Application of the Unfair Commercial Practices Directive

Overview of the Commission's May 2016 guidance document
This document seeks to provide an overview of the guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, published by the European Commission in May 2016. Following a thumbnail sketch of the guidance document, it refers to general concepts in the Unfair Commercial Practices Directive, their interpretation and practical examples of interplay between the directive and other sector-specific EU legislation; the growing case law of the Court of Justice of the EU and national courts; and how the directive applies to some emerging practices in offline and, more particularly, online sectors. Another aim of this analysis is to present the views of the European Parliament in relation to unfair commercial practices, as well as those of some stakeholders, principally consumer organisations and business associations.
EXECUTIVE SUMMARY

The Unfair Commercial Practices Directive, adopted in 2005, is the main horizontal piece of European Union (EU) legislation regulating misleading advertising and other unfair practices in business-to-consumer transactions, and applies to all unfair commercial practices on- and off-line that occur before, during and after a business-to-consumer transaction has taken place.

In response to input received from national enforcers and other stakeholders, as well as the emergence of new practices and development of EU and national case law, in May 2016 the European Commission presented a new, legally non-binding guidance document on how to apply the directive.

While only the Court of Justice of the EU has competence to interpret Union law, the guidance, taking the form of a vademecum, includes the interpretation of key concepts of the directive, interplay with other sectoral EU legislation and practical examples of unfair commercial practices. It is designed to provide national enforcement authorities, consumers and businesses with help.

Firstly, the guidance clarifies the notions of a 'trader', 'commercial practice' and 'transactional decision', as well as the concepts of 'average' and 'vulnerable' consumers, including in the light of rulings by national courts.

Secondly, it provides practical examples of misleading actions and omissions as well as aggressive commercial practices that, for instance, include 'copycat packaging' (i.e. confusing consumers by designing the packaging of a product so that it resembles a competing recognised brand) and the onerous or disproportionate switching barriers for services. The guidance also touches briefly on the black list of commercial practices, those that are in all circumstances considered unfair, such as pyramid promotional schemes, persistent and unwanted solicitations by telephone, fax, email or other remote tools, and direct appeals to children.

Thirdly, the guidance specifically addresses examples of unfair commercial practice that have emerged with application of the directive across four different sectors, namely in the area of environmental claims, online transactions, and in the financial, travel and transport sectors. Here mention is made of the practice of 'greenwashing' in relation to environmental claims, the failure of traders to disclose 'paid placements' to consumers in the online sector, and traders falsely representing themselves as consumers when writing consumer online reviews.

Finally, this analysis sheds some light on issues that the European Parliament raised in its previous term (2009-2014) in relation to unfair commercial practices. The point of view of stakeholders on the directive and the guidance is also included in order to provide a broader perspective.
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1. Introduction

1.1. New guidance

As a part of the e-commerce package,¹ in May 2016 the European Commission published its guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices.² It is linked to its communication on a comprehensive approach to stimulating cross border e-commerce for Europe’s citizens and businesses.³

With the aim of ensuring enhanced legal certainty, common understanding and convergence of practices in the application of this directive, the Commission published its previous (first) guidance⁴ on the matter in 2009, and from 2013 began working on updating it. In 2013 it published its first report on the application of the Unfair Commercial Practices Directive⁵ together with a communication,⁶ where it promised to further develop the guidance document in response to the input received from national enforcers and other stakeholders, the emergence of new practices, and the development of European Union and national case law. Preparing the new guidance, the Commission held workshops with stakeholders, engaging national consumer authorities via the Consumer Protection Cooperation Network.⁷

The aim of the new guidance, which is a not a legally binding document, is to facilitate implementation of Unfair Commercial Practices Directive.⁸ It is worth remembering that only the Court of Justice of the EU has competence to interpret Union law.

In this respect, the legal certainty that the revised guidance is to provide would be helpful to enforcement authorities, consumers and businesses alike. More specifically, consumers would benefit from enhanced enforcement of the directive in terms of curbing unfair commercial practices, while businesses would benefit from clarity in applying EU rules.

The guidance – a vademecum – includes interpretation and practical examples of:

- the interplay between the Unfair Commercial Practices Directive and other sector-specific EU legislation;
- the growing case law of the Court of Justice of the EU and national courts;
- how the Unfair Commercial Practices Directive applies to new and emerging models, particularly in the online sector.

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² SWD(2016) 163 final.
⁵ COM(2013) 139 final.
⁷ Consumer Protection Cooperation Network is a network of authorities responsible for enforcing EU consumer protection laws within the EU and European Economic Area countries.
2. Context

The Unfair Commercial Practices Directive, in force since 2007, is the main horizontal piece of EU legislation regulating misleading advertising and other unfair practices in business-to-consumer transactions.

By defining the commercial practices that are prohibited in the EU, it applies to all unfair commercial practices that occur before, during and after a business-to-consumer transaction has taken place. It is largely used by national enforcement authorities to ensure fairness in business-to-consumer transactions.

According to the directive, unfair commercial practices are those which:

- do not comply with the requirements of professional diligence;\(^9\)
- are likely to distort the economic behaviour of the average consumer.\(^10\)

Annex I of the directive contains a list of those commercial practices that are in all circumstances, therefore without a case-by-case assessment, to be considered unfair.

According to the Commission, this directive is the most regularly used legal basis for consumer protection cooperation enforcement actions, which are governed by the regulation on consumer protection cooperation.\(^11\) It applies to products and services across all economic sectors, both online and offline, which is why it is a relevant legal reference for businesses, especially for those active cross-border or throughout the EU.

This maximum harmonisation directive is also part of the current review of EU consumer law (also referred to as a fitness check of EU consumer and marketing law),\(^12\) which the Commission intends to finalise by the second quarter of 2017. The results of this review are to provide a basis for future policy developments in the area of consumer protection.


3.1. The scope of the directive and interplay with other EU legislation

In relation to the scope of the directive it is clarified that commercial practices, as defined in the directive, are those directly connected with the promotion, sale or supply of a

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\(^9\) According to the Directive (Article 2): ‘professional diligence’ can be defined as ‘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’.

\(^10\) The Directive (Recital 18) ‘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.’ It should also be mentioned that it is up to the national courts and authorities to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, in order to determine the typical reaction of the average consumer in a specific case.

\(^11\) Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, which is currently being reviewed.

\(^12\) See: Review of EU Consumer law, European Commission website.
product to consumers. This means that if a trader purchases a product from a consumer, the directive does not apply.

In cases of a link between the sale of a product by a consumer to a trader, and a related sale (promotion or supply) of a product to the consumer, the situation is more complex. For instance, the directive does apply in the case of trade-in agreements in the motor vehicle trade, where a trader buys a used vehicle from a consumer and the consumer in turn buys a vehicle from the trader. Another example is the purchase and resale of gold from a consumer – when a trader offers a consumer a professional evaluation of gold before it is sold to the trader (thereby providing a service) – which in this case would fall under the scope of the directive.

It is to be noted as well that the directive does not prevent Member States from setting their own rules regulating commercial practices for reasons of health, safety, environmental protection, or taste and decency, in their national marketing and advertising rules. The guidance also specifies that business-to-business commercial practices do not fall within the scope of the directive.

Because of the full harmonisation nature of the directive, Member States may not adopt stricter rules than those of the directive, even if these aim to achieve a higher level of consumer protection. The Court of Justice in its ruling in relation to this issue clarified that national rules that are stricter – for instance rules requiring a price reduction to mention also a reference price and the duration of the promotion – are not permitted as they do not comply with the directive, namely its Article 4. In relation to financial services and immovable property however – in line with Article 3(9) – Members States may impose more restrictive or prescriptive requirements than those provided in the directive.

In cases of interplay or conflict between the directive and other sectoral EU law – addressed in Article 3(4) – the directive acts as a safety net, by complementing and filling gaps in that law, but when sector-specific or other EU law is in place, these provisions of lex specialis will prevail. In this way Member States can, for instance, introduce additional pre-contractual requirements for on-premises sales, as they are the subject of a minimum harmonisation clause under the Consumer Rights Directive. As regards the applicability of the directive to non-EU traders, it is clarified that when the conditions of Article 6(1) of Regulation 864/2007 (Rome II) are fulfilled, the directive is applicable.

3.2. General definitions and notions of the directive

3.2.1. The notion of ‘trader’

As defined in Article 2(b) of the directive, the trader is 'any natural or legal person who, in commercial practices [...], is acting for purposes relating to his trade[.], business, craft or profession and anyone acting in the name or on behalf of the trader[.]. That is why, in

13 See the Court of Justice judgment: 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.
14 Case C-421/12, European Commission v Kingdom of Belgium, 10 July 2014.
15 Lex specialis refers to law governing a specific subject matter.
16 Directive 2011/83/EU on consumer rights. See the guidance for more details on interplay of the directive with other pieces of EU legislation: Unfair Contract Terms Directive (p. 20); Misleading and Comparative Advertising Directive (p. 21); Services Directive (p. 22); e-Commerce Directive (p. 22); Audiovisual Media Services Directive (p. 23); and Data Protection Directive and the e-Privacy Directive (p. 23).
17 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). Its Article 6(1) states: '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.'
the online sector, the liability for app content lies with the app developer. Nevertheless, the app store provider could also be the one responsible for ensuring that games on their platforms do not contain direct exhortations to children. In defining whether a seller can be qualified as trader, the following criteria could be of help: a profit-seeking motive, the number and frequency of transactions, the seller's turnover, and the intention of the seller to purchase products in order to resell them.

The guidance also specifies that, in accordance with Annex I of the directive, the practice of falsely representing oneself as a consumer is prohibited, for instance in the case of online consumer reviews. An example of such an unfair practice would be a hotel website hosting positive reviews—supposedly written by consumers—that have in reality been written by the hotel owner.

3.2.2. Concept of 'commercial practice'
In line with Article 2(d) of the directive, business-to-consumer commercial practices are defined as: '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 of Justice further clarified that in this context it is immaterial whether 'the action of the professional concerned took place on only one occasion and affected only one single consumer'.

3.2.3. Concept of a 'transactional decision'
A transactional decision, as defined in the directive, is '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'. This can be interpreted broadly, since the Court of Justice ruled that a transactional decision covers not only the decision whether or not to purchase a product, but also decisions directly related to that decision, especially the decision to enter the shop. Similarly, online, a decision to click through the website owing to a commercial offer can be considered a pre-purchase transactional decision.

3.2.4. The 'average consumer'
The benchmark for the average consumer is mentioned in Recital 18 and further specified in Articles 5 to 8 of the directive. However, some national courts (e.g. in Germany, Hungary and the United Kingdom) have also ruled on the definition of the term, since the national courts and authorities are able, in respect of the case law of the Court of Justice, to determine the typical reaction of the average consumer in a specific case.

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18 A direct exhortation is a direct appeal to children, which is banned in all media (internet, TV, magazines). According to the European Commission 'Go buy the book!' or 'Get your parents to buy the DVD!' would be examples of direct exhortations to children.

19 Case C-388/13, UPC, 16 April 2015.


21 See footnote 10.
National courts’ interpretations of the ‘average consumer’

The UK High Court of Justice stated that the term 'average consumer' relates to 'consumers who take reasonable care of themselves, rather than the ignorant, careless or over-hasty', also concluding that one cannot assume that the average consumer will read the small print on promotional documents.

The German Higher Regional Court of Karlsruhe ruled that people with impaired eyesight can also be considered average consumers, stating that printing information in a very small font can be a misleading commercial practice.

The Metropolitan High Court of Appeal in Hungary ruled that a 'reasonably acting consumer is not suspicious and tends to trust that the received information is valid and accurate'. It also found that 'a reasonably acting consumer is not obliged to search further 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'.

3.2.5. The 'vulnerable consumer'

The vulnerable consumer is mentioned in Article 5(3) and Recital 19 of the directive. Accordingly, where 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'.

3.3. Misleading actions

According to Article 6 of the directive, a commercial practice is considered misleading if it contains false information, is untruthful or in any way deceives or is likely to deceive the average consumer (even if the information is factually correct) in relation to the existence or nature of the product, its main characteristics, price, the need for a service, part replacement or repair, etc., and in whichever case causes (or is likely to cause) him to take a transactional decision that he would not have taken otherwise.

For instance, the use of default settings for additional payments that the consumer then needs to reject, or unnecessarily complex

European Commission study on consumer vulnerability

The 2016 study carried out across the EU, in Iceland and in Norway in the online, energy and finance sectors, defined a vulnerable consumer in relation to five dimensions:

- heightened risk of negative outcomes or impacts on well-being;
- having characteristics that limit ability to maximise well-being;
- having difficulty in obtaining or assimilating information;
- inability or failure to buy, choose or access suitable products;
- higher susceptibility to marketing practices, creating imbalances in market interactions.

The study also found that most consumers show signs of vulnerability in at least one dimension and that less than a fifth of consumers surveyed showed no signs of vulnerability.


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22 See pp. 42-43 of the guidance.

23 Children are, for instance, considered as a particularly vulnerable group in the use and purchase of digital content, for instance, as found by the 2016 European Commission Study on the impact of marketing through social media, online games and mobile applications on children’s behaviour. Similar could be said for the elderly. The 2016 Commission study on consumer vulnerability found that elderly consumers (65-74 and above 75 years of age) find it more difficult than middle aged consumers (33-44 years of age) to compare offers and select deals in key markets.
information may be deemed misleading. 'Up to' claims, where a trader, for instance, advertises a promotion 'up to 70% off', while most items on promotion are actually reduced by a lower percentage, could also be considered misleading. The 'copycat packaging' practice, which refers to the design and packaging of a particular product in a way that it resembles a competing recognised brand, could also be considered misleading, as it adds to the confusion of consumers and may therefore distort their commercial behaviour.

3.4. Misleading omissions

Misleading omissions of material information that the average consumer needs in order to make an informed transactional decision would also be qualified as misleading commercial practice. Hidden marketing and failure to identify commercial intent – in line with Article 7(2) of the directive – can be considered a misleading omission, as is providing material information in an unclear, unintelligible, ambiguous or untimely way, if it is likely to cause the average consumer to take a transactional decision he would not have otherwise taken.

The guidance also clarifies that in distance contracts,24 in line with the Consumer Rights Directive,25 information regarding the main characteristics of the service, the price including taxes, the duration of the contract and of consumers' obligations needs to be provided clearly, prominently and directly before the consumer places his or her order. Describing products as 'gratis', 'free', or 'without charge', if a consumer has to pay any other costs but the costs of responding to the commercial practice, collecting the item and the costs of its delivery, is deemed unfair and is prohibited by the directive.

As is also explained, planned (or built-in) obsolescence practice26 is not in itself unfair. However, omitting the information that a product has been designed with a limited lifetime might in specific circumstances be considered to be an omission of material information to the consumer (Article 7 of the directive).

3.5. Aggressive commercial practices

A commercial practice is defined in Article 8 of the directive as aggressive if, in its factual context, by harassment, coercion (including the use of physical force) or undue influence, it significantly impairs the average consumer's freedom of choice or conduct (or is likely to do so) regarding the product, causing (or likely to cause) him to take a transactional decision that he would not have otherwise taken. Onerous or disproportionate switching barriers, for instance, could be deemed an aggressive practice.

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24 In line with Article 2 of Directive 2011/83/EU on consumer rights, a 'distance contract' refers to 'any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded'.


26 This practice refers to 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' (See the guidance, p. 82). See also: Planned obsolescence: Exploring the issue, EPRS briefing, European Parliament, May 2016.
3.6. Black list of commercial practices

The black list in Annex I of the directive consists of 31 practices which are in all circumstances considered unfair. These include:

- pyramid promotional schemes;
- the practice of falsely claiming that a product can cure illnesses, dysfunctions or malformations;
- making persistent and unwanted solicitations by telephone, fax, email or other remote tools;
- direct exhortation to children, pressuring them to buy a product directly or to persuade adults to buy it for them ('pester power');
- creating a false impression that the consumer has already won (or will win) a prize, when there is no prize or equivalent benefit, etc.

Figure 1 – Identifying a prohibited commercial practice


27 For the list of all the practices that are in all circumstances considered unfair, see Annex I of the Unfair Commercial Practices Directive.
3.7 Application of the directive to specific sectors

3.7.1 Environmental claims

Environmental claims may be misleading if based on vague and general statements of environmental benefits, as they could be hard (if not altogether impossible) to substantiate.

There are no specific rules on 'environmental' or 'green' claims (practice of creating the impression that a product or a service has a positive or no impact on the environment) in the directive. When such claims cannot be verified and are untrue, the practice is often referred to as 'greenwashing'. Despite the absence of specific rules, the directive provides two main principles as a basis for handling such claims:

- traders must present their green claims in a clear, specific, accurate and unambiguous way, to ensure that consumers are not misled (Articles 6 and 7);
- traders must possess the evidence supporting their claims and be ready to supply it to competent enforcement authorities in an understandable way if the claim is challenged (Article 12).

Figure 2 – Identifying good and poor practice in environmental claims


3.7.2. Online sector

Since the directive applies only to business-to-consumer situations, the first step in assessing its applicability in a given online environment (also in the new sharing or collaborative economy\(^{28}\)), is to define whether such a trader-consumer relationship exists. This is done by assessing whether a specific online services provider can be

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\(^{28}\) In June 2016, the European Commission published ‘A European agenda for the collaborative economy’, which is supposed to serve as policy orientation for Member States to help ensure balanced development of the EU collaborative economy. See also: A European agenda for the collaborative economy, EPRS briefing, European Parliament, November 2016.
considered as a trader in line with Article 2(b) and whether it is engaging in business-to-
consumer commercial practices with consumers.

This is relevant, as some platforms, if they act solely as intermediaries providing hosting services, may not be liable for the information stored – in line with Article 14(1) of the e-
Commerce Directive.\(^{29}\)

However, if the hosting service provider plays an active role (e.g. by providing assistance, particularly optimising the presentation of the offers for sale in question or promoting them), then this prevents it from being able to rely on this exemption. The French Supreme Court, for instance, rejected\(^{30}\) this exemption of liability for a price comparison website that was offering to top rank the products of traders that paid an additional fee, as it was indirectly promoting these products and in this way acting as an active provider of a commercial service for these traders.

That is why platforms that are considered traders:

- need to act with a degree of professional diligence – in line with Article 5(2) of the directive – and not mislead their users by action or omission; and
- need to take measures to enable (i) third party traders to comply with EU consumer and marketing law rules and (ii) users to clearly understand who their contracting party is and that they will only benefit from protection under EU consumer and marketing laws in their relations with ‘traders’.

In e-commerce in general, the party who has to remedy the non-conformity of goods supplied to the consumer (through repair, replacement, reduction of the price or rescission of the contract) is the seller – the party with whom the consumer concludes the sales contract on the marketplace – which depends on the individual contract. That is why an e-commerce platform, to the degree that it can be considered a 'trader', should enable its users to understand clearly who their contracting party is.

In the case of search-engines, the guidance notes that consumers expect them to display 'natural' and 'organic' results related to their search query on the basis of sufficiently impartial criteria. With a different reality, in case of a 'paid placement' and a 'paid inclusion' as form of advertising, the failure of the trader to disclose 'paid placement' could be in breach of the following provisions, namely the requirement to clearly distinguish editorial and advertising content (point 11 of Annex I of the directive), as well as Article 7(2) of the directive, which prevents traders from hiding the commercial intent of a commercial practice.

In relation to online comparison tools, a multi-stakeholder group on comparison tools which included industry representatives, operators of comparison tools, non-governmental-organisations and national authorities, was set up by the Commission. In 2016 it developed key principles\(^{31}\) in this area to help stakeholders comply with the Unfair Commercial Practices Directive. As an example, a 'dimming' technique, when a comparison tool takes down pictures from an offer of one specific provider while keeping the pictures of the other providers’ offers, could be considered misleading. Similarly, claiming that there is only one room left available at a specific price, while it cannot be

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29 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’).


31 See: Key principles for comparison tools, European Commission.
clearly understood by the average consumer that the claim only applies to room availability on one specific platform, could also be misleading.

As regards users' review tools, the guidance clarifies that falsely representing oneself as a consumer, as would be the case of a trader posting fake consumer reviews, is prohibited. Suppressing genuine negative consumer reviews without clearly stating to consumers that only a selection of them is being presented is also problematic.

As some social media such as Facebook, Twitter or blogs are becoming platforms for advertising and product placement, as well as user-generated content, the prohibitions of Article 7(2) and point 22 of Annex I of the directive against hidden marketing remain particularly important. Specifically, as many of the users, such as children and teenagers, belong to particularly vulnerable groups, they may be particularly sensitive to hidden marketing and not be able to distinguish one type of content from the other.

A practice called 'dynamic pricing' (or 'real-time' pricing), where a trader raises a product price after the consumer has already put it in the shopping cart, could be misleading under Article 6(1) of the directive. Otherwise, traders are free to determine their prices, as long as they appropriately inform consumers about them – and about how they are calculated. Price discrimination on the basis of nationality and place of residence is explicitly prohibited by the Services Directive.\(^{32}\)

The guidance also notes that traders that track and collect consumer preferences by using their online personal data need to comply with EU data protection rules, the use of cookies or similar devices on users’ terminal equipment aimed at gathering information are permitted solely with the users' informed consent. However, if the information obtained with this type of practice, known as profiling, is used to exert undue influence (i.e. by falsely claiming that only few tickets are available on the basis of the assessment that time is pressuring the consumer), it could be in breach of Article 6(1)(a) and point 7 of Annex I of the directive.

As regards the use of geo-localisation techniques, the guidance specifies that a denial of access to a product on the basis of geographical information about the consumer and a rerouting is not an unfair commercial practice by itself, so long as the trader complies with the information requirement in Article 8(3) of the Consumer Rights Directive.\(^{33}\)

3.7.3. Travel and transport sector

The guidance clarifies that the information requirements from Articles 6 and 7 of the directive\(^{34}\) apply not only to traders (i.e. hotels or airlines) directly. They may even apply to intermediaries, such as metasearch websites or comparison tools, if they act in the name or on behalf of the trader.

Furthermore, in this sector, a practice of charging tourists for additional air transport fuel costs without any documentation or indication on how the costs have been calculated, may be considered a misleading omission, a misleading action or an aggressive practice.

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\(^{32}\) Directive 2006/123/EC on services in the internal market, namely its Article 20.

\(^{33}\) Directive 2011/83/EU on consumer rights. Its Article 8(3) states that: ‘trading websites shall indicate clearly and legibly at the latest at the beginning of the ordering process whether any delivery restrictions apply and which means of payment are accepted’. In relation to this, the Commission in May 2016 also presented a proposal on geo-blocking and discrimination among customers in the EU. See also: Geo-blocking and discrimination among customers in the EU, EPRS briefing, July 2016.

\(^{34}\) For instance, the information on the product's main characteristics, the trader's identity; the price inclusive of taxes, the payment arrangements, the complaint handling policy etc. Failing to provide these material pieces of information could be considered a misleading mission.
In line with the Consumer Rights Directive,\(^{35}\) it is also forbidden to use default options for additional payments that the consumer then needs to reject (i.e. non-obligatory travel insurance), since the consumer should be requested to give explicit consent to all extra payments.

In the car rental sector, a commercial practice requiring consumers to pay significantly more fuel than they have actually used could sometimes be considered contrary to the professional diligence requirements set out in Article 5(2) of the directive.

### 3.7.4. Financial services

Member States may impose more restrictive and prescriptive requirements for financial services and for immovable property, in line with Article 3(9) of the directive. For services to consumers in the area of financial services and immovable property, **requirements for professional diligence** from Article 5(2) of the directive seem to be of particular importance. This is because the consumer may suffer significant economic consequences if the trader does not act professionally, with a skill and care that can reasonably be expected from a professional in this field.

Specifically for this sector, the guidance notes that **traders should not exaggerate the economic benefits, omit information on financial risks** to consumers or rely too strongly on past performance of a financial product. It also states that, in some cases, obstacles to bank switching could be considered an aggressive commercial practice.

### 4. European Parliament position

The Parliament has mentioned the issue of unfair commercial practices, not least in its 2014 non-legislative **resolution on the implementation of the Unfair Commercial Practices Directive 2005/29/EC**.\(^ {36}\) There it emphasised the **importance of the 2009 guidance document** produced by the Commission to assist in application of the directive, welcoming the Commission’s intention to revise this document by 2014. It further called on the Commission to clarify the relationship between Directives 2005/29/EC and 2006/114/EC,\(^ {37}\) to guarantee a high level of protection for all economic operators in the Union, particularly consumers and small and medium-sized enterprises, from fraudulent and unfair practices, thus boosting confidence within the single market.

At that time it also considered it not appropriate to extend the scope of the Unfair Commercial Practices Directive on business-to-consumer relations to include business-to-business unfair commercial practices. The Parliament also stated that further efforts should be made to strengthen the enforcement of the directive in relation to **vulnerable consumers**.

It further expressed concern at cases of **misleading use of customer review tools** and price comparison websites, welcoming the Commission’s decision to consider how the information provided on such platforms might be made clearer to consumers. It also considered that the penalties imposed for failure to comply with the directive should never be lower in value than the profit made through a practice deemed to be unfair or misleading.

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In addition, it expressed concern regarding the increasing number of complaints concerning online ticket purchasers who have fallen victim to what is commonly referred to as 'IP tracking', a practice that seeks to record the number of web visits by individual users through the same IP address and then artificially pushes up prices based on the level of interest revealed by other similar searches. It called on the Commission to investigate the frequency of this practice, which results in unfair competition and constitutes a misuse of users' personal data, and, if appropriate, to propose suitable legislation to protect user interests.

Finally, it stressed that the use of false environmental claims is an unfair practice that is on the rise, encouraging the Commission to expand the section of the guidance document devoted to this practice in order to clarify the application of the directive for economic operators.

5. Stakeholders' views

5.1. European Consumer Organisation – BEUC

In its 2016 position paper, BEUC noted that the Unfair Commercial Practices Directive has shown great potential to protect consumers at all stages of a commercial transaction, but that some clarifications and improvements were needed. It also stressed that enforcement and possibility of redress were crucial for the effectiveness of the directive.

BEUC welcomed the update of the Commission’s guidance document on the directive as it deemed that the scope of application of this piece of legislation was often unclear. While considering that such guidelines may be a valuable source of information, a renewal of the guidance was in its opinion not enough, since these types of document cannot provide a formal interpretation of EU law for specific situations and also have no legal authority.

On the enforcement of the directive, it noted that there is an urgent need to strengthen the role of national authorities, consumer associations, and the European Commission, using an integrated approach that takes into account public and private enforcement tools.

In its opinion, owing to the full harmonisation nature of the directive and specifically its defined and exhaustive list of unfair commercial practices in Annex I, Member States are prevented from prohibiting and punishing certain unfair practices, which are often closely connected with the specific cultural, social or economic environment of the Member States. It further argued that when it comes to transparency in pricing and promotions, the current list is not comprehensive and precise enough.

In its opinion, the fact that the directive does not oblige Member States to implement an adequate framework for contract law remedies for consumers (i.e. rights to withhold performance, obtain redress, or terminate a contract where the contract has been concluded as a consequence of an unfair practice) is an important flaw – to the detriment of the consumer.

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5.2. BusinessEurope – the voice of enterprises in 34 European countries

BusinessEurope, in its recent 2016 position paper on the fitness check of the EU consumer and marketing law, expressed general support for the use of guidance or interpretation guidelines, such as the Commission guidance on the Unfair Commercial Practices Directive, as tools to reach a more uniform interpretation of EU law.

5.3. The European eCommerce and Omni Channel Trade Association (EMOTA)

Similarly, EMOTA, the European-level umbrella federation representing online and distance sellers across Europe, in its position paper on the fitness check of the EU consumer and marketing law, does not consider any new legislation to be necessary at this stage. It rather points to the usefulness of guidance and industry standards to bridge potential existing gaps and help improve enforcement, thus reducing the impact of anticompetitive actions.

6. Main references


European Commission, website 'Review of EU Consumer law (Fitness Check)'.


39 An efficient & fit-for-purpose consumer framework, BusinessEurope, September 2016, p. 3.
Consumers may find it difficult to identify potentially harmful or unfair practices when entering into a transactional relationship with traders. Similarly, businesses and enforcement authorities may sometimes have problems applying and interpreting EU legislation in relation to commercial practices. While it is the Court of Justice that has competence to interpret EU legislation, the European Commission published legally non-binding guidance on the implementation/application of the Directive on Unfair Commercial Practices in May 2016, which aims to clarify some of the issues that have arisen since the adoption of the directive.