



## The unfair commercial practices Directive. questions and answers

### 1. The objective

#### What is an unfair commercial practice?

A commercial practice is an activity linked to the promotion, sale or supply of a product to consumers.

It covers any act, omission, course of conduct, representation or commercial communication – including advertising and marketing – which is carried out by a trader. If it is unfair, this means it is deemed to be unacceptable with regards to the consumer, according to specified criteria.

#### What does the Directive aim to do?

The Unfair Commercial Practices (UCP) Directive aims to clarify consumers' rights and to simplify cross-border trade.

Common rules and principles will give consumers the same protection against unfair practices and rogue traders whether they are buying from their corner shop or purchasing from a website based abroad. It will also mean that businesses will be able to advertise and market to all 480 million consumers in the EU, in the same way as to their domestic *customers*.

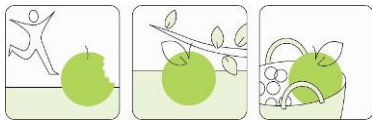
The aim is to boost consumer confidence and give business a uniform and transparent EU wide set of rules.

### 2 The overall structure of the directive

#### How is the Directive structured and what types of behaviour will be prohibited?

There are three main sections in the directive:

- 1. The **general clause** contains the general ban on unfair commercial practices. This provision will replace Member States' existing, divergent general clauses and thus remove internal market barriers. The general clause will ensure that this new legislation withstands the test of time.
- 2. Two main categories of unfair commercial practices – "**misleading**" and "**aggressive**" practices – are described in more detail. In fact, the vast majority of practices which would be considered unfair would fall under these provisions. When applying the above provisions, practices are assessed in light of the effect they have, or are likely to have, on **the average consumer**.
- 3. Finally, the **Black List** contains the list of those practices which shall, in all circumstances, be regarded as unfair and thus banned – without applying the average consumer test.



### 3 The main elements of the Directive in more detail

#### The General Clause

Some practices may emerge in the future that do not fall under the criteria of “misleading” or “aggressive” although they are unfair. The general clause will ensure that this new legislation withstands the test of time.

**Two defining criteria are used to identify an unfair commercial practice** - a commercial practice is regarded as unfair – and prohibited – if it meets the following two, cumulative criteria:

- 1. The practice is contrary to the requirement of **professional diligence** Professional diligence is “the special skill and care which a trader may reasonably be expected to exercise, commensurate with honest market practices and/or general principle of good faith in the trader’s field of activity.”
- 2. The practice materially distorts or is likely to **materially distort the average consumer’s economic behaviour** The criterion “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 otherwise taken.

#### Misleading Practices (actions and omissions)

The Directive defines in detail what is considered **a misleading action or a misleading omission**. Actions are the activities traders carry out in the promotion and sales of their products.

A commercial practice is misleading if it either:

- 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 correct and
- Causes or is likely to cause him to take a transactional decision that he would have otherwise not taken.

The criteria are objective so that there is no need to prove that a consumer was actually misled. The possibility of deception alone can be considered misleading, if the other elements are present as well. There is no need to prove a financial loss.

#### Misleading Omissions

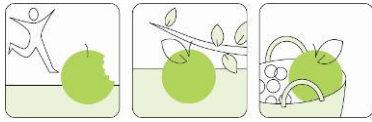
Omissions refer to the fact that consumers need information to make informed choices. A trader must provide material information that the average consumer needs. It is misleading to:

- Omit material information that the average consumer needs, according to the context, to take an informed transactional decision;
- Hide or provide material information in an unclear, unintelligible, ambiguous or untimely manner;
- Fail to identify the commercial intent of the commercial practice if not already apparent from the context.

When assessing practices for omissions, the following aspects are taken into consideration:

- What counts is the effect of the commercial practice in its entirety, including the presentation; Information must be displayed clearly: obscure presentation is tantamount to an omission to inform.





## Aggressive Commercial Practices

Regulating aggressive commercial practices is new at EU level. A practice is considered aggressive if the average consumer's freedom of choice or conduct is significantly impaired.

The Directive contains a list of criteria to help determine whether a commercial practice uses harassment, coercion, including physical force, or undue influence.

"Undue influence" means "exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision."

## The Black List

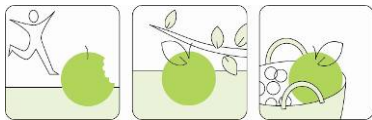
Certain commercial practices across Europe are banned outright under the Directive. To ensure that traders, marketing professionals and customers are clear about what is prohibited, a Black List of unfair practices has been drawn up. The commercial practices on the Black List are **unfair in all circumstances** and no case-by-case assessment against other provisions of the Directive is required.

## Which types of commercial practices does it cover?

What is included?

- Trust marks and codes
- Bait advertising
- Bait and switch
- Limited offers: Special offer, today only!
- Language of after-sales service: Marketing in English, after-sales services in Swedish
- Advertising products which cannot be legally sold
- Misleading impression of consumers' rights: "Special for you"
- Advertorials: "Mixed messages"
- Security as marketing argument: Unduly playing on fear of security risks
- Decoy: "Reputable brand, or maybe not?"
- Pyramid schemes
- False claims regarding moving premises or cessation of business: "End of lease! All stock must go!"
- Facilitation of winning chances: How to win the lottery
- False claims about curative capacity: "Trickium 24 cures disease"
- Market information
- Prizes: "Congratulations! You have won a prize"
- Falsely creating the impression of free offers: "Free sunglasses"
- Products not ordered
- Professional trader disguised as consumer
- After sales services: "Europe wide guarantees"
- Pressure selling: "Yes, you can leave once the paperwork is done"
- Aggressive doorstep selling: "Yes, I will leave, once the paperwork is done"
- Persistent and unwanted solicitations: "With the third phone call maybe a contract will be agreed..."
- Insurance claims: No one picks up the phone
- Direct exhortations to children: "Go buy the book!"
- Inertia Selling





- Emotional pressure
- Prize Winning

See brochure below for details of blacklisted schemes and examples:

[http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/ucp\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/ucp_en.pdf)

#### 4. Protecting vulnerable consumers

The Directive provides for special protection to vulnerable consumers:

- (A) When a commercial practice is targeted at a specific group of consumers, then the impact of the practice will be assessed from the perspective of the average member of the group in question. For example, in the case of advertising to children, the average child of the relevant age group will be the benchmark.
- (B) Within the Directive, certain commercial practices are prohibited since they are considered unfair and are likely to affect especially vulnerable consumers in that case. Examples of such practices include:
  - Claiming that products are able to facilitate winning in games of chance;
  - Falsely claiming that a product is able to cure illnesses, dysfunction or malformation;
  - Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products to them ("pester power").
- (C) In addition, there is a "safeguard clause" in the Directive to protect particularly vulnerable consumers: traders cannot evade the unfairness rules by specific practices that would only fool particularly vulnerable consumers even if even if those practices cannot be proven to target that group.

#### 5. Other important issues

##### The scope of protection

The Directive only protects **the economic interest of the consumer** and not other interests such as health or safety. In addition, taste and decency are outside the scope of application of the Directive.

The Directive applies only to commercial practices – between businesses and final consumers (B2C) – and thus does not cover commercial practices between businesses, such as boycotts and refusals to supply.

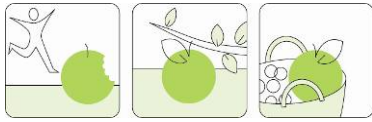
The Directive will apply where there are no specific provisions regulating unfair commercial practices in EU **sector specific legislation**. Where such specific provisions do exist, they will **take precedence** over the Directive.

Where EU sector specific legislation regulates only some aspects of commercial practices, for example the content of information requirements, the Directive will come into play for other elements, for example, if the information required in the sector specific legislation is presented in a misleading way.

##### Enforcement

Each Member State has to adopt national laws which correspond to the provisions of the Directive. Enforcement of these rules in practice is the task of national consumer protection authorities and courts. The Commission will verify that the national rules comply with the Directive. The Commission has already launched proceedings against the Member States that have not yet adopted any national rules.





Since January 2007, there is a new EU-wide network of national enforcement authorities in place to strengthen the enforcement the laws everywhere in the EU. Joint EU actions enforcement actions can be taken to check whether traders comply with consumer laws, for example the recent joint sweep investigation on airline companies' websites.

### **Which countries have not yet implemented the UCP Directive?**

Finland, France, Germany, Hungary, Lithuania, Luxemburg, Malta, the Netherlands, Portugal, Romania, Spain, Sweden and the United Kingdom. In some of these countries the adoption of new laws is in the pipeline.

### **Have infringement procedures been taken against all of them?**

Yes, the Commission launched infringement proceedings in August 2007.

### **Some Member States are late in transposing the Directive into national law. How are consumers protected against unfair commercial practices in such a situation?**

It is important to note that, in those Member States where the legislation is late, it is clearly established in ECJ case law, that enforcement bodies and judges should make up for the regulatory gaps by interpreting and applying the existing laws in the light of the new standards- to the extent possible. In short, consumers in these Member States can invoke their rights under the new UCP laws after the December 12 deadline – however there can and will be gaps.

### **What rules were in place before the UCP?**

The Misleading Advertising Directive from 1984 provided minimum standards to ban misleading advertising. It was updated in 1997 to allow comparative advertising under certain conditions. That Directive established minimum standards in this field, but national differences remained. There was no general clause covering new, innovative practices, The Misleading Advertising Directive did not contain any Black List of practices that are banned under all circumstances. Finally, there was no common standard for protecting vulnerable consumers.

### **What about the Black List? Weren't a lot of these practices banned before?**

E.g. false claims have been banned under the Misleading Advertising Directive already, but the Black List makes the bans crystal clear. It is important to apply uniform bans in the Member States. To date there were different interpretations e.g. regarding the use of word "free" – sometimes combined with small print explaining it is not free. The Black List of aggressive practices is new at the EU level. Some practices have been banned in some countries, e.g. under the criminal law. Direct exhortations to children to buy and "pester power" have been banned in television across EU, but the Black List now covers all media, including the Internet.

