. price, quality, user reviews). To the extent that operators of search engines, travel or ticket booking sites, e-commerce platforms acting as a marketplace for several traders develop functions or applications dedicated to the comparison of products and services, these functions or applications are also covered by the term ‘comparison tool.’*

A recent study for the European Commission<sup>286</sup> found that the most popular types of online platforms usually offer some degree of comparison services, even if in many instances their comparison function does not cover as large a variety of products or services as that of dedicated comparison web sites. These include travel booking sites such as Expedia, Tripadvisor, Booking.com and Opodo, search engines such as Google and Yahoo. Multi-trader e-commerce platforms such as Amazon and eBay also offer a limited comparison function for offers listed on their sites.

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<sup>283</sup> SEObok, *Consumer Ad Awareness in Search Results*, \*2, 7-8 (Apr. 15, 2012), <http://www.seobook.com/consumer-ad-awareness-search-results>. Earlier published research has reported similar findings. For example, in the 2005 Pew Research Center survey, 62% of searchers were not even aware of the distinction between paid and non-paid results, with only 18% saying they could always differentiate paid from non-paid results. 2005 Pew Search Engine Survey at ii, 17.

<sup>284</sup> <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3325&news=1>.

<sup>285</sup> [http://ec.europa.eu/consumers/consumer\\_rights/unfair-trade/comparison-tools](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/comparison-tools)

<sup>286</sup> Study on the coverage, functioning and consumer use of comparison tools and third-party verification schemes for such tools by ECME Consortium and DELOITTE, funded by the European Union, 2014.

The UCPD only applies to the comparison tool if it qualifies as a ‘trader’ within the meaning of Article 2(b), i.e. the Directive does not apply to comparison tools that are run on a non-professional basis.

For example:



- *A grocery price comparison service ('quiestlemoinscher.com', created by a large French supermarket company) was considered by French courts to be a trader's website and a tool for comparative advertising.<sup>287</sup>*
- *A consumer organisation running a comparison tool offering information to consumers against payment of a subscription would, in principle, have to comply with the requirements of the UCPD. Indeed, this service could be part of the organisation's strategy to gain commercial profit from its services to consumers, making it a 'trader' within the meaning of Article 2(b) of the Directive.*

Whether providers of comparison tools which qualify as traders comply with their transparency obligations under Articles 6 and 7 of the UCPD must be assessed on a case-by-case basis.

Different criteria could be relevant in this assessment, for example whether they provide information on:

- the comparison coverage (e.g. sectors and number of traders);
- the criteria applied for comparing and ranking products (e.g. whether paid or sponsored products are included among comparison results, whether the presentation of comparison results clearly distinguishes between products that are included or ranked on the basis of payment and other products, whether other optional services are included);
- the frequency of updates of the information (in particular the price and availability of products).

Such information may enable consumers to understand that the ranking of products or traders may not be exhaustive and that they may find other offers using a different information channel. It will also help to avoid the risk of consumers being misled by listings marked as a ‘best deal’ or ‘recommended choice’.

In their ‘Key principles for comparison tools’, the multi-stakeholder group on comparison tools considers that:

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<sup>287</sup> Tribunal de commerce de Paris – 29 mars 2007 – Carrefour c/Galaec (la coopérative groupement d'achat des centres Leclerc).

*‘Criteria used for the rankings should be clearly and prominently indicated, as well as, where relevant to ensure that consumers are not misled, general information about any specific methodology used (...). Comparison tools should give a clear indication of the completeness and coverage of the comparison’.*

Some comparison tools use claims such as ‘best deals’ to identify not necessarily the cheapest deals, but rather those that offer the best value for money. Omitting information about the criteria for the ‘best deal’ claim could be misleading under Article 7 of the UCPD.

Under Article 6(2) of the UCPD, providers of comparison tools who qualify as traders under the UCPD and engage in any commercial communication directly connected with the promotion, sale or supply of a product to consumers must ensure that the information that is provided by the platform itself does not create confusion with any products, trade marks, trade names or other distinguishing marks of a competitor.

Under Article 6(1)(d) and 7(4)(c) of the UCPD, the total price or the manner in which it is calculated must be clearly indicated, including, *"where appropriate, freight, delivery or postal charges"*. Hence, if the comparison tool site does not directly sell itself and hence does not deal with such delivery charges, it would not need to display them.

When the goods or services compared are not identical, differences in their main characteristics should be clearly indicated.

In their *‘Key principles for comparison tools’*, the multi-stakeholder group on comparison tools considers that:

*‘Comparison tools should ensure that all the information they provide is accurate and in particular that information regarding price and availability corresponds exactly to the offer as made available by the seller of the product or service. In no case should availability information give a false impression of scarcity’.*

Comparison tools sometimes display prices that cannot be found when consumers go to the web page of the trader providing the actual product.<sup>288</sup> If a comparison tool displays prices or products that are not actually available this could be in breach of Articles 6 and 7 UCPD and, according to the circumstances, several provisions of the black list in Annex I UCPD, which prohibit, in all circumstances, bait advertising (point No 5), bait and switch (point No 6) and passing on materially inaccurate information on market conditions with the intention of inducing the consumer to acquire that product

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<sup>288</sup> According to the Study on the coverage, functioning and consumer use of comparison tools and third-party verification schemes for such tools (EAHC/FWC/2013 85 07), the most commonly reported problem was the unavailability of a product on the seller's website (32%).



at conditions less favourable than normal market conditions (point No 18). This assessment is without prejudice to Articles 14 and 15 of the e-Commerce Directive.

Misleading statements about limited availability of a product may be in breach of Article 6(1)(b) of the UCPD.

For example:



- *A major accommodation booking platform was fined by the Commercial Court of Paris for displaying misleading information on the availability of accommodation and the existence of price promotions.*<sup>289</sup>
- *In April 2014, the Dutch Advertising Code Committee found advertisements on a major accommodation booking platform to be misleading. The claims were: 'We have only 1 room left!' and 'Only 1 room left' at a specific price. The authority found that it was not clear to the average consumer that these claims only related to the rooms a hotel had made available through that platform. The platform's failure to inform consumers that its claims related to those rooms only meant that consumers could be misled into believing that the hotels were fully booked, whereas in fact the same hotels could have rooms available through other booking channels. In July 2014, this decision was upheld by the Appeals Board.*<sup>290</sup>
- *A comparison tool may use different techniques to imply to consumers that a product is not available. For example, by using the technique of "dimming", a comparison tool takes down pictures related to the offer of one specific provider while keeping the pictures of other providers. This could lead consumers to click much less frequently on the offer without pictures. If such a presentation is likely to deceive consumers, it could be contrary to Article 6(1)(b) as misleading in relation to the availability of a product and to Article 7(2) UCPD as information provided in an unclear manner.*

Available evidence suggests<sup>291</sup> that the nature of the relationship between comparison tool operators and the sellers of products and services featured on their platforms is often unclear to consumers.

As discussed in Section 5.2.6 on search engines, the UCPD requires all traders to clearly distinguish a natural search result from advertising. This also applies to operators of comparison tools. The relevant provisions in this respect are Article 6(1)(c) and (f) and Article 7(2) UCPD.

<sup>289</sup> *Tribunal de commerce de Paris*, 4 October 2011, Synhorcat c/ Expedia.

<sup>290</sup> <https://www.reclamecode.nl/webuitspraak.asp?ID=135065&acCode>.

<sup>291</sup> Study on the coverage, functioning and consumer use of comparison tools and third-party verification schemes for such tools by ECME Consortium and DELOITTE, funded by the European Union, 2014.

In their 'Key principles for comparison tools', the multi-stakeholder group on comparison tools considers that:

*'Consumers must be clearly informed when a contractual or any other type of relationships between the comparison tool operator and a trader is affecting the impartiality of the results displayed. When the default ranking is affected by a contractual or any other type of relationships between the CT operator and the manufacturer/seller/provider/any other organisation, it should be clearly marked and consumers should also be given the option to rank the offers in an impartial way (e.g. by ascending price).'*

The 'Key principles for comparison tools' also say that:

*'Comparison tools should be transparent about their business and financing models, including owners, shareholders, material connections with manufacturers, sellers or providers of the goods and services featured. Any material connection to traders whose products/services are compared on the comparison tools should be adequately disclosed.'*

For example:



- *A banner on the page displaying search results that clearly identifies advertisements.*
- *The use of a specific colour, font or display to identify advertisements, including through special icons.*

Some failures by comparison tools to properly disclose paid inclusion or placement have been considered misleading by national authorities.

For example:



- *A price comparison website offered to top rank the products of traders paying an additional fee. The French Supreme Court ruled that consumers' transactional decisions can be influenced by a comparative display that they might believe has no commercial intent or objective. On this basis, the comparison website's commercial practice was qualified as misleading. The Court found that the comparison tool's failure to clearly identify this top ranking as a paid one was likely to materially distort the economic behaviour of consumers.<sup>292</sup>*

<sup>292</sup> Cass. Com. 4 décembre 2012, 11-27729, Publicité Sté Pewterpassion.com c/ Sté Leguide.com.

- *A major comparison and booking service enabled hotels to manipulate the ranking by paying higher commission fees. This was found misleading by the Regional Court of Berlin.*<sup>293</sup>

Comparison tools that rank products using scores calculated on the basis of user reviews should also comply with the principles discussed in Section 5.2.8 on user review tools.

#### 5.2.8 User review tools

Many online platforms offer consumers the possibility to inform other consumers about their experience with a product or a service provider. This includes e-Commerce platforms, search engines, specialised travel review sites, comparison tools and social networks.

For example:

- *On 19 June 2015, the UK Competition and Markets Authority published a report on online reviews and endorsements in the UK following a call for information to industry and consumers.*<sup>294</sup> *Among the findings in this report was that: 'Consumers that use online reviews find them valuable. We estimate that more than half of UK adults use them. Across the six broad sectors that we looked at, we estimate that £23 billion a year of UK consumer spending is potentially influenced by online reviews. Consumers that use online reviews appear to trust them and they appear to be an important source of information for consumers' buying decisions. Further, most consumers said that the product or service purchased after reading reviews matched up to their expectations'.*



The UCPD applies to any natural or legal person that qualifies as a "trader" according to Article 2(b) UCPD. As regards consumer reviews, the Directive will not apply to consumers who provide information about their experience with products or services, unless they are acting on behalf of a trader. However, it will apply to the practices of many online platforms that present consumer reviews, in so far as these platforms qualify as traders. The notion of the "trader" within the meaning of the UCPD is discussed in Section 2.1.

When publishing user reviews, a platform operator is required to provide truthful information on the main characteristics of its services in accordance with Articles 6(1)(b) and 7(4)(a) UCPD. In particular, the platform should not mislead its users as to the origin of the reviews: it should avoid creating the impression that reviews posted through it originate from real users, when it cannot adequately ensure this. In such

<sup>293</sup> LG Berlin, 25.08.2011, Az.16 O 418/11.

<sup>294</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/436238/Online\\_reviews\\_and\\_endorsements.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/436238/Online_reviews_and_endorsements.pdf)

case, the platform operator should clearly inform consumers about this fact. If, a contrario, a user review tool provider explicitly claims that its reviews originate from users, it should take reasonable and proportionate steps which – without amounting to a general obligation to monitor or carry out fact-finding (see Article 15(1) e-Commerce Directive) – increase the likelihood for such reviews to reflect real users' experiences.

Such steps could include for example:

- having the technical means to verify the reliability of the person posting a review, for instance by requesting him/her to register;
- verifying the IP address used to submit the review;
- requiring information by which the person acknowledges to have actually used the object of the review (e.g. a booking number).

In their '*Key principles for comparison tools*', the multi-stakeholder group on comparison tools considers that:

*'Comparison tools should take measures to ensure the trustworthiness of user reviews and ratings, and provide an overview of the methodology used to the extent that this is necessary to ensure that consumers are not misled.'*

If a third party trader posts fake reviews in the name of consumers (or engages e-reputation agencies to do so) it is acting contrary to point No 22 of Annex I of the Directive, which prohibits '*falsely representing oneself as a consumer*'. Consequently, any review presented by a trader as information provided by a consumer must genuinely reflect real consumers' opinions, findings, beliefs or experience.

For example:



- *A trader posted 'likes' for its dental products on its own website claiming 'guaranteed real customer reviews' and then linked the 'likes' to a review site, on which the positive customer reviews were favoured over neutral or negative reviews. A German appellate Court found it misleading of the trader to claim 'guaranteed real customer reviews', when the link was not giving an objective account of the customers' views.<sup>295</sup>*
- *In October 2015, Canada's largest telecommunications company agreed to pay a fine of 1 250 000 Canadian dollars for encouraging its employees to post positive reviews and ratings of the company's products without disclosing that they worked for the company. The Canadian Competition Bureau found that these reviews and ratings created the general impression that they were made by independent and impartial consumers and temporarily affected the overall star rating for the products in question.<sup>296</sup>*

<sup>295</sup> OLG Düsseldorf, 19.02.2013, Az. I – 20 U 55/12.

<sup>296</sup> <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03992.html>.

A problematic practice that has been reported by enforcement authorities is the suppression of genuine negative consumer reviews by review sites, without making it clear to consumers that only a selection of reviews is being presented to them.<sup>297</sup>

This could be a misleading action contrary to Article 6 UCPD or a misleading omission contrary to Article 7 UCPD. Namely, the review site's active creation of a false or misleading overall impression about its nature or functioning and omission of material information (i.e. failing to inform consumers that all genuine consumer reviews are not published) may cause the average consumers reading the online reviews to continue using the online platform or to take a decision to contact a trader which they would not have taken had they known that negative reviews had been suppressed. According to the circumstances, the omission of genuine reviews could itself be a misleading omission.

This practice could also be contrary to the requirements of professional diligence as provided for in Article 5(2) UCPD. A review site's failure to publish all genuine reviews without making consumers aware of this fact in a clear manner could be contrary to the standard of special skill and care which an online platform providing user reviews can reasonably be expected to exercise towards consumers. Consequently, in order to ensure that they comply with the UCPD, traders should either post both positive and negative reviews or clearly inform consumers that all relevant reviews are not posted.

Another commercial practice is the suppression of genuine negative reviews as a result of traders forcing consumers and review sites to prevent negative reviews about them from being published.<sup>298</sup>

Such practices could meet the definition of 'misleading' laid down in Articles 6 and 7 UCPD if, for example, the trader bans negative online reviews to manage its reputation so that negative reviews about it are not displayed. In such a situation, the overall presentation of the nature of the trader and the characteristics of its products can be deceptive, even if the remaining positive reviews were true. This deception could be likely to cause the average consumer (who has not yet been in contact with this trader) to select this trader rather than a competitor who has not engaged in such unfair commercial practices. This practice could also be assessed as contrary to professional diligence as provided for in Article 5(2) UCPD.

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<sup>297</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/436238/Online\\_reviews\\_and\\_endorsements.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/436238/Online_reviews_and_endorsements.pdf).

<sup>298</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/436238/Online\\_reviews\\_and\\_endorsements.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/436238/Online_reviews_and_endorsements.pdf).



For example:

- *In an ongoing case, the US Federal Trade Commission has challenged terms and conditions used by a trader under which consumers, when buying a product, had to agree not to publish negative reviews if they were not satisfied with the product. In addition, if the consumer published negative reviews, the trader would take away a discount that the consumer had been given when purchasing the product, significantly increasing the price the consumer had to pay. To enforce these terms and conditions, the trader even filed lawsuits against consumers that published negative reviews. The Federal Trade Commission is arguing that such commercial practices distort the information environment by not letting potential new buyers of the product know about negative experience from previous buyers, potentially causing new buyers to take a transactional decision they would not have taken otherwise.<sup>299</sup>*

A connection between a provider of a user review tool presenting a user review about a product and the trader that supplies the product must be fully disclosed if the connection could materially affect the weight or credibility of the review i.e. if the connection cannot reasonably be expected by the average consumer. This should enable consumers to realise that such reviews may possibly not be as impartial as unsponsored reviews regarding the quality of the product.

The relevant provisions in this situation are:

- Article 6(1)(c) of the UCPD, which prevent traders from misleading consumers on the motives for the commercial practices and the nature of the sales process; and
- Article 7(2) and point No 22 of Annex I, which prevent traders from hiding the commercial intent of the commercial practice.

### 5.2.9 Social media

Social media such as Facebook, Twitter, YouTube, WhatsApp, Instagram and blogs enable users to create profiles and communicate with each other, including sharing information and content, such as text, images and sound files. A social medium may be a chat room, a blog or a social network.<sup>300</sup>

Some social media have become platforms for advertising, product placement and consumer reviews. Therefore, they can present increased risks for hidden and misleading advertising, given that commercial elements are often mixed with social

<sup>299</sup> [https://www.ftc.gov/news-events/press-releases/2015/09/ftc-sues-marketers-who-used-gag-clauses-monetary-threats-lawsuits?utm\\_source=govdelivery](https://www.ftc.gov/news-events/press-releases/2015/09/ftc-sues-marketers-who-used-gag-clauses-monetary-threats-lawsuits?utm_source=govdelivery).

<sup>300</sup> See also the definition in the Position of the Nordic Consumer Ombudsmen on social media marketing of 3 May 2012: <http://www.consumerombudsman.dk/~media/Consumerombudsman/dco/Guidelines/Position%20of%20the%20Nordic%20Consumer%20ombudsmen%20on%20social%20media%20marketing.pdf>.

and cultural user-generated content. Furthermore, consumers could experience social media just as services for the exchange of information between consumers and may not be aware that traders use social media for marketing purposes. For this reason, the prohibitions in Article 7(2) and point No 22 of Annex I UCPD against hidden marketing are particularly relevant. A similar requirement stems from Article 6(a) of the e-Commerce Directive.

On the one hand, social media platforms can qualify as "traders" in their own right, under the UCPD. On the other hand, social media are often used by third party traders to engage directly in unfair commercial practices towards consumers.

Indeed, a wide variety of commercial practices take place in social media.

For example:



- *A trader encourages users to share marketing material with other users by offering price reductions on its marketed products as a reward.*
- *A blogger is given a free vacation by a tour operator in exchange for posting positive reviews on the vacation and the tour operator.*
- *A celebrity (music, sports) is given an endorsement deal in exchange for posting pictures of bought products such as sneakers.*

National enforcement authorities have identified a number of issues in relation to social media and EU consumer and marketing law, such as:

- commercial practices put in place by social media platforms, including facilitating and selling paid 'likes' and sponsored reviews, blogs and accounts to third party traders;
- possibly unfair standard contract terms used by social media platforms;
- social media services being presented to consumers as 'free' when they require personal data in exchange for access;
- commercial practices put in place by third party traders through social media platforms, including hidden marketing, fake or misleading user reviews, direct exhortations to children, spam and subscription traps.

The distinction between third party traders and other social media users can sometimes be blurred.



For example:



- *The Guidance on Labelling of Marketing in Social Media by the Norwegian Consumer Ombudsman<sup>301</sup> reads: ‘You can comment on products that you have bought yourself or received as presents from, for example your friends or your boyfriend, without labelling the information as marketing, as long as you do not link the product to an advertising network. It is in cases where both you and the advertiser get an advantage from your comments that you must label it as marketing, for example if you have received a jacket for free and then make comments about the jacket it in your blog.’*

Article 6 of the UCPD prevents traders from misleading consumers in relation to commercial practices involving the use of systems such as ‘likes’. By presenting fake ‘likes’ to consumers, a trader may mislead consumers about its own reputation or the reputation of its products or services, possibly causing consumers to take transactional decisions they would not have taken otherwise.

If a third party trader posts fake reviews in the name of consumers (or engages e-reputation agencies to do) it will be acting contrary to point No 22 of Annex I of the Directive, which prohibits *‘falsely representing oneself as a consumer’*.

Many users of social media are children and young people.

Consequently, Article 5(3) of the UCPD can be relevant as a legal basis for protecting *‘a clearly identifiable group of consumers who are particularly vulnerable’*.

This reinforces the general requirement of the UCPD to clearly indicate the marketing purpose. In addition, point No 28 of Annex I, which prohibits direct exhortations to children, can also be relevant as a legal basis.

Issues related to the marketing of products as “free” or similar are discussed in section 4.4 in the context of point No 20 of Annex I and in Section 3.4.1 as regards omission of material information. If a social media platform does not inform consumers that their personal data will be processed for economic purposes it could be argued that it is omitting material information that the consumer needs to take an informed transactional decision. For such an omission to be unfair under Article 7 UCPD, it will have to be shown that it is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

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<sup>301</sup> Guidelines adopted in 2011; [http://www.forbrukerombudet.no/asset/4474/1/4474\\_1.pdf](http://www.forbrukerombudet.no/asset/4474/1/4474_1.pdf)

An updated version of this Guidance document, adopted in June 2014, is currently only available in Norwegian; [http://www.forbrukerombudet.no/asset/5018/1/5018\\_1.pdf](http://www.forbrukerombudet.no/asset/5018/1/5018_1.pdf).



### 5.2.10 Collective buying platforms

This form of collaborative e-commerce allows consumers to purchase products together to obtain a more favourable price.

If a group buying platform is run by a 'trader' who is running it for purposes relating to its business activities and engages in commercial practices vis-à-vis consumers, it will fall within the scope of the UCPD and will need to comply with the Directive's requirements.

Based on Articles 6(1) and 7 of the UCPD, the following principles should apply to such collective buying platforms:

- information they provide to consumers should be clear and accurate regarding the scope of the offer;
- information they provide about the quality of the product/service obtained following a group purchase should not be misleading. Notably, the quality should not be lower than an offer at a normal price, unless consumers are clearly informed that this is the case.

Online platforms offering group buying services should provide clear and accurate information on the offer's content and price and on the provider of the product/service. The conditions under which consumers can benefit from the product (e.g. minimum number of buyers, duration of the offer) should be clearly spelled out. In addition, consumers should not be misled on the specific advantage offered by the platform; in other words, the product or service offered should be of the same quality as a product or service bought under normal conditions.

For example:

- *An offer for a specific treatment in a wellness centre is advertised at a 50 % reduction if bought from a group buying platform. Such an offer is likely to fall under Article 6(1)(b) and (d) (as a misleading indication of a price advantage) if the treatment offered lasts only 30 minutes whereas at full, ordinary price it lasts 60 minutes, unless consumers were clearly informed otherwise.*



For example:



- *On 1 July 2013, the Consumer Rights Protection Centre in Latvia published a guidance document on fair commercial practices for group buying<sup>302</sup>, which clarifies:*

*- in relation to contact details:*

*'[...] the author of a commercial practice must provide, according to applicable laws, comprehensive and truthful information about itself as the seller of coupons and, given the special nature of group buying portals, about the sellers of the products and the providers of the services offered.'*

*- in relation to the price:*

*'In the case of package offers, i.e. a combination of several products or services, when the price may vary depending on the number/volume of products or services acquired, the total package price must be indicated to avoid any impression that a larger number of products or services may be acquired at a lower price when they may not.'*

### 5.2.11 Dynamic pricing

Dynamic pricing (also called real-time pricing) means changing the price for a product in a highly flexible and quick manner in response to market demands. For example, in France, the national data protection supervisory authority<sup>303</sup> and the consumer enforcement authority<sup>304</sup> recently checked French travel websites<sup>305</sup> and found evidence of dynamic pricing practices, in particular prices for airline and train tickets that differed depending on the time of day when the consumer makes a reservation.

Under the UCPD, traders can freely determine the prices they charge for their products as long as they adequately inform consumers about total costs and how they are calculated (Articles 6(1)(d) and 7(4)(c) UCPD). However, in some circumstances, dynamic pricing practices could meet the definition of 'unfair' under the UCPD.

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<sup>302</sup>

[http://www.ptac.gov.lv/sites/default/files/docs/vadlinijas\\_godigas\\_komerccprakses\\_istenosanai\\_kolektiva\\_iepirksanas\\_joma\\_01\\_07\\_2013\\_new.pdf](http://www.ptac.gov.lv/sites/default/files/docs/vadlinijas_godigas_komerccprakses_istenosanai_kolektiva_iepirksanas_joma_01_07_2013_new.pdf)

<sup>303</sup> Commission nationale de l'informatique et des libertés – CNIL.

<sup>304</sup> Direction générale de la concurrence, de la consommation et de la répression des fraudes – DGCCRF.

<sup>305</sup> See [press release](#) of 27 January 2014. The checks on French websites did not find evidence of prices changing on the basis of the location of IP addresses, which is discussed in the following section on price discrimination.

For example:



- *A dynamic pricing practice where a trader raises the price for a product after a consumer has put it in his digital shopping cart could be considered a misleading action under Article 6(1)(d) UCPD.*

### 5.2.12 Price discrimination

Price discrimination is where a trader applies different prices to different groups of consumers for the same goods or services.

As with dynamic pricing, under the UCPD traders are free to determine their prices if they adequately inform consumers about those prices and how they are calculated.

However, the Services Directive<sup>306</sup> includes a general prohibition on price discrimination based on nationality and place of residence.

Article 20 of the Services Directive:



*‘the general conditions of access to a service, which are made available to the public at large by the provider’ may not ‘contain discriminatory provisions relating to the nationality or place of residence of the recipient’.*

However, Article 20 of the Services Directive does not preclude *‘the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria’*. In addition, direct or indirect price discrimination based on the nationality of the final customer or its residence or on the place of establishment of carriers or ticket vendors within the Union is explicitly prohibited by several sector-specific pieces of EU legislation. This applies to air transport,<sup>307</sup> maritime transport<sup>308</sup> and bus and coach transport.<sup>309</sup>

In a ‘Fitness Check for the Internal Aviation Market’, adopted by the European Commission on 6 June 2013,<sup>310</sup> it was found that 26 % of airlines practised price discrimination for airline services based on the consumer’s place of residence. Other

<sup>306</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

<sup>307</sup> Cf. Article 23(2) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community.

<sup>308</sup> Cf. Article 4(2) of Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004.

<sup>309</sup> Cf. Article 4(2) of Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport.

<sup>310</sup> Cf. Commission Staff Working Document SWD(2013) 208 final, *Report on the suitability of economic regulation of the European air transport market and of selected ancillary services*, page 81.

airlines usually applied service fees only to sales in particular Member States or enabled residents of particular Member States to avoid payment fees.

### 5.2.13 Personalised pricing

The possibility of tracking and profiling consumer behaviour<sup>311</sup> enables traders to personalise and target advertising and offers for specific consumers in the form of 'personalised pricing'.

For example:



- *An online trader is building 'shopping profiles' based on the purchasing power of its online customers, enabling the trader to adapt its prices. A customer categorised as having 'higher purchasing power' could be recognised either by the computer's IP address or other means, such as a cookie, when the consumer visits the trader's website from its home computer. Prices proposed to this customer could be, for example, on average 10 % higher than for a new customer or a customer categorised as having 'lower purchasing power'.*

As with dynamic pricing and price discrimination, under the UCPD traders are free to determine their prices if they duly inform consumers about the prices or how they are calculated.

Traders that track and collect consumer preferences by using online personal data qualify as 'data controllers' under the Data Protection Directive and must comply with EU rules on data protection. This includes the requirement that the data controller must stop sending direct marketing if the individual receiving it objects to its personal data being processed for that purpose (Article 14(b)). In addition, Article 15 of the Data Protection Directive grants the right to every person not to be subject in principle to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc.

As from the date of applicability of the new rules of the General Data Protection Regulation, foreseen in 2018, which will replace Directive 95/46/EC, they will apply to the processing, also by a controller or processor not established in the Union, of

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<sup>311</sup> A related technique is 'online behavioural advertising' (OBA). Self-regulatory principles for OBA have been developed at European level with the European Advertising Standards Alliance's (EASA) Best Practice Recommendation on Online Behavioural Advertising (12 April 2011). Under the EASA, OBA is 'a technique to serve online advertisements that are targeted to the users' potential interests. In order to be able to target ads, OBA companies try to predict a user's interests and preferences based on the user's past website viewing record, for example in the form of data about page views or user clicks. This information is collected over time and across multiple web domains rather than from a single website. By definition, an OBA company, often known as an 'ad network', collects information on viewing behaviour from websites that it does not own or operate.'

personal data of subjects who are in the Union, whenever (i) the processing activities are related to either the offering of goods or services, irrespective of whether a payment by the data subject is required and (ii) the processing activities relate to the monitoring of their behaviour as far as their behaviour takes place within the Union.

In addition, the General Data Protection Regulation defines 'profiling' as "*any form of automated processing of personal data consisting of the use of those data to evaluate certain personal aspects relating to an individual, in particular to analyse or predict aspects concerning that individual's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements*". The right of the individual not to be subjected to automated individual decision making will then extend to such profiling.

When sending direct marketing and commercial communications to consumers over electronic communications networks, traders must also comply with Article 6, 9 and 13 of the e-Privacy Directive.<sup>312</sup> This includes the requirement that the data controller must stop sending direct marketing if the individual receiving it withdraws his consent.

Also under Article 5(3) of the e-Privacy Directive, the use of 'cookies' or similar devices on users' terminal equipment for obtaining information through such devices are permitted only with the users' informed consent.

Personalised pricing/marketing could be combined with unfair commercial practices in breach of the UCPD.

For example:

- *If the information gathered through profiling is used to exert undue influence e.g. a trader finds out that the consumer is running out of time to buy a flight ticket and falsely claims that only a few tickets are left available. This could be in breach of Article 6(1)(a) and Annex I No 7 UCPD.*



Furthermore, under Articles 8 and 9 of the UCPD, marketing based on tracking and profiling must not involve aggressive commercial practices. Point No 26 of Annex I (see also Section 4.5 on Persistent marketing by a remote tool) prohibits making persistent and unwanted commercial communications to consumers ('spam').

Having said that, personalised pricing policies based, for instance, on the customer's purchasing power/wealth as perceived by a trader do not currently seem to be

<sup>312</sup> Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 337, p.20.

widespread outside of loyalty programmes and price advantages, which are normal business practices, and prices that vary by distribution channel used (e.g. online as opposed to brick and mortar shops). In the few cases reported, the companies concerned changed their practices because they generated consumer distrust in the trader or brand in question. For example, on 17 May 2013, the UK Office of Fair Trading (now the Competition and Markets Authority — CMA) published a report on personalised pricing online.<sup>313</sup> The report found *‘that pricing decisions are influenced by analysis of aggregated information collected by consumers’*, but also that *‘our evidence indicates that businesses are not using information about individuals to set higher prices to them’*.<sup>314</sup>

The UK report includes the following case study on personalised pricing:<sup>315</sup>



- *"Many respondents referred to what happened to Amazon.com in the USA in 2000. At the time a company spokesperson described it as 'a very brief test to see how customers respond to various prices'. One man recounted how he ordered a DVD, paying \$24.49. The next week he went back to Amazon and saw that the price had jumped to \$26.24. As an experiment, he stripped his computer of the electronic tags that identified him to Amazon as a regular customer. Then the price fell to \$22.74. It is widely reported that customer criticism led to Amazon offering refunds to DVD buyers who bought at the higher price. In our own research, we found no evidence of prices being set on the basis of individual consumer profiles by Amazon or any other company, as opposed to a broader group, or type, of consumers. However, we have seen that the technology exists to do this."*

#### 5.2.14 Use of geo-localisation techniques

When shopping in/from another Member State, consumers are sometimes subject to outright refusals by traders to sell, or to price discrimination, based on the place of residence or nationality of the consumer. Such practices can take place online and when shopping over the counter. Traders may use geo-localisation techniques, e.g. on the basis of the consumer's IP address, residence address, country of issue of credit cards etc., to either deny the sale of a product to the consumer, to automatically reroute him or her to a local webstore or for price discrimination purposes.

Traders may have different reasons for denying access to a product or to apply different prices based on geographical information. As regards the denial of sale or rerouting, according to Article 8(3) of the Consumer Rights Directive, traders must

<sup>313</sup> Personalised Pricing, Increasing Transparency to Improve Trust, OFT 1489; [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared\\_offt/markets-work/personalised-pricing/offt1489.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/markets-work/personalised-pricing/offt1489.pdf).

<sup>314</sup> See pages 2 and 3 of the 'Personalised Pricing, Increasing Transparency to Improve Trust' report, OFT 1489, cited above.

<sup>315</sup> See page 13 of the 'Personalised Pricing, Increasing Transparency to Improve Trust' report, OFT 1489, cited above.

inform consumers about delivery restrictions at the latest at the beginning of the ordering process. On the basis of Article 7(5) UCPD, this information requirement qualifies as "material" under the UCPD. On the other hand, if a trader complies with the information requirement of Article 8(3) CRD, such denial of sale or rerouting is not an unfair commercial practice *per se* under the UCPD. However, according to the facts of the individual case, such practices could lead to unfair commercial practices.

On 25 May 2016 the European Commission adopted a legislative proposal to end unjustified geo-blocking and comprehensively fight discrimination based on residence or nationality presented.<sup>316</sup>

Furthermore, such practices may constitute an infringement of other areas of EU law (e.g. Article 20 of the Services Directive and competition law<sup>317</sup>). As noted under section 5.2.3 on price discrimination, Article 20 of the Services Directive obliges Member States to ensure that companies do not treat consumers differently on the basis of their place of residence or nationality, unless justified by objective criteria. It concerns both outright refusals to sell, including automatic re-routing, and the application of different prices taking place online or offline.

### 5.3 Travel and transport sector

Irregularities in the transport sector were found notably in the 2007 CPC Sweep<sup>318</sup> on airline ticket selling websites, the 2012 Study on price transparency in the air transport sector and the 2013 CPC Sweep on websites selling air travel and hotel accommodation.

Irregularities included misleading price indications (e.g. prices excluding unavoidable charges) and lack of information on the availability of offers.

More recently, problems have been reported in the car rental sector, in particular over the presentation of the offer, the product's main characteristics and insurance policies.

#### 5.3.1 Cross-cutting issues

The UCPD does not only apply to the trader who actually provides the travel and transport. Article 2(b) of the Directive expressly mentions, in the notion of trader, also '*any other person acting in his name or on his behalf*'. As a consequence, information

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<sup>316</sup> See the proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on place of residence or establishment, or nationality within the Single Market.

<sup>317</sup> See Chapter 1.4.10 and DG Competition Staff Working Document on geo-blocking practices in e-commerce: [http://ec.europa.eu/competition/antitrust/ecommerce\\_swd\\_en.pdf](http://ec.europa.eu/competition/antitrust/ecommerce_swd_en.pdf)

<sup>318</sup> A "sweep" is a systematic check carried out simultaneously in different Member States to investigate breaches of consumer protection law in the particular on-line sector.

requirements laid down by Articles 6 and 7 are applicable not only to airlines, hotels or car rental companies, but may also apply to intermediaries – such as comparison tools or metasearch websites – operating between them and consumers in the name or on the behalf of the trader providing the product.

For example:



- *Not only the airline itself but also the online travel agent offering flight tickets to consumers<sup>319</sup> in the name of the airline or on its behalf should inform consumers whether luggage is included in the price for the flight or whether it is subject to an extra fee. Both should also inform passengers whether flights can be rebooked or refunded.*

Article 7(4) lists certain pieces of information to be regarded as material in invitations to purchase, for example, for a flight or train ticket, accommodation or a rental car, if the information is not already apparent from the context. Failing to provide this information could in some cases be regarded as a misleading omission. The types of information covered by this point include in particular:

- the product's main characteristics;
- the trader's identity;
- the price inclusive of taxes;
- the arrangements for payment;
- the complaint handling policy.

Invitations to purchase are further discussed in Section 2.5.

Article 7(4)(b) requires traders to provide their geographical address and identity. Under Article 7(5) in combination with Article 5(1)(c) of the e-Commerce Directive, the trader's email address is also material information under the UCPD. This information should be easy to find (i.e. not in the general terms and conditions or on separate information pages/ links) and directly and permanently accessible.

As regards complaint handling, under Article 7(4)(d) of the UCPD, it should be clear to the consumer whom to contact in case of queries or complaints. The consumer should be given clear instructions about how to complain in the event of a problem, for example through an email address and telephone number.

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<sup>319</sup> The concept of "passenger" is broader than the concept of "consumer" and only the consumer of transport services is subject to the UCPD. The passengers who travel for professional reasons are covered by the sectorial regulations on passenger rights.



For questions on the language of terms and conditions, please see Section 3.4.7 on the provision of certain information in another language.

While there is a general consensus that the advertised price should include from the outset all applicable fees and charges, a 2012 study on 'Price Transparency in the air transport sector'<sup>320</sup> found that many airlines show the price excluding taxes, fees and charges and a good number of them add charges they describe as 'optional' but which are, *de facto*, unavoidable (e.g. free means of payment only if the airline's credit card is used). This problem of 'drip pricing' has particularly detrimental repercussions at the stage where consumers compare prices to inform their decision<sup>321</sup>.

Traders – including any intermediaries facilitating business to consumer transactions – should ensure that the price of tickets is transparent from the outset, already from the advertising stage as well as during the booking process.

In particular, under Articles 6(1)(d) and 7(4)(c), the total price to be paid must at all times be indicated and include the applicable charges and taxes which are unavoidable and foreseeable at the time of publication/booking, including payment surcharges. For example, for air transport, those charges would include air fare or air rate as well as all applicable taxes, airport charges and other charges, surcharges and fees, such as those related to security or fuel.

Prices for flights or hotel rooms may change very rapidly. For example, when a consumer looks for a flight ticket on the platform of an online travel agent the price may change between the moment the consumer starts searching for a ticket and the moment he decides to make a purchase. If such price changes are truly due to the dynamic nature of the market and thus outside of the control of the online travel agent, they will have an impact on the online travel agent's possibilities to ensure that the price it advertises is at all times fully correct. The rules of the UCPD suggest that traders that are aware of the possibility of sudden price changes have to make this clear to the consumers when advertising prices.

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<sup>320</sup> [http://ec.europa.eu/transport/modes/air/studies/doc/internal\\_market/final\\_report\\_price\\_transparency.pdf](http://ec.europa.eu/transport/modes/air/studies/doc/internal_market/final_report_price_transparency.pdf).

<sup>321</sup> Due to the activity of national enforcement authorities, this practice is evolving.

For example:



- *A trader offering package holidays mentioned the price of an insurance policy in the total price of a product. However, the insurance policy was not mandatory but optional. The Czech Trade Inspectorate's decision to qualify such practice as misleading was confirmed by the Czech supreme administrative court.*<sup>322</sup>
- *Charging tourists for supplementary fuel costs without indicating how this charge was calculated and without providing consumers with proper documentation was considered to be a misleading omission, a misleading action and an aggressive practice under the UCPD by the Italian Antitrust Authority.*<sup>323</sup>
- *A trader offering holiday flats omitted to indicate in the price mandatory costs such as cleaning costs, city taxes and additional service charges for booking. A German court of appeal found this practice to be in breach of professional diligence and a misleading omission.*<sup>324</sup>

Information on optional charges should be prominently displayed<sup>325</sup> and traders should not mislead consumers regarding the purchase of additional services. Optional costs may for instance be: the cost for a single room, non-compulsory insurance, choice of seat or checked luggage (as opposed to hand luggage)<sup>326</sup>.

Consumers should be informed about the existence of non-mandatory costs in invitations to purchase and in any case at the latest at the start of the booking process.

It should also be made clear that these costs are optional, and consumers should not be misled regarding their decision to purchase additional services.

These requirements follow in particular from Articles 6(1)(b) and (d) and 7(4)(a) and (c) UCPD. Practices that contravene these principles could, depending on the circumstances be considered contrary to the requirements of professional diligence, cf. Article 5(2) UCPD.

<sup>322</sup> 1 As 59/2001 – 61, Blue Style s.r.o. v Czech Trade Inspectorate, 22 June 2011.

<sup>323</sup> PS3083, Teorema Tour – Adeguamento costo carburante aereo, 26 August 2009.

<sup>324</sup> OLG Hamm, 06.06.2013, Az. I-4 U 22/13.

<sup>325</sup> The OFT's position in its response to the airline surcharges super-complaint was that optional charges should be no more than 1 click away from the headline price, see <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/card-surcharges/>

<sup>326</sup> In C-487/12, *Vueling Airlines*, 18 September 2014, the Court found that hand baggage must be considered, in principle, as constituting a necessary aspect of the carriage of passengers and that its carriage cannot, therefore, be made subject to a price supplement, on condition that such hand baggage meets reasonable requirements in terms of its weight and dimensions, and complies with applicable security requirements.

In addition to the rules of the UCPD, the Consumer Rights Directive precludes the use of default options the consumer has to reject in order to avoid additional payments rather than requesting the consumer's express consent to extra payments, such as in the case of pre-ticked boxes on websites. Article 22 of that Directive provides that *'If a trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.'*

Apart from cases of pre-ticked boxes there may be other cases where traders who market their services online offer additional services in an unclear or ambiguous manner, such as hiding the option of not booking any further services. Such commercial practices may be considered as misleading, aggressive or incompatible with professional diligence.

Since such practices have been observed in particular in the air transport sector and given the existence of additional rules in that sector, examples are given under point 5.3.4.

### 5.3.2 Package Travel

Directive 90/314/EEC<sup>327</sup> on package travel, package holidays and package tours and the new Directive (EU) No 2015/2302<sup>328</sup> on package travel and linked travel arrangements contain provisions on the combination of different travel services, i.e. carriage of passengers, accommodation, rental of motor vehicles<sup>329</sup> and other tourist services, which are offered to travellers.

Directive (EU) No 2015/2302 inter alia regulates the pre-contractual information which traders have to give to travellers, including specific information on the services included in a package and the total price of the package inclusive of taxes and, where applicable, of all additional fees, charges and other costs. Under Directive (EU) No 2015/2302 traders also have to inform travellers prominently whether the offered services constitute a package or only a linked travel arrangement, with a lower level of protection, and have to provide information on the level of protection applying to the relevant concept, using standardised information forms.

Traders are also obliged to inform travellers on optional or compulsory insurance to cover the cost of cancellation by the traveller or the cost of assistance in the event of accident, illness and death. Directive (EU) No 2015/2302 does not prevent the application of the UCPD to packages and linked travel arrangements in complement to

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<sup>327</sup> Council Directive of 13 June 1990 on package travel, package holidays and package tours (90/314/EEC), OJ L 158 of 30.6.1990, page 59. Directive 90/314/EEC is repealed with effect from 1 July 2018.

<sup>328</sup> [Directive \(EU\) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation \(EC\) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC](#), OJ L 326, 11.12.2015, p. 1–33. The Member States are obliged to transpose Directive (EU) No 2015/2302 by 1 January 2018 and to apply the transposition measures from 1 July 2018.

<sup>329</sup> Separate type of travel service only under Directive (EU) No 2015/2302.

the specific rules of Directives 90/314 and 2015/2302, notably where traders market additional services in an unclear or ambiguous manner.

### 5.3.3 Timeshare contracts

Directive 2008/122/EC<sup>330</sup> (the 'Timeshare Directive') grants certain consumer protection rights regarding timeshare, long-term holiday products, resale and exchange contracts. In particular, it lays down:

- strict rules on traders' pre-contractual and contractual information obligations;
- the consumer's right to withdraw from the contract within 14 calendar days;
- a ban on advance payments during the withdrawal period;
- a ban on advertising or selling such products as an investment.

The UCPD provides protection to consumers complimentary to the protection offered by the Timeshare Directive.

The research undertaken to support the Commission report evaluating the Timeshare Directive<sup>331</sup> points to certain recurrent problems in this sector, in particular in some popular holiday destinations in some EU Member States:

- Misleading information before the contract is signed, giving buyers the wrong impression that the choice of available holiday places is practically unlimited or that the contract can be easily sold or exchanged. The consumer discovers only sometime after the signature of the contract that this information is incorrect.
- Aggressive selling methods consisting in potential buyers being put under considerable pressure, for instance being 'locked' in a room where endless presentations take place and from where they are sometimes not allowed to leave unless they sign the contract.

The UCPD addresses these practices through its provisions on misleading actions (in particular Article 6(1)(b)) and Articles 8 and 9 on aggressive commercial practices.

Furthermore, the Commission report on the Timeshare Directive pointed to recurrent consumer problems with termination of their timeshare contracts.

The Report concludes that this aspect can be successfully addressed at the level of national law<sup>332</sup> and better enforcement of relevant EU consumer law instruments.

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<sup>330</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ L 33, 3. 2.2009, p. 10.

<sup>331</sup> [http://ec.europa.eu/justice/consumer-marketing/files/timeshare\\_report\\_2015.pdf](http://ec.europa.eu/justice/consumer-marketing/files/timeshare_report_2015.pdf).

<sup>332</sup> For example "The OFT/CMA decisions on this issue argued that on inheritance of a time share, in accordance with the applicable national law, a new contract is entered into, between the timeshare company and the new owner. That new contract would be governed by the Timeshare directive including the right of withdrawal. It would be a misleading omission to fail to inform about this cancellation right (Art. 7 UCPD), and a misleading action to deny that it exists (Art. 6 UCPD) [the UK authorities have been asked to provide reference to the decision]".

#### 5.3.4 Issues relevant in particular to air transport

A flight's 'main characteristics' within the meaning of Articles 6(1)(b) and 7(4)(a) UCPD should include the existence of stop overs and the precise indication of the flight's place of destination.

This is particularly relevant for airlines which sometimes organise flights from airports located at a certain distance from a big city, but use the name of that city in their marketing. In some cases, such commercial practices may mislead consumers as to the airport's actual location and be likely to cause consumers to take transactional decisions they would not have taken otherwise. Indeed, some consumers could prefer paying a higher price in return for arriving at an airport closer to the city of destination.

For example:



- *Indicating a destination as 'Barcelona' when the airport is actually located in the city of Reus which is 100 km from Barcelona is likely to be considered as deceiving.*

On top of the requirements of Articles 6(1)(d) and 7(4)(c) UCPD to display the price inclusive of unavoidable and foreseeable fees and taxes, Article 23(1) of the Air Services Regulation provides that *'the final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication'*.

The Regulation also requires:

- the indication of the final price to be broken down into components (e.g. air fare, taxes, airport and other charges and surcharges);
- that optional price supplements are communicated in a clear, transparent and unambiguous manner at the start of the booking process;
- that the customer's acceptance of optional price supplements must be on an 'opt-in' basis.

Where travel service providers who market their services online breach the Consumer Rights Directive or the Air Services Regulation, aspects of the infringing practices that are not regulated by these sector-specific legal instruments could be considered unfair under the UCPD to the extent that they are likely to cause the average consumer to take a transactional decision he would not have taken otherwise. This must be assessed on a case-by-case basis.

For example:



- *A trader uses pre-ticked boxes or offers additional services in an unclear or ambiguous manner by hiding the possibility not to book any further services or by making it difficult for consumers not to select the additional services. By doing so, the trader could cause consumers to accept additional services which they would not have chosen otherwise.*
- *The price of flight tickets does not in most cases include the price of travel insurance. The practice where consumers who do not wish to buy travel insurance are required to click on the 'no insurance' option when booking a flight ticket is likely to fall under Article 22 of the Consumer Rights Directive and Article 23(1) of the Air Services Regulation. Even before the entry into application of the Consumers Rights Directive, some national authorities had taken action against such practices under the UCPD. In particular, in a decision by the Latvian Consumer Protection Authority of 23 October 2012,<sup>333</sup> which was confirmed by Latvian courts,<sup>334</sup> the use of pre-ticked-boxes by an airline was considered as unfair for being aggressive and not in compliance with professional diligence. Similarly, the practice where consumers who do not wish to purchase travel insurance are required when booking a flight ticket to select a 'no insurance' option hidden among a list of potential countries of residence had been considered as unfair by the Italian Antitrust Authority<sup>335</sup>, because it was incompatible with professional diligence (Article 5(2) UCPD) or misleading (Article 6 or 7).*

The information requirements of the Air Services Regulation qualify as material information under Article 7(5) UCPD.

They add to the UCPD requirements under Article 7(4) as regards information about the total price of the flight ticket including whether consumers need to pay a development fee at the departing/arriving airport.

In addition it should be recalled that, as discussed in Section 1.4.1, where sector-specific or other EU law is in place and its provisions overlap with the provisions of the UCPD, the corresponding provisions of the *lex specialis* will prevail.

Information about mandatory fees to be paid after the booking process, for instance directly at the airport (e.g. development fee levied for all passengers departing from certain airports e.g. in Ireland and England) should be prominently displayed by the transport carrier or the travel agent at the start of the booking process.

<sup>333</sup> CRPC decision No.E03-PTU-K115-39 of 23.10.2012 against AirBaltic.

<sup>334</sup> Judgments of the Riga Regional Court of 11.03.2014 in Case No 133051012 and of the Administrative Regional Court of 17.02.2015 in Case No 2015.03.10.

<sup>335</sup> Autorità Garante della Concorrenza e del Mercato, decision of 20 December 2013, PS7245 – Ryanair – Assicurazione Viaggio.

If airlines or intermediaries selling flight tickets link the cost of the payment surcharge to the means of payment used, the initial price should include the cost of the most common method of payment<sup>336</sup>.

When such surcharges cannot be calculated in advance, consumers should be properly informed about the manner in which the price is calculated or about the fact that they 'may be payable'.

For example:



- *If paying with an airline's loyalty card incurs a cost of € 1.5, while paying with a credit card costs € 6, the price indicated in the invitation to purchase and at the start of the booking process should include the price of the credit card. Moreover, most consumers will probably not be able to pay with the airline's loyalty card.*

In addition, Article 19 of the Consumer Rights Directive prohibits traders from charging the consumer fees for using a particular means of payment that exceed the cost borne by the trader for the use of such means. According to the Consumer Rights Directive guidance document issued by DG Justice and Consumers,<sup>337</sup> Article 19 of the Consumer Rights Directive should apply to all kind of fees which are directly linked to a means of payment, regardless of how they are presented to consumers.

For example:



- *Fees referred to as administration, booking or handling fees, which are commonly used in the online ticketing sector, especially by airlines and ferry companies, and also in online sales of tickets for events, should be covered by Article 19 if they can be avoided by using a specific means of payment.*

Where traders advertise a specific flight ticket, they should also indicate the cancellation policy that applies to that ticket (e.g. whether there is no refund or whether it is possible to change tickets). This is particularly relevant where administrative fees charged by the air carrier/travel agent to the consumer for cancelling the ticket amount to the actual cost of the ticket itself.

When cancellation fees charged by airlines are even higher than the price paid for the ticket, claims by the trader that cancellation is possible could be misleading.

<sup>336</sup> See undertakings from airlines following complaints in the UK at <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/card-surcharges/>

<sup>337</sup> [http://ec.europa.eu/justice/consumer-marketing/files/crd\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf)



Also, procedures put in place should not make it difficult to reclaim taxes and charges no longer due. Otherwise, this could amount to a lack of professional diligence within the meaning of Article 5(2) and an aggressive practice under Articles 8 and 9, in particular Article 9(d).

Issues related to price discrimination observed in the air transport sector are discussed in section 5.2.3.

#### 5.3.5 Issues specific to car rental

European consumer protection authorities, acting through the Consumer Protection Cooperation (CPC) Network, carried out a joint enforcement action on car rentals in 2014 and 2015.

This was a reaction to a steady increase in consumer complaints on car rental services booked in another country — from about 1 050 cases in 2012 to more than 1 750 in 2014 — as reported by [European Consumer Centres](#),

A dialogue was set up between [CPC authorities](#), led by the UK Competition and Markets Authority, and five major car rental companies operating in the EU.

The companies pledged to better align current car rental practices to the requirements of consumer legislation set out by the UCPD, the Consumer Rights Directive and the Directive on Unfair Terms in Consumer Contracts.<sup>338</sup>

Traditionally, car rental companies provide vehicles with a full tank and require consumers to return the vehicle with a full tank after rental.

However, consumers complained that some traders make consumers pay an additional cost for the full tank when taking possession of the vehicle and then expect the consumers to return the car with an empty tank, without providing any reimbursement if there is still fuel in the tank when the car is returned.

Under the UCPD, such commercial practice cannot be considered unfair per se. However, traders will need to comply with the information requirements of Articles 6 and 7 of the Directive.

When car rental companies rent a vehicle with a full tank, information that the consumer will have to pay for the fuel ahead could in some cases be considered as material information on the basis of Articles 6(1)(b) and (d), 7(1) and 7(4)(a) and (c). The cost will be likely to qualify as non-optional and thus be part of the total price of the product under Articles 6(1)(d) and 7(4)(c) of the Directive, information on which must be provided from the beginning of the booking process.

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<sup>338</sup> A press release from the European Commission on the outcome of this enforcement action is available at: [http://europa.eu/rapid/press-release\\_IP-15-5334\\_en.htm?locale=EN](http://europa.eu/rapid/press-release_IP-15-5334_en.htm?locale=EN).



A commercial practice by which consumers have to pay for significantly more fuel than they actually use could also in some circumstances be contrary to the requirements of professional diligence laid down in Article 5(2) UCPD.

For example:



- *The duration of the rental period and the local situation could be taken into account when assessing whether the practice of charging consumers for the full tank is unfair. For example, the fact that a vehicle is rented for a short time (e.g. two or three days) or the geographical location (e.g. a car rented on a small island) could make it unlikely that the consumer will be able to empty the tank.*

Under Articles 6(1)(b) and (d) and 7 (4)(a) and (c), consumers should be clearly informed about the main characteristics and the price of the rental service.

The main characteristics and the price of a car rental contract could, for example, include information about the type of vehicle, the costs, the extent of waivers and excesses and possible options (such as winter tyres and child seats).

For example:



- *It could be misleading for a trader to claim '0 liability' if, in fact, an excess will always apply to the consumer in the event of damage, even at a small cost.*
- *It could be misleading to claim 'full insurance included' when, for example, the insurance does not cover damage to the roof and windshield.*

Car rental companies should also take specific national or local requirements into account.

For example:



- *German law requires all vehicles to be equipped with snow tyres in winter. A company offering car rental in Germany during the winter period should provide vehicles with snow tyres. If snow tyres involve an additional cost, consumers should be informed about this non-optional cost right at the start of the booking process.*

## 5.4 Financial services and immovable property

### Article 3(9)



*In relation to financial services as defined in Directive 2002/65/EC and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates.*

### Recital 9

*'financial services and immovable property, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders. For this reason, in the field of financial services and immovable property, this Directive is without prejudice to the right of Member States to go beyond its provisions to protect the economic interests of consumers'.*

#### 5.4.1 Cross-cutting issues

In explanation of the rationale behind Article 3(9) of the Directive, the 2013 Commission Report on the application of the Directive<sup>339</sup> noted that:

*'The main reasons are: the higher financial risk in respect of financial services and immovable property (as compared to other goods and services); the particular inexperience of consumers in these areas (combined with a lack of transparency, in particular of financial operations); particular vulnerabilities found in both sectors that make consumers susceptible to both promotional practices and pressure; the experience of the competent financial enforcement bodies with a nationally grown system; and finally the functioning and the stability of the financial markets as such.'*

It follows from Article 3(9) UCPD that its rules provide for minimum harmonisation only for financial services and immovable property.

Member States can therefore adopt more restrictive or prescriptive national rules as long as these rules comply with EU law.

For example:

- *Member States can adopt more detailed information requirements for financial and immovable property products.*



<sup>339</sup> See [http://ec.europa.eu/justice/consumer-marketing/files/ucpd\\_report\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucpd_report_en.pdf), section 3.4.3.

In the *Citroën Belux* case,<sup>340</sup> the Court ruled that Member States may lay down a general prohibition on combined offers made to consumers where at least one of the components is a financial service. In this case, the combined offer made by Citroën was the inclusion of six months' free comprehensive insurance with the purchase of a new Citroën car. Furthermore the Court clarified that Article 3(9):

*'[...] does not impose any limit as regards how stringent national rules may be in that regard or lay down any criteria regarding the degree of complexity or risk which those services must involve in order to be covered by more stringent rules.'*<sup>341</sup>

The Commission's Study on how the UCPD applies to financial services and immovable property<sup>342</sup> showed that the exemption has been widely used by Member States. The study reveals that most of these additional rules consist of sector-specific pre-contractual and contractual information obligations.<sup>343</sup> It also found that a significant number of bans predominantly concern direct selling and promotional practices,<sup>344</sup> practices that take advantage of particular vulnerabilities,<sup>345</sup> or the prevention of conflicts of interest.<sup>346</sup>

The Commission Report on the application of the UCPD noted that although extensive national rules exist, the UCPD has been cited as the legal basis in at least half of cases concerning unfair practices in the fields of financial services and immovable property.

Article 5(2)(a) UCPD on the requirements of professional diligence seems particularly relevant to traders acting towards consumers within the fields of immovable property and financial services. If the trader does not act with the standard of skill and care which can reasonably be expected from a professional within these fields of commercial activity, the consumer might suffer significant economic consequences. The most commonly reported unfair practices (within the meaning of the UCPD) in

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<sup>340</sup> Case C-265/12, *Citroën Belux NV v Federatie voor Verzekerings- en Financiële Tussenpersonen (FvF)*, Judgment of 18 July 2013.

<sup>341</sup> Case C-265/12, paragraph 25.

<sup>342</sup> *Study on the application of the Unfair Commercial Practices Directive to financial services and immovable property* conducted on behalf of the European Commission, DG Justice 2012, available at: <http://ec.europa.eu/justice/consumer-marketing/document>.

<sup>343</sup> E.g. as regards financial services, specific information requirements in the banking sector (such as for the assignment of secured credit to a third person in Germany or an advertisement for money exchange services in Spain), investment services, insurance, financial intermediaries. For immovable property, information requirements related to the purchase of a property, the transaction itself, the real estate agent and construction contracts.

<sup>344</sup> E.g. prohibition of cold calling, unsolicited emails, doorstep selling of mortgage loans and for a real estate agent to retain money without legal reason in Austria, doorstep selling of monetary credit in the Netherlands, combined offers in Belgium and France.

<sup>345</sup> E.g. prohibition of usurious credit in most Member States, prohibition on advertising that a loan may be granted without documentary proof of the consumer's financial position in France, or on issuing, without prior consent of the legal representative, ATM cards to minors in Austria.

<sup>346</sup> E.g. in Denmark, prohibition on banks financing their clients' purchase of shares issued by the bank itself; in France, prohibition on banks stopping their customers from using a credit insurance provider other than the one provided by the bank itself when the level of guarantee offered is similar.

relation to both financial services and immovable property concern a lack of essential information at the advertising stage and misleading descriptions of products.<sup>347</sup>

#### 5.4.2 Issues specific to immovable property

Whilst immovable property is traditionally regulated at national level, some important aspects thereof are, since March 2016, regulated at EU level<sup>348</sup>. The UCPD's general rules typically complement both sector-specific EU law, as well as national, sometimes stricter, rules.

There are some issues specific to the application of the Directive to this sector. Indeed, many consumers invest in real estate as an alternative to a pension fund. They buy a property with a view to letting it and receive rent instead of receiving interest as they would have done if investing in a financial product. This raises questions as to how the notion of 'consumer' applies to real estate buyers.

Under Article 2(a) of the Directive, any natural person who is *acting for purposes which are outside his trade, business, craft or profession* will qualify as a consumer. Consequently, the fact that a natural person buys an immovable property for investment purposes should not affect his status as a consumer, as long as this is done outside the person's professional activities. Therefore, the Directive will apply and protect, for instance, such a buyer who is misled by a real estate developer over the purchase.

For example:

- *A teacher in Germany decides to buy two flats in a holiday complex in Spain in order to rent them to other people and, at a later point in time, retire in Spain. As long as he does this outside his professional activities, he will qualify as a consumer under the Directive in relation to his flats in Spain.*



The notion of 'trader' as it applies to non-professional landlords is also interesting. Under Article 2(b) of the Directive, any natural or legal person qualifies as a trader if he is *acting for purposes relating to his trade, business, craft or profession*. Consequently, the mere fact that a person lets an apartment or a house to somebody else should not automatically qualify him as a trader vis-à-vis his tenant, if this is not his professional activity. On the other hand, however, if a person receives an essential part of his income from renting apartments to other people, the person could in certain circumstances be considered a trader under the UCPD.

<sup>347</sup> [COM\(2013\) 139 final](#), section 3.4.3.

<sup>348</sup> Directive 2014/17/EU on Mortgage Credit entered into force on 21 March 2016.

For example:



- *The UK Guidance for lettings professionals on consumer protection law<sup>349</sup> considers individual landlords as consumers in their relations with selling agents and suggests that landlords take a cautious approach and always comply with the obligations of traders in their contacts with their tenants.*

Because of the importance and uniqueness of the decision that consumers make when purchasing immovable property, traders should pay particular attention to complying with the information requirements in Article 6 and 7 UCPD.

For example:



- *Consumers that have bought apartments in certain property development projects have found that after the buildings were finished, the apartments were connected neither to a water supply nor to electricity. Information that this would be the case would be likely to qualify as material information in relation to the 'main characteristics of the product' both under Article 6(1)(b) and 7(4)(a) UCPD. The fact that an additional service would be necessary to connect the apartment to these facilities could also be material under Article 6(1)(e).*
- *The surface area of an immovable property could qualify as material information under Articles 6(1)(a), 6(1)(b) and 7(4)(a).*
- *The price of the property including VAT and all unavoidable charges, such as the selling agent or broker's commission, would be material information under Article 7(4)(c).*

### 5.4.3 Issues specific to financial services

Since a robust set of EU sector-specific legislation exists in this sector, the 'safety net' character of the UCPD is particularly apparent here.<sup>350</sup>

Financial services are defined by Directive 2002/65/EC as 'any service of a banking, credit, insurance, personal pension, investment or payment nature'.<sup>351</sup> Several types of sector-specific EU legislation are of relevance for consumer protection in relation to

<sup>349</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/319820/Lettings\\_guidance\\_CMA31.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319820/Lettings_guidance_CMA31.PDF)

<sup>350</sup> Article 12 of the Mortgage Credit Directive prohibits tying practices (see page 17 of the Guidance). Moreover, recent pieces of EU legislation contain specific provisions on cross-selling practices concerning payment accounts (see Article 8 of Directive 2014/92/EU the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, OJ L 257, p. 216, 28.8.2014) and investment services (see Article 24 (11) of the Directive 2014/65/EU on markets in financial instruments, OJ L 173, p.349, 12.6.2014). In addition, the new Insurance Distribution Directive (EU) 2016/97 (OJ L 26, p. 19, 02.02.2016) contains rules on distance selling – see also [http://europa.eu/rapid/press-release\\_IP-15-5293\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5293_en.htm).

<sup>351</sup> Article 2(b) of Directive 2002/65/EC concerning the distance marketing of consumer financial services.

financial services. Examples would be:

- Directive 2014/65/EU on markets in financial instruments;
- Directive (EU) 2015/2366 on payment services;<sup>352</sup>
- Directive 2008/48/EC on credit agreements for consumers;
- Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property;
- Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features;<sup>353</sup>
- Directive on insurance sales;<sup>354</sup>
- Regulation (EU) 2015/751 on interchange fees for card-based payment transactions,
- Regulation (EU) 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)<sup>355</sup>

The interplay between sector-specific legislation and the UCPD is discussed in Chapter 1.4 'Interplay between the Directive and other EU law'. Financial service products are often difficult to understand and can involve significant economic risks, so traders should take particular care to act with the standard of skill and care which can reasonably be expected from a professional within this field of commercial activity cf. Article 5(2)(a) UCPD.<sup>356</sup>

For example:



- *Under Article 5(6) of the Consumer Credit Directive, creditors and, where applicable credit intermediaries should provide adequate explanations to consumers in order to place the consumer in a position enabling him to assess whether the proposed credit agreement is adapted to his needs and to his financial situation,*

<sup>352</sup> Directive (EU) 2015/2366 on payment services in the internal market, OJ L 337, 23.12.2015, p. 35.

<sup>353</sup> Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.

<sup>354</sup> The Directive has been adopted by the legislator end of 2015 and is expected to be published in 2016. A press release from the European Commission on this agreement is available at: [http://europa.eu/rapid/press-release\\_IP-15-5293\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5293_en.htm). The Insurance Distribution Directive has introduced a standardised 'insurance product information document' for non-life insurance products, which aims at giving clear, non-misleading pre-contractual information to consumers about the non-life insurance product and its characteristics. The revised Directive will cover the entire distribution chain and will be referred to as the Insurance Distribution Directive, replacing the 2002 [Insurance Mediation Directive](#).

<sup>355</sup> Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ L 352, 9.12.2014, p. 1.

<sup>356</sup> According to the study on consumer vulnerability across key markets in the European Union, the incidence of vulnerability is particularly high in the financial sector.

*where appropriate by explaining the pre-contractual information to be provided in accordance with Article 5(1) of the Consumer Credit Directive, the essential characteristics of the products proposed and the specific effects they may have on the consumer, including the consequences of default in payment by the consumer.*

Here are some of the misleading practices as set out in Articles 6 and 7 UCPD, reported in the Commission's Study on how the UCPD applies to financial services and immovable property:

- lack of information in advertising on the annual percentage rate of charge (APR) and the cost of credit;
- offers of misleading bargains for credit contracts with a low interest rate;
- lack of proper information on the legal obligations related to the signing of contracts.<sup>357</sup>

For example:



- *Traders should not exaggerate economic benefits, not omit information about financial risks to consumer and not over-rely on past performance on the financial product.*
- *The main characteristics of a financial product under Articles 6(1)(b) and 7(4)(a) could include information that a financial product will be calculated in a currency which is not that of the country where the contract is concluded.*
- *Under Article 6(1)(d) and 7(4)(c), the presentation and calculation of fees and charges should include all costs incurred by the consumers, for example by including costs of the service related to fees for agents or intermediaries, or in relation to overdraft charges. The presentation and calculation of fees and charges should also clearly state that a specific low interest rate and/or charge is only applicable for a limited period of time.*

Articles 8 and 9 set out criteria for assessing aggressive commercial practices.

Point No 27 of Annex I to the Directive refers to an aggressive commercial practice in the field of financial services which is considered unfair in all circumstances:

<sup>357</sup> See Study on the application of the Unfair Commercial Practices Directive to financial services and immovable property conducted on behalf of the European Commission, DG Justice 2012, available at: <http://ec.europa.eu/justice/consumer-marketing/document>.



## No 27 of ANNEX I



*'Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.'*

For example:



- *In some circumstances, obstacles to switching<sup>358</sup> may be considered an aggressive commercial practice and therefore unfair on the basis of Article 9(d).<sup>359</sup>*
- *In the insurance sector, point No 27 Annex I has been applied to situations where insurers refused to pay claims by compelling consumers who wanted to apply for compensation under an insurance policy to produce documents which could not be reasonably considered relevant to establish the validity of the request. In those cases, the traders systematically failed to respond to pertinent correspondence in order to dissuade consumers from exercising their contractual rights.<sup>360</sup>*

National authorities have applied the UCPD in the field of financial services.

For example:



- *The Greek authorities took legal action against certain banks for providing misleading information on the risks inherent in certain financial products, namely Lehman Brothers' bonds.<sup>361</sup> When determining whether such practices were misleading, the Greek authorities took into account the fact that the consumers targeted by the banks for the sale of these bonds were ordinary current account holders not being familiar with these types of financial products.*

<sup>358</sup> Directive 2014/92/EU on the comparability of fees related to payment accounts, switching from and access to payment accounts introduces a specific procedure to be followed by payment account providers (Article 10) and requires them to inform consumers about their switching service (Article 14).

<sup>359</sup> In relation to bank switching, the European Banking Industry Committee adopted common principles facilitating bank account switching due to be implemented as of 1 November 2009. See: [http://ec.europa.eu/internal\\_market/finances-retail/docs/baeg/switching\\_principles\\_en.pdf](http://ec.europa.eu/internal_market/finances-retail/docs/baeg/switching_principles_en.pdf).

<sup>360</sup> Reported in Portugal, see study on the application of the UCPD to financial services and immovable property in the EU, 2012.

<sup>361</sup> Ministry of Development, Directorate General for Consumers, Directorate for Consumer Protection, fine of € 1 000 000 imposed on Citibank PLC, Athens on 27 March 2009.



## Annex I: Case-law from the CJEU on the UCPD (ordered by year)

Case	Year	Topic discussed in draft UCPD guidance	Section of draft UCPD guidance
C-261/07 Total Belgium	2009	<ul style="list-style-type: none"> <li>• Full harmonisation effects of the Directive</li> <li>• Application of the Directive to sales promotions</li> </ul>	<ul style="list-style-type: none"> <li>• 1.3 full harmonisation character</li> <li>• 1.3.1 Application to sales promotions and price reductions</li> </ul>
C-304/08 Plus Warenhandelsgesellschafft	2010	<ul style="list-style-type: none"> <li>• Application of the Directive to sales promotions</li> <li>• Distinction between consumers' and competitors' interests</li> </ul>	<ul style="list-style-type: none"> <li>• 1.3.1 Application to sales promotions and price reductions</li> <li>• 1.2.2 Commercial practices which relate to a business-to-business transaction or which harm only competitors' economic interests</li> </ul>
C-540/08 Mediaprint	2010	<ul style="list-style-type: none"> <li>• Directive precludes a general national ban on sales with bonuses designed to achieve consumer protection as well as other</li> </ul>	<ul style="list-style-type: none"> <li>• 1.2.1 Commercial practices which do not affect the consumer's economic interests</li> <li>• 1.3.1 Application to sales promotions and price reductions</li> </ul>
C-522/08 Telekom. Polska	2010		<ul style="list-style-type: none"> <li>• 1.3.1 Application to sales promotions and price reductions</li> </ul>

C-122/10 Ving Sverige	2011	<ul style="list-style-type: none"> <li>• For a commercial communication to be capable of being categorised as an invitation to purchase, it is not necessary for it to include an actual opportunity to purchase or for it to appear in proximity to and at the same time as such an opportunity using "entry-level prices" is not contrary to the UCPD, provided that the final price cannot "reasonably be calculated in advance"</li> <li>• Extent of the information relating to the main characteristics of a product which has to be communicated in an invitation to purchase must be assessed on the basis of the context of that invitation, the nature and characteristics of the product and the medium of communication used</li> </ul>	<ul style="list-style-type: none"> <li>• 2.6.1 concept of "invitation to purchase"</li> <li>• 2.6.2 Material information in the case of an invitation to purchase</li> <li>• 3.3.3 Limits of the communication medium used</li> </ul>
C-288/10 Wamo	2011	<ul style="list-style-type: none"> <li>• National rules prohibiting price reductions during pre-sales periods not compatible with the Directive in so far as it seeks to protect the economic interests of consumers</li> </ul>	<ul style="list-style-type: none"> <li>• 1.2.2 Commercial practices which relate to a business-to-business transaction or which harm only competitors' economic interests</li> </ul>

C-126/11 Inno	2011	<ul style="list-style-type: none"> <li>National provision does not fall within the scope of the Directive "if it aims solely, as argued by the referring court, at regulating relations between competitors and does not aim at protecting consumers</li> </ul>	<ul style="list-style-type: none"> <li>1.2.2 Commercial practices which relate to a business-to-business transaction or which harm only competitors' economic interests</li> </ul>
C-428/11 Purely Creative	2012	<ul style="list-style-type: none"> <li>Notion of 'cost' in relation to No 31 of Annex I</li> </ul>	<ul style="list-style-type: none"> <li>4.7 Prizes – No 31 of annex I (prizes)</li> </ul>
C-559/11 Pelckmans Turnhout	2012	<ul style="list-style-type: none"> <li>National prohibition to open shops seven days a week found to only aim to protect the interests of workers and employees in the distribution sector and not intend to protect consumers.</li> </ul>	<ul style="list-style-type: none"> <li>1.2.1 Commercial practices which do not affect the consumer's economic interests</li> </ul>
Case C-453/10 Pereničová and Perenič	2012	<ul style="list-style-type: none"> <li>Erroneous information provided in the contract terms is 'misleading' within the meaning of the UCPD if it causes, or is likely to cause, the average consumer to take a transactional decision that he would not have taken otherwise.</li> </ul>	<ul style="list-style-type: none"> <li>1.4.5 Interplay with the Unfair Contract Terms Directive</li> </ul>
C-206/11 Köck	2013	<ul style="list-style-type: none"> <li>National law allowing the announcement of a clearance sale only subject to the authorization of the competent administrative authority considered to be aimed at the protection of consumers, and not solely at the protection of competitors and other operators in the</li> </ul>	<ul style="list-style-type: none"> <li>1.2.1 Commercial practices which do not affect the consumer's economic interests</li> </ul>

		market	
C-435/11 CHS Tour Services	2013	<ul style="list-style-type: none"> <li>If a commercial practice satisfies all the criteria in Article 6(1) for being categorised as a misleading practice in relation to the consumer, it is not necessary to determine whether such a practice is also contrary to the requirements of professional diligence as referred to in Article (5)(2)(a)</li> </ul>	<ul style="list-style-type: none"> <li>3.1 The general clause – the requirements of professional diligence</li> </ul>
C-59/12 BKK Mobil Oil	2013	<ul style="list-style-type: none"> <li>A public law body charged with a task of public interest, such as the management of a statutory health insurance fund, can qualify as a "trader"</li> </ul>	<ul style="list-style-type: none"> <li>2.1 The notion of trader</li> </ul>
C-265/12 Citroën Belux	2013	<ul style="list-style-type: none"> <li>MS can lay down a general prohibition on combined offers made to consumers where at least one of the components of those offers is a financial service</li> </ul>	<ul style="list-style-type: none"> <li>5.4.1 Financial services and immovable property – horizontal issues</li> </ul>
C-281/12 Trento Sviluppo	2013	<ul style="list-style-type: none"> <li>Broad interpretation confirmed: "transactional decision" covers not only the decision whether or not to purchase a product, but also decisions directly related to that decision, in particular the decision to enter the shop</li> </ul>	<ul style="list-style-type: none"> <li>2.3 The concept of "transactional decision"</li> </ul>

C-343/12 Euronics	2013	<ul style="list-style-type: none"> <li>• Directive precludes a national provision, which aims at prohibiting sales at loss, only in so far as this provision follows also the aim of protecting consumers.</li> </ul>	<ul style="list-style-type: none"> <li>• 1.2.2 Commercial practices which relate to a business-to-business transaction or which harm only competitors' economic interests</li> </ul>
C-421/12 EC vs Kingdom of Belgium	2014	<ul style="list-style-type: none"> <li>• National rules which place a general prohibition on practices not referred to in Annex I, without providing for an individual analysis as to whether the practices are 'unfair' in the light of the criteria laid down in Articles 5 to 9 of that directive, are not permitted under Article 4 thereof and run counter to the complete harmonisation objective pursued by that directive</li> <li>• Price promotions and total harmonisation character in light of the Price Indication Directive</li> <li>• Omission by a trader of information which is required by national provisions allowed by the minimum clauses in the existing EU law instruments will not qualify as an omission of material information and thus not constitute a misleading omission under the Directive</li> </ul>	<ul style="list-style-type: none"> <li>• 1.3.1 Application to sales promotions and price reductions</li> <li>• 1.3.1 Application to sales promotions and price reductions</li> <li>• 1.4.3 Other EU information requirements as "material information"</li> </ul>

Case C-515/12 '4finance' UAB v Lithuanian Finance Ministry	2014	<ul style="list-style-type: none"> <li>• A pyramid promotional scheme constitutes an unfair commercial practice only where such a scheme requires the consumer to give financial consideration, regardless of its amount, for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.</li> </ul>	<ul style="list-style-type: none"> <li>• 4.2 Pyramid schemes — banned commercial practice No 14</li> </ul>
C-388/13 UPC	2015	<ul style="list-style-type: none"> <li>• Neither the definitions set out in Articles 2(c) and (d), 3(1) and 6(1) of the Unfair Commercial Practices Directive nor the latter, considered as a whole, contain any indication that the act or omission on the part of the professional must be recurrent or must concern more than one consumer</li> </ul>	<ul style="list-style-type: none"> <li>• 2.2 concept of commercial practice</li> </ul>
C-13/15 Cdiscount	2015	<ul style="list-style-type: none"> <li>• It is for national authorities and courts to decide whether a national provision is intended to protect consumer interests</li> </ul>	<ul style="list-style-type: none"> <li>• 1.2.2 Commercial practices which relate to a business-to-business transaction or which harm only competitors' economic interests</li> </ul>

<p>Joined Cases C-544/13 and C-545/13</p>	<p>2015</p>	<ul style="list-style-type: none"> <li>• The application of the UCPD is not excluded even if other EU legislation also applies to a given set of facts.</li> <li>• Even where medicinal products for human use, such as those at issue in the main proceedings, fall within the scope of Directive 2001/83, advertising practices relating to those medicinal products, such as those alleged in the main proceedings, can also fall within the scope of Directive 2005/29 provided that the conditions for application of that directive are satisfied.</li> </ul>	<ul style="list-style-type: none"> <li>• 1.4.1 Relationship with other EU legislation</li> </ul>
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