



# Unfair Commercial Practices

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**Council Directive 2005/29**  
concerning unfair business-to-consumer commercial  
practices (“UCP”)

**Unfair commercial practices shall be prohibited**  
(Article 5(1))

# The general definition of an *unfair* commercial practice

Article 5(2)

- **Contrary to professional diligence**

failing to meet 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 2(h)); **and**

- **Likely to materially distort the economic behaviour of consumers**

likely to “appreciably impair the average consumer’s ability to make an informed transactional decision that he would not have taken otherwise” (Article 2(e))

# The Most Common Unfair Practices: Misleading and Aggressive

“In particular, commercial practices shall be unfair which:

(a) are misleading as set out in Articles 6 and 7,

or

(b) are aggressive as set out in Articles 8 and 9”

Article 5(4)

“The general prohibition is **elaborated by rules on the two types** of commercial practices **which are by far the most common**, namely misleading commercial practices and aggressive commercial practices”

Recital (13)

# Practices to “be regarded as” Misleading

## **Actions**

(Article 6(1) and (2))

Causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise and:

- deceives or is likely to deceive the average consumer ... in relation to one or more of a number of specified elements; or
- involves marketing which creates confusion with products of a competitor; or
- involves non-compliance with a firm and verifiable commitment in a code of conduct by which the trader has undertaken to be bound

## **Omissions**

(Article 7(1) and (2))

Causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise and:

- by omitting material information that the average consumer needs to take an informed transactional decision and thereby; or
- By hiding or providing in an unclear, unintelligible, ambiguous or untimely manner such material information ... or failing to identify the commercial intent of the commercial practice

# Practices to “be regarded as” Aggressive

A commercial practice is to be regarded as aggressive if ... **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 otherwise”** (Article 8)

# The Black List

Annex 1 to the UCP contains the list of **31 commercial practices** “*which shall in all circumstances be regarded as unfair*” (Article 5(5))

Of particular relevance in the context of debt collection are:

“25. 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” and

“26. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation”

# Clarity with Open Texture

“The specific categories do not prejudice the **autonomous functioning of the general prohibition**, which will continue to operate as a **safety net** and hence provide a way of assessing the fairness of **any current or future trade practices** that do not fall within one of the two key types explicitly mentioned”

Explanatory Memorandum to the UCP Proposal at [52]

To eliminate “**obstacles to the free movement of services and goods across borders**”  
“**by establishing uniform rules** at Community level which establish a **high level of consumer protection** and by **clarifying certain legal concepts**” (recital (5))

# A Defining Tendency

“Moreover the touchstone must in my view be the standard imposed by the regulatory authorities pursuant to their statutory duties, not resort to a visceral instinct that the relevant conduct is beyond the Pale ... It would be an anomalous result if a lender was obliged to disclose receipt of a commission in order to escape a finding of unfairness under s.140A of the Act but yet not obliged to disclose it pursuant to the statutorily imposed framework under which it operates”,

UK Court of Appeal in *Harrison v Black Horse Limited* [2011] EWCA Civ 1128 at [58], a decision on the “unfair relationship” provisions of the Consumer Credit Act 1974

“It is not possible to define an unfair relationship ... That would serve to reduce the effectiveness of the test and the ability of the court to tackle unfair relationships – whatever form they take ... lenders have to look beyond simply complying with procedural rules, to ensuring that the substance of the relationship is not unfair ... Lenders do not need another list of specific practices as those are already made clear in other legislation, although complying with all of them will not necessarily mean that a relationship is fair”, Parliamentary Under-Secretary of State for Trade and Industry, during the passage through the UK Parliament of the Bill which introduced section 140A.

# Divergent Translation

Paragraph 31 of Annex I UCP:

“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”

Republic of Ireland provision implementing paragraph 31 of Annex I UCP

“Making a representation or creating an impression that a consumer has won or will win a prize or other equivalent benefit, if –

- (i) there is no prize or equivalent benefit, or
- (ii) in claiming the price, the consumer has to make a payment or incur a loss”

# Sector-Specific Community Law

“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”,

Recital (10)

“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”

Article 4

# Complementary Framework

“Information requirements established by Community law in relation to commercial communication including advertising or marketing ... shall be regarded as material”

Article 7(5)

C-453/10, Jana Perenicova, Vladislav Perenic v S.O.S. financ, spol.sro:

If understating the APR is an unfair commercial practice, does the UCP permit there to be any impact on the validity of the credit agreement and on the achievement of the objective in Article 4(1) and Article 6(1) of Directive 92/13 on unfair terms, if invalidity is more advantageous to the consumer?

# Key Concepts

- **B2C commercial practice** (Article 2(d))

*“... directly connected with the promotion, sale or supply of a product ...”*

- **professional diligence** (Article 2(h))

*“standard ... which ... may reasonably be expected ... commensurate with honest market practice and/or good faith*

- **average consumer** (recital (18) and Articles 2(b), 6(1) and (2), 7(1) and (2))

*“reasonably well-informed and reasonably observant and circumspect”*

- **transactional decision** (Article 2(k))

*“... 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 ...”*

# Professional Diligence

- Compare “the measure of special skill and care exercised by a trader commensurate with the requirements of normal market practice” in the UCP proposal

# Transactional Decision

“a commercial practice may be considered unfair not only if it is likely to cause the consumer to purchase or not to purchase a product but also if it is likely to cause the consumer to enter a shop, spend more time on the Internet engaged in a booking process or decide to not switch to another trader or product”

The Commission Guidance (SEC (2009) 1666)

Approximates the laws of Member States “on **unfair commercial practices**, including unfair advertising, **which directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors**”

Recital (6) of the UCP

# Invitation to Purchase

Invitation to purchase = commercial communication = commercial practice  
(Article (d) and (i))

An invitation to purchase will be an unfair commercial practice if it omits the main characteristics of the product and thereby is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise  
(Article 7(1) and (4))

An invitation to purchase may give only some of the main characteristics of a product, without being an unfair commercial practice within Article 7, provided that the invitation to purchase refers the consumer to the trader's website and the website contains all the material information referred to in Article 7:

*Case C-122/10, Konsumentombudsmannen v Ving Sverige AB*

# Harmonisation

- Objective of Maximum harmonisation: to remove discrepancies between domestic laws so as to reduce transaction costs and encourage consumer confidence and thereby to eliminate barriers to cross-border trade (Article 4; Case C-304/08, Plus)
- Minimum harmonisation for financial services: Article 3(9)
- Post-contractual information requirements under domestic UK law going beyond the UCP (and the CCD): information on request, periodic information, including warnings such as:
  - “Minimum payments  
If you make only the minimum payment each month, it will take you longer and cost you more to clear your balance”
  - Consumer Credit Act 1974, Part VI , and the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007

# Role to Play in Financial Services?

*“I see no ethical distinction between how the financial services industry loots its customers and how youths looted London shops. Both grab what they can when they can ... Bankers do not use outright physical violence. Why would they, when they can loot from the comfort of their offices without fear of arrest?”*

Peter Wilby in the New Statesman, 15 August 2011

## On Closer Analysis

“The banks may not be the most popular institutions in the country at present, but that does not mean that their methods of charging for retail banking services are necessarily unfair when viewed as a whole. As a very general proposition, consumer law in this country aims to give the consumer an informed choice rather than to protect the consumer from making an unwise choice”

Lady Hale at [93] in the UK Supreme Court decision on bank charges, *Office of Fair Trading v Abbey National plc and others* [2010] 1 AC 696

# Operation as a Safety-Net

*The Office of Fair Trading v Ashbourne Management Services Ltd and others* - [2011] All ER (D) 276 (May): unfair debt collection practices restrained as unfair commercial practices