



Combating unfair commercial practices

SUMMARY Consumers in the Internal Market cannot always count on an honest stance from all enterprises. Prior to the adoption of the [Unfair Commercial Practices Directive](#) ('UCPD') in 2005, regulation to deal with such practices was partly at national level, and partly harmonised at EU level.

The UCPD provides for full (maximum) harmonisation, which means that Member States are no longer allowed to introduce or maintain a higher level of consumer protection rules in this area of the law.

The UCPD contains a general ban on unfair practices, as well as specific rules addressing various types of such practices. Furthermore, a 'black list' of unfair practices is annexed to the Directive.

The UCPD seeks to protect the 'average EU consumer', taking into account practices addressed at specific groups of consumers, as well as the need for special protection of vulnerable persons such as children.

Not all Member States implemented the UCPD on time, and the regulatory techniques used in national legal systems vary to a significant degree.

Despite that, in its 2013 communication the Commission has expressed satisfaction with the effects of the UCPD. It sees opportunities to enhance its enforcement in closer cooperation with national authorities including through greater monitoring of their activity.



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Background

Unfair commercial practices

Not all businesses behave fairly towards consumers. Unfair commercial practices, such as providing misleading information, exerting pressure or behaving aggressively are a problem not only for consumers but also for those other undertakings which do operate fairly.

EU Member States (MS) have attempted to combat such practices in their national laws, especially in competition and contract law. However, this has resulted in the emergence of divergent standards which, in practice, amount to barriers both for consumers (who do not know what kind of protection they can count on in another MS) and for undertakings (which need to adapt their commercial practices to every MS). For example, Luxembourg banned doorstep selling and Sweden completely banned advertisements addressed to minors.¹

In order to remove such obstacles to the functioning of the internal market, the EU legislature had both to deregulate (on the national level) and re-regulate (at EU level) prohibitions of unfair commercial practices.²

Consumer protection before the UCPD

Prior to the adoption of the [Unfair Commercial Practices Directive](#) (UCPD) in 2005, the EU protected consumers against unfair commercial practices only through a sectoral approach.³ Thus it addressed the issue of unfair practices either with regard to specific types of contracts (e.g. timesharing

or package holidays) or with regard to specific modes of concluding contracts (e.g. distance or doorstep). This approach was criticised because it led to fragmentation and confusion.⁴

Unfair Commercial Practices Directive

Scope

Horizontal approach

In contrast to earlier EU initiatives, the UCPD takes a horizontal approach, whereby its rules apply to all types of products and services and to all methods of marketing and selling, whether online or offline.

Only business-to-consumer transactions

The UCPD applies only to business-to-consumer transactions. This means that business-to-business transactions, consumer-to-consumer transactions, and even consumer-to-business transactions (when a consumer sells a good to a trader) fall entirely outside the UCPD's scope.

Economic interests only

The UCPD covers only those rules which are aimed at the protection of the economic interests of consumers. Therefore, national rules aimed at issues such as health and safety, are outside its reach.⁵ Furthermore, the Court of Justice of the EU (CJEU) [explained](#) that national rules aimed at protecting workers' rights (and not consumer rights) are outside the scope of the UCPD. The same [applies](#) to rules aimed at maintaining competition between undertakings.

Regulatory technique

Full harmonisation

The UCPD is based on a [full harmonisation](#) approach, as opposed to the minimum harmonisation approach of many other consumer directives (such as the one on [unfair terms](#)).⁶ This means that MS may not enact higher standards for consumer protection than those prescribed by the UCPD.

The CJEU has [confirmed](#) that the UCPD fully harmonises the rules on unfair commercial

practices and therefore MS cannot adopt more consumer-friendly national rules.

Transitional period

A transitional period of six years was set, up to June 2013, during which MS could apply higher national standards. Such measures had, however, to be notified to the Commission which was not always done. Theoretically, the transition period could be prolonged, but the Commission [indicated](#) in March 2013 that it was against extending this derogation.

Exceptions from full harmonisation

Two areas of commerce have been exempted from full harmonisation, namely those relating to financial services and immovable property. In those two areas the principle of minimum harmonisation applies, and MS can enact more consumer-friendly rules than those in the UCPD. Furthermore, maximum harmonisation does not extend to procedural aspects, leaving MS a greater margin of appreciation regarding enforcement of the UCPD.⁷

UCPD and private law

The UCPD clearly states that its rules are 'without prejudice' to individual actions (for compensation) brought by victims of unfair commercial practices, and to EU and national rules of contract law. It also states that MS are allowed to retain more consumer-friendly contract law rules.

Nevertheless, there is room for interaction between the application of the UCPD and contract law instruments, such as the [Unfair Terms Directive](#). In a recent ruling, the CJEU [held](#) that the unfairness of a commercial practice under the UCPD can be a reason to treat the relevant term of a consumer contract as unfair under the Unfair Terms Directive. However, there is no automatic relationship between 'unfairness' under both Directives.

It has been argued,⁸ though, that the finding of a violation of the duty of transparency under the Unfair Terms Directive could automatically be considered

a 'misleading omission' under the UCPD if such a violation is capable of altering an average consumer's decision on a potential transaction. Under this view, the use of terms which count as 'unfair' under the Unfair Terms Directive should, in general, be regarded as 'unfair commercial practices' under the UCPD.

The ban on unfair practices

A general standard

The general definition of an 'unfair commercial practice' in the UCPD relies upon two elements. First of all, it must violate the standard of professional diligence, that is the standard of special skill and care that a trader may be reasonably expected to exercise towards the consumer. This corresponds to honest market practice or a good-faith approach in the trader's field of economic activity.

Secondly, it must materially distort the consumer's economic behaviour or be likely to distort it. In practice, an unfair commercial practice must impair the consumer's ability to make an informed decision, in effect leading them to make a decision regarding the purchase of a product or the exercise of a contractual right they would not otherwise have taken.

Apart from the general ban, the UCPD defines specific types of unfair commercial practices: misleading actions, misleading omissions and aggressive practices.

Misleading actions

Misleading actions are practices which are either untruthful or, although factually correct, are deceitful towards the average consumer. Such misleading information may concern the trader, the product, the price or the nature of the commercial transaction.

Typical misleading commercial practices, listed on the UCPD 'black list', include *inter alia*: false claims by a trader to be a signatory of a code of conduct; falsely displaying a trust mark or quality mark to which the trader is not entitled; 'bait and switch'

practices (offering one product, but refusing to sell it in order to promote another one); falsely stating that a product is available for only a limited period of time; and pyramid promotional schemes.

The CJEU ruled that the indication, in a term of a consumer credit contract, of an annual percentage rate lower than the actual one is a misleading commercial practice ([Pereničová case](#), 2012).

Misleading omissions

A commercial practice amounts to a misleading omission if it omits material information, necessary for the average consumer to take an informed decision. In the case of an invitation to purchase, material information includes, *inter alia*, the main characteristics of the product, the identity and address of the trader, the price inclusive of any taxes, as well as the existence of a right of withdrawal for the consumer.

The CJEU clarified the notion of 'invitation to purchase', indicating that it exists *inter alia* when there is a visual reference to the product and its price, but there is no need for an immediately available 'mechanism' (e.g. for concluding the transaction ([Ving Sverige case](#), 2011)).

Aggressive commercial practices

The UCPD defines as 'aggressive' those practices which involve harassment, coercion, use of force or undue influence. Typical aggressive commercial practices, listed on the UCPD black list, include: creating the impression that the consumer cannot leave the premises until a contract is concluded; making personal visits to the consumer's home despite their request to leave; making persistent solicitations by telephone or e-mail; and creating the false impression that the consumer has already won or will win a prize.

Type of consumer protected by the UCPD

Definition of consumer in the UCPD

The UCPD repeats the established [definition of consumer](#) in EU law, i.e. a natural person

(as opposed to a company or association) acting for purposes outside their trade, business, craft or profession.

The 'average consumer'

However, consumers differ between each other as regards their perceptions, knowledge, experience and expectations of traders. The Directive, following CJEU case-law, seeks to protect the average consumer, that is a person who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.

Particular groups of consumers

Nevertheless, in the case of commercial practices addressed at a particular group of consumers, the benchmark is an average member of such a group.

Furthermore, in the case of commercial practices which are likely to distort the economic behaviour of vulnerable groups of consumers, an average member of such a group serves as a benchmark. This applies especially to consumers who are vulnerable on account of their mental infirmity, physical infirmity, age or credulity.

'Average consumer'

The concept of the 'average consumer' has been [criticised by some academics](#) on the basis of findings of cognitive psychology and behavioural economics. They argue that it is a simplistic concept which does not reflect real-world consumer behaviour. Instead, they propose either to interpret the notion very flexibly or abandon it altogether. However, other scholars take the view¹ that the UCPD does not pretend that there actually is an 'average consumer' but rather that such an 'artificial' benchmark is inevitable for the integration of the Internal Market.

code (the Netherlands) or other existing acts (e.g. Belgium). However, 14 MS adopted specific acts transposing the UCPD (e.g. UK and Poland).

National prohibitions struck down by CJEU

Because the UCPD is a full-harmonisation instrument, MS had to repeal any laws which were more consumer-friendly than the directive.

The CJEU has declared a number of national prohibitions of unfair terms to be incompatible with the UCPD, being a full harmonisation instrument. These included general prohibitions of commercial practices which are not black-listed by the UCPD, such as combined offers ([TPSA case](#), 2010), purchase of a product as a precondition for taking part in a lottery or obtaining

a bonus ([Plus Warenhandelsgesellschaft case](#), 2010), announcement of price reductions before the sale period begins ([Wamo case](#), 2011), announcement of clearance sales without permission from authorities ([Köck case](#), 2013).

Scope: also business-to-business?

A vast majority of MS apply the UCPD only to business-to-consumer transactions. However, Germany, Austria, France and Sweden have also extended the scope of application of the UCPD's rules to business-to-business transactions. A [consultation](#) of MS and stakeholders revealed that there is no support for EU-wide extension of the UCPD outside the business-to-consumer context, covered at present.

Enforcement

The UCPD does not harmonise procedural issues, leaving questions of enforcement to the MS. They have employed a wide array of techniques. The Nordic countries (Denmark,

Implementation and enforcement

Delays in implementation

The implementation of the UCPD was considerably delayed. Only six MS implemented it within the deadline (June 2007), and the CJEU issued judgments against two MS for non-transposition (Spain and Luxembourg).

Regulatory techniques in the MS

The MS have used divergent regulatory techniques as regards the implementation of the UCPD. Some countries implemented it into existing acts against unfair competition (e.g. Germany), others into consumer codes (e.g. France) or the civil

Sweden and Finland) entrusted this task to their consumer ombudsmen. In certain other countries (e.g. UK and the Netherlands) enforcement of the UCPD is the task of consumer or competition authorities. In yet others, (e.g. Belgium) a ministerial department ensures the enforcement of the UCPD. Finally, Germany and Austria have opted for a private enforcement scheme.

Self-regulation

Self-regulation by enterprises themselves plays a major role in some MS (e.g. UK, the Netherlands).⁹ Businesses enact self-binding codes of conduct, such as the [Dutch Advertising Code](#) issued by the Dutch Advertising Standards Organisation. A special commission within the Organisation ensures compliance with this soft law instrument. Similarly in the UK, a major role is played by the Committee of Advertising Practice which runs two [advertising codes](#). These are enforced by the [Advertising Standards Authority](#) which is also a private body.

Criminal sanctions

Some MS have resorted to criminal sanctions in order to ensure the enforcement of the UCPD (e.g. UK, Belgium, France). However, in other MS such possibilities are limited (e.g. Germany, the Netherlands).¹⁰

Individual private-law enforcement

Some countries (e.g. UK, the Netherlands) have provided for a right to damages for consumers who have been harmed by an unfair commercial practice.

Guidance from the European Commission

In order to facilitate uniform application of the UCPD across the EU, the Commission issued a [Guidance document](#) in 2009. Published in all official EU languages, this document contains practical examples of the application of the UCPD. It is not a binding authority, however it can be persuasive (e.g. in an Advocate General's [opinion](#)).

The need for such guidance, especially as regards the interpretation of open-ended concepts in the UCPD, has been emphasised

by [scholars](#). They point out that in the absence of uniform interpretation of general standards of the UCPD, its aim of full harmonisation could be hampered.

Since 2011 the Commission has also run an online [UCPD database](#), collecting data on national implementing measures and case-law, as well as academic papers on the UCPD.

Evaluation

Commission communication (2013)

In its [communication](#) published in March 2013 on the application of the UCPD, the Commission expressed a very positive view of the impact of the UCPD. In its opinion, the Directive has improved consumer protection within the EU, whilst simultaneously protecting honest enterprises from their rogue competitors. The communication cites a [Eurobarometer poll](#), according to which between 2006 and 2012 the proportion of consumers wishing to shop across intra-EU borders has grown from 33% to 56%. The Commission believes that the UCPD 'has played its part' in this growth of confidence.

Further action

The Commission considers that in order to enhance the effective enforcement of the UCPD, there is a need for:

- reinforced cooperation in cross-border enforcement, coordinated by the Commission,
- close monitoring of transposition and application in the MS, including conformity checks and in-depth reviews,
- further development of the Guidance document and the UCPD database,
- organisation of thematic workshops by the Commission for national enforcement officers and judges, and
- introduction of enforcement indicators, evaluating the progress of the MS.

The Commission is of the opinion that there is no need to amend the UCPD at this stage, emphasising in particular that experience

with enforcement in the MS is still too limited.

European Parliament

On 27 June 2013, the EP Committee for Internal Market and Consumer Protection held a first [exchange of views](#)¹¹ with a view to drafting an initiative report on the Commission's communication on the implementation of the UCPD Directive ([rapporteur](#): Robert Rochefort, ALDE, France).

Main references

[The New European Law of Unfair Commercial Practices and Competition Law](#) / Bert Keirsblick, Hart, 2011

Communication [On the application of the Unfair Commercial Practices Directive: Achieving a high level of consumer protection; Building trust in the Internal Market](#), COM(2013) 138 final

Communication [First Report on the Application of Directive 2005/29/EC](#), COM(2013) 139 final

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Endnotes

- ¹ The UCPD and Its General Prohibition / Giuseppe B. Abbamonte, in: [The Regulation of Unfair Commercial Practices under EC Directive 2005/29](#), Hart, 2007, p. 12.
- ² Who is the Average Consumer? / Stephen Weatherill, in: [The Regulation of Unfair Commercial Practices](#) (above), p. 137.
- ³ The Unfair Commercial Practices Directive: An Example of the New European Consumer Protection Approach / Giuseppe B. Abbamonte, in: *Columbia Journal of European Law*, vol. 12, 2006, p. 698.
- ⁴ *Ibid.*, p. 698.
- ⁵ [First Report on the Application of Directive 2005/29/EC](#), COM(2013) 139 final, p. 9.
- ⁶ [Full Harmonisation in European Private Law: A Two-Track Concept](#) / Vanessa Mak, in: *European Review of Private Law*, vol. 20, no. 1, 2012, pp. 213-236, p. 214.
- ⁷ [The New European Law of Unfair Commercial Practices and Competition Law](#) / Bert Keirsblick, Hart, 2011, p. 460.
- ⁸ [The interaction between consumer protection rules on unfair terms and unfair commercial practices: Pereničová and Perenič](#) / Bert Keirsblick, in: *Common Market Law Review*, vol. 50, 2013, pp. 247-264, at p. 260.
- ⁹ [The New European Law of Unfair Commercial Practices](#) (above), pp. 444-445, 451, 460.
- ¹⁰ *Ibid.*, pp. 479-480.
- ¹¹ See [video](#) of the IMCO meeting, from 10:14.