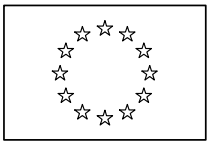

EUROPEAN COMMISSION

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COMMISSION STAFF WORKING DOCUMENT

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

December 2009

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Please note that this document cannot provide a formal interpretation of community law in relation to specific situation. It does also not provide legal advice on issues of national law.

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INTRODUCTION

Directive 2005/29/EC of the European Parliament and of the Council on Unfair Commercial Practices (hereafter "the Directive") was adopted on 11 May 2005.

The Directive lays down harmonised rules for the fight against unfair commercial practices and contributes to a high level of consumer protection. It ensures that consumers are not misled or exposed to aggressive marketing and that any claim made by traders in the EU is clear, accurate and substantiated, enabling consumers to make informed and meaningful choices. The Directive also aims to ensure, promote and protect fair competition in the area of commercial practices.

Since the adoption of the Directive, Member States have enacted national transposition laws. This poses a number of challenges, especially if one considers the legal impact of full harmonisation in an area characterised by considerable differences in national policy, style and enforcement techniques. In order to ensure that both consumers and traders are subject to the same rules across the EU, it is very important that national authorities and courts contribute to the uniform implementation and consistent enforcement of the Directive.

This document aims at providing guidance on the key concepts and provisions of the Directive perceived to be problematic. It includes practical examples showing how this Directive works. The guidance aims at developing a common understanding and a convergence of practices when implementing and applying the Directive. However, this document has no formal legal status and in the event of a dispute, the ultimate responsibility for the Directive's interpretation lies with the Court of Justice of the European Union.

The guidance is based on the results of the cooperation with Member States and stakeholders, which the Commission has carried out in the years which followed the adoption of the Directive. Following an informal working practice group and various consultations, the Commission's Health and Consumers Directorate General has drawn up this staff working document which seeks to address a number of issues raised by national authorities and stakeholders.

The guidance is a living document. It is available on-line[1] and will be supplemented and updated on a regular basis as the knowledge of unfair commercial practices grows. It is not exhaustive but will evolve, according to the input received from national enforcers, the emergence of new practices or additional questions and the development of European and national case law.

Finally, the guidance will support the Report on the Directive's application which the Commission intends submit to the European Parliament and the Council by June 2011[2].

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1 http://ec.europa.eu/consumers/index_en.htm.

2 See Article 18(1) of the Directive.

1. THE SCOPE OF APPLICATION OF THE DIRECTIVE

Commercial practices are defined under 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) defines product as *"any good or service including immovable property, rights and obligations*". This definition corresponds with the definition of a product in the Directive on Misleading and Comparative Advertising[3] and in the proposal for a Directive on Consumer Rights.[4]

Article 3

"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".

1.1. After-sales practices are covered by the definition of commercial practices

The definition of commercial practices should be read in conjunction with Article 3 which concerns the scope of the Directive.

Commercial practices not only occur during the marketing and the sale or supply stages but also after the sale (see Article 3(1)). Recital 13 of the Directive 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".*

This is also highlighted in the explanatory memorandum of the Commission's proposal for the Directive[5] (point 59):

"As explained above, rather than impose a specific unfairness category in relation to after-sale practices, this proposal applies the provisions of the Directive to commercial practices both before and after sale. The trader will consequently need to ensure that commercial practices after sale meet the same fairness standards as commercial practices before sale. However, the absence of after-sale services would not in itself be considered unfair unless the trader's conduct would lead the average consumer to have materially different expectations about the after-sale service available."

Examples:

– Debt collection activities should be regarded as after-sales commercial practices regulated by the Directive. Indeed, when a consumer owes a trader a certain amount of money (as a consumer debt), the collection of this debt (in-

[3] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning Misleading and Comparative Advertising (codified version), OJ L 376, 27/12/2006.

[4] COM(2008) 614 final

[5] COM (2003) 356 final

house or by a third party) is directly connected with the sale or supply of products;

– After-sales services should reflect what the trader has promised (for instance, where a computer is sold with a guaranteed free hotline, the trader is not allowed to charge for its use);

– Onerous or disproportionate switching barriers should also be regarded as after-sales practices. For example, the Italian enforcement authority fined a telecoms company for delaying and preventing its customers from switching to another service provider[6].

1.2. Online commercial practices occurring on social media or comparison websites are covered by the definition

Social media, which include blogs, social networking sites, have become important avenues for commercial practices, especially hidden ones. They are sometimes used by traders to promote and advertise their products.

For example, several Member States have reported that cosmetic companies have paid bloggers to promote and advertise their products on a blog aimed at teenagers, unbeknownst to other users. In such cases, the authorities considered that the bloggers concerned were engaging in hidden commercial practices.

Unfair commercial practices may also occur on **price comparison websites**. An obvious case is when an online price comparison service belongs or is linked to a trader and is used to advertise its products. For example, the site "quiestlemoinscher.com" (literally "whoisthecheapest.com"), a grocery price comparison service created by a French major supermarket company, was considered by French courts to be a trader's website and a tool for comparative advertising[7].

In the case of professional but independent price comparison websites, the trader's activity consists of sourcing prices from retailers and passing this information on to consumer. Such service providers should therefore also be considered as traders and they would therefore be bound by the Directive's provisions. In such cases the criteria and methodology used by the services providers and any contractual links with certain traders would have to be disclosed to the sites' users.

However, where individuals provide price comparison information purely on a non-professional basis, they are not considered as engaging in commercial practices. Again, it is for national enforcers to assess whether such sites fall inside the Directive's scope on a case-by-case basis.

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6 PS1268 - TELE2-ostruzionismo migrazione, Provv. n. 20266 del 03/09/2009 - Pubblicazione Bollettino n. 36/2009 PS1700 - TISCALI-ostruzionismo passaggio a TELECOM, Provv. n. 20349 del 01/10/2009 - Pubblicazione Bollettino n. 40/2009.

7 Tribunal de commerce de Paris – 29 mars 2007 – Carrefour c/Galaec (la coopérative groupement d'achat des centres Leclerc).

1.3. Does the concept of the commercial practices cover situations of traders buying products from consumers?

Certain traders may, in the course of their professional activity, purchase products from consumers. This is the case for example of car dealers, antique shops and retailers of second-hand goods.

According to the definition provided in the Directive, commercial practices only cover practices *"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 Directive.

However, there are cases where the link between the purchase of a product by the trader from consumers and the promotion, sale or supply of a (different) product to consumers can be established. For instance, in the motor vehicle trade, it is common for consumers to enter trade-in agreements which see the trader purchasing a used vehicle from the consumer who in turn buys a vehicle from the trader. In such cases, the commercial practice is a two-step action: the purchase of the vehicle by the trader would not occur independently of the sale of a car to the consumer and the practice as a whole falls therefore within the scope of the Directive.

In relation to those cases where such a link cannot be established Member States remain free, in any event, to extend the scope of the Directive through national law or jurisprudence to cover consumer-to-business transactions, as long as this complies with EU law.

For example, the UK guidelines on the UK Regulations implementing the Directive[8] provide the following 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*".

1.4. Sales promotions fall within the scope of the Directive

Commercial practices such as combined or tied offers, discounts, price reductions, promotional sales, commercial lotteries, competitions, and vouchers fall within the scope of the Directive and are, thus, regulated by its provisions.

Indeed, the definition of commercial practices ("directly connected with the promotion, sale or supply of a product to consumers") clearly refers to promotions. As such, the Directive includes several provisions relating to promotional practices (e.g. Article 6(d) on misleading actions as regards the existence of a specific price advantage; Annex I point 5 (bait advertising), point 7 (special offers), point 19 and 31 (prizes promotion, competition), and point 20 (free offers)).

The Court of Justice has clarified this point in the "Total Belgium" case[9]:

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8 Consumer protection from unfair trading – Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive – Office of Fair Trading/ Department for Business Enterprise and Regulatory Reform.

9 Joined cases C-261/07 (VTB-VAB NV v Total Belgium NV) and C-299/07 (Galatea BVBA v Sanoma Magazines Belgium NV), 23 April 2009.

"[…]combined offers constitute commercial acts which clearly form part of an operator's commercial strategy and relate directly to the promotion thereof and its sales development. It follows that they do indeed constitute commercial practices within the meaning of Article 2(d) of the Directive and, consequently, fall within its scope." (point 50).

According to paragraph 69 of the Advocate General's Opinion in this case, *"combined offers are based on the linking together of at least two different offers of products into a single of sale…from a business management perspective, combined offers constitute a measure of pricing and communication policy, two of the most important policies in marketing*".

The Court of Justice will shed further light on the Directive's scope in its upcoming judgments, namely:

– C-304/08 "Plus Warenhandelsgesellschaft" (Preliminary ruling – Germany). This case concerns a national ban on making consumers' participation in prize competitions or lotteries conditional on the purchase of goods or services. In her Opinion, the Advocate General argued that this type of joint offers constitute commercial practices and fall within the scope of the Directive[10].

– C-540/08 "Mediaprint Zeitungs" (Preliminary ruling – Austria). This case concerns a national ban on offering free prizes with newspapers or other periodicals, or with other goods and services;

– C-522/08 "Telekomunikacja Polska" (Preliminary Ruling – Poland). This case concerns a national ban, in the telecoms sector, on making the sale of telecom services dependent on the purchase of another service or piece of equipment.

1.5. Commercial practices occurring in the financial sector fall within the scope of the Directive

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.

Directive 2002/65/EC[11] defines financial services as *"any service of a banking, credit, insurance, personal pension, investment or payment nature*".

Examples of unfair commercial practices in the financial sector

Financial services fall within the scope of the Directive and are subject to its provisions, including Annex I (the "black list"). As mentioned in Recital 10, the Directive "*provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products. This is*

[10] Opinion in case C-304/08 – 3 September 2009

[11] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ 271/16 of 9 October 2002.

particularly important for complex products with high levels of risk to consumers, such as certain financial services products".

National authorities have already applied the provisions of the Directive in this field. Thus, the Greek[12] and Belgian authorities have already taken legal action against certain banks for providing misleading information on the risks inherent in certain financial products, namely Lehman Brothers' bonds.

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 rather than professional investors familiar with these types of financial products.

The Commission Staff Working Paper on Retail Financial Services[13] of 22 September 2009 identified other problematic commercial practices occurring in the financial sector, e.g.:

- non-transparent bank fees which make it almost impossible for consumers to systematically compare all the offers presented in the market[14];
- insufficient and unintelligible pre-contractual information (complex language, important information hidden in small print, long pages of information provided only shortly before the signature of the contract). As a consequence, consumers are not adequately informed about the features (e.g. the interest rate, the expected return and the costs involved) of the financial product;
- for current bank accounts, possible obstacles to switching.

Under the Directive, such practices could be considered misleading: information to consumers should not be false or deceptive particularly with regards to the benefits, expected results and the risks contained in a financial product or service. Further, the presentation and calculation of fees and charges should be clear (e.g. in relation to overdraft charges). Under the Directive, information, even if factually correct, should not be presented in a deceptive manner. Finally, the Directive sets out criteria to assess aggressive practices, including using onerous or disproportionate non-contractual barriers where consumers wish to terminate the contract or to switch to another trader. Obstacles to switching may therefore be considered aggressive practices[15].

With regard to payment services (defined as services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account), consumers are also protected against unintelligible information under the Payment Services Directive[16] which provides that "*the information and conditions shall be given in easily understandable*

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12 Ministry of Development, Directorate General for Consumers, Directorate for Consumer Protection, fine of 1.000.000. € imposed on 27 March 2009 to the company Citibank PLC, Athens.

13 http://ec.europa.eu/consumers/rights/fin_serv_en.htm

14 See the in-depth bank fees study under: http://ec.europa.eu/consumers/strategy/facts_en.htm#Retail

15 In relation to bank switching, the European Banking Industry Committee has adopted common principles facilitating bank account switching which were due to be implemented as of 1st November 2009. See: http://ec.europa.eu/internal_market/finservices-retail/docs/baeg/switching_principles_en.pdf

16 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJ L 319 , 05/12/2007 P. 0001 – 0036.

words and in a clear and comprehensible form, in an official language of the Member State where the payment service is offered or in any other language agreed between the parties" (Article 41).

The Commission services will collaborate with national authorities on the Directive's enforcement in the financial sector and may supplement the guidance in light of the additional cases and examples collected**.**

The minimum harmonisation clause

Article 3(9) specifies that Member States are allowed to regulate in a more prescriptive manner unfair commercial practices occurring in this sector – meaning that the Directive does not fully harmonise national rules regulating unfair commercial practices in the field of financial services. Recital 9 further explains that "*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".*

For example:

- Member States can retain national rules prohibiting combined offers of financial services[17] as long as these rules otherwise comply with EU law;
- Member States can retain more detailed information requirements for financial products or standard used forms.

The relationship with specific Directives

Where other directives provide for more specific rules for commercial practices in the financial sector, the Directive complements this existing legislation.

For example, the Consumer Credit Directive[18] contains specific provisions on advertising concerning credit agreements (such advertising shall specify for example the borrowing rate, the total amount of credit, the annual percentage rate of charge and if applicable the duration of the credit agreement) as well as a list of standardised pre-contractual information to be provided to consumers to enable them, in particular, to compare different offers. The UCP Directive complements these specific requirements. It will come into play if, for example, the information is advertised in a misleading way or if the service provider uses aggressive commercial practices.

The Payment Services Directive (Directive 2007/64/EC) contains pre-contractual information requirements in the field of payment services offered to consumers (Articles 37-39, 42) as well as requirements on how this information should be conveyed (Articles 36 and 41). The area where the Directive and the Payment Services Directive overlap is limited since the scope of the Payment Service Directive is circumscribed to payment services (whereas the

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[17] The Court of Justice's case law on joint offers does not apply to the financial sector by virtue of Article 3(9).

[18] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC – OJ L 133/66 of 22 May 2008

Directive applies to a broader array of business-to-consumers (B2C) financial services). In this limited area, the Payment Services Directive contains more specific provisions on pre-contractual information to be provided to consumers in cases of an invitation to purchase and on the modalities for delivering pre-contractual information and is therefore *lex specialis* to the Directive. Outside this area, the Directive continues to apply and is therefore complementary to the Payment Services Directive (cf. Recital 22 of the Payment Services Directive). The Directive is applicable, for example, when it comes to advertising of payment services or aggressive selling of payment services.

1.6. Commercial practices which do not affect the consumer's economic interests do not fall within the Directive's Scope

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****.*

Article 1 of the Directive explicitly provides for the harmonisation of those practices "harming consumers' economic interests."

Where national rules aim at protecting interests which are not of an economic nature, such rules will not fall within the scope of the Directive. Therefore, the Directive does not affect the possibility for Member States to have additional and more restrictive rules regulating commercial practices for reasons of protection of the health and safety of consumers (see Article 3(3) of the Directive) or the protection of the environment.

In the same vein, national rules regulating commercial practices, including marketing and advertising, based on "taste and decency" grounds are not covered by the Directive. According to Recital 7, "*[this Directive] does not address legal requirements related to taste and decency which vary widely among the Member States. Commercial practices such as, for example, commercial solicitations in the streets, may be undesirable in Member States for cultural reasons. 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 choice. Full account should be taken of the context of the individual case concerned in applying this Directive, in particular the general clauses thereof."*

Therefore, national rules on commercial practices, including marketing and advertising, regulating the protection of human dignity, the prevention of sexual, racial and religious discrimination, or the depiction of nudity, violence, anti-social behaviour are not covered by the Directive.

In light of the above, the following examples fall outside the scope of the Directive:

- national prohibitions or stricter rules regulating the marketing of violent online videogames;
- national rules prohibiting advertisements for toys with a military theme directed at children.

1.7. Commercial practices which harm only competitors' economic interests or which relate to a transaction between traders do not fall within the scope of the Directive

Article 3

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.

Business-to-business transactions

Business-to-business ("B2B") commercial practices do not fall within the scope of the Directive. They are partly regulated under the Misleading and Comparative Advertising Directive[19].

Member States may decide to extend the protection granted under the Directive to B2B commercial practices (or to consumer-to-consumer). For example, Germany, Austria and Sweden have extended all of the provisions of the Directive to B2B commercial practices, while France has done the same for certain provisions only.

National rules protecting competitors' interests

Recital 6 clarifies that the 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 subsidiarity, Member States will continue to be able to regulate such practices in conformity with Community law, if they choose to do so".*

Thus, national rules regulating commercial practices such as below-cost selling/selling at a loss, for which the sole rationale is to ensure fair competition in the market space, do not fall within the scope of the Directive.

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

For example, national measures regulating the dates of seasonal sales in order to protect SMEs from intensive sales all year long from big chain stores have as their purpose to ensure fair competition. Consequently, they do not fall within the scope of the Directive. On the other hand, national measures providing for more prescriptive rules on the way discount prices must be presented to consumers during seasonal sales or regulating the transparency of the information on sales fall within the Directive's scope.

The distinction between consumers' and traders' interest is expected to be clarified by the Court of Justice in rulings on cases currently pending before it. For example, in the Opinion delivered in the *Plus Warenhandelsgesellschaft*[20] case, the Advocate General considers that

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[19] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), OJ L 376, 27/12/2006.

[20] Opinion in case C-304/08 – 3 September 2009

the Directive is applicable despite the fact that the national regulation (the UWG) protects a broader array of interests (consumers' as well as competitors' interests) *(EN version not available yet):*

> 65. À la différence du gouvernement tchèque, je n'ai aucun doute que l'article 4, point 6, de l'UWG a pour sens et pour objet de protéger le consommateur.
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> 66. Premièrement, d'après son article 1er, l'UWG sert à protéger les concurrents et autres opérateurs, mais également les consommateurs contre la concurrence déloyale. Deuxièmement, la genèse ainsi que le sens et l'objet de l'article 4, point 6, de l'UWG plaident en faveur d'une telle interprétation. Cette disposition codifie en effet la jurisprudence du Bundesgerichtshof relative à l'ancienne version de l'article 1er de l'UWG, selon laquelle il était contraire au droit de la concurrence de subordonner la participation à des concours ou à des jeux promotionnels à l'achat d'une marchandise ou à la commande d'une prestation. D'après les travaux préparatoires, l'objectif du texte est de protéger le consommateur contre toute atteinte excessive portée à sa liberté de décision au moyen de l'exploitation de la passion du jeu. L'idée de départ est que l'offre combinant participation à un jeu promotionnel et vente de marchandises peut faire basculer la décision d'achat même d'un consommateur moyen raisonnable de telle façon que cette décision ne sera plus fondée sur des considérations rationnelles, mais sur le désir d'emporte le lot mis en jeu. Cela reflète d'ailleurs le sentiment unanime de la doctrine.
>
> 67. Partant, cette disposition nationale relève également du champ d'application personnel de la directive 2005/29.

In the Opinion, the Advocate General suggests a number of criteria to assess whether such "mixed" national measures (i.e. protecting both consumers' and competitors' interests) fall within the scope of the Directive. Thus, the general purpose of the law, the background and genesis of the measures in question, the preparatory works and academic comments can be taken into account in order to establish whether a provision aims at protecting consumers.

1.8. The concept 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 intermediaries acting on behalf of the trader. For example, agents paid by the trader to market or advertise their products will be traders in the understanding of the Directive.

Since the Directive regulates commercial practices in a broad sense and covers the particular situation of "hidden" traders (see below), it is important that national enforcers assess on a case-by-case basis which persons can be defined as traders in given circumstances.

For example, there may be situations where individuals who appear to be consumers selling products to other consumers could be in fact traders ("hidden B2C" sales). National enforcers should make an assessment taking the following into account: whether the seller has a profit-seeking motive; the number, amount and frequency of transactions; the seller's sales turnover; whether the seller purchases products in order to re-sell them. Persons whose main activity is

to sell products from their homes on the internet using auction websites on a very frequent basis, seeking profit and/or purchasing products with the aim of reselling them at a higher price, could for example fall within the definition of trader.

Organisations which pursue charitable or other ethical goals will qualify as traders under the Directive depending on whether they engage in commercial activities (e.g. the sale of ethical products). When they act as traders they should thus comply with the provisions of the Directive as far as their commercial activities are concerned (for instance, information about the origin of the product or its ethical aspects should not be misleading). Several Member States have reported the case of a disabled painters' association offering postcards made by its members for free, but inviting people to make a contribution. National enforcers have considered that the association was acting as a trader and have assessed the practice under the provisions of the Directive.

The fact that an organisation is structured as "non-profit" or "not-for-profit" is immaterial to the assessment of whether such an organisation is a trader or not under the Directive. For example, if a private health insurance company describes itself as a "not-for-profit" organisation on the grounds that it has no shareholders and reinvests its trading surplus in the business this does not put in doubt that such a company is a trader under the Directive.

Public authorities can also be traders when carrying out commercial activities. For example, a municipality marketing discounted prices for tickets to an art exhibition which they organize will fall under the definition of trader for the purposes of the Directive.

Finally, the Directive tackles the particular situation of "hidden" traders or traders representing themselves as consumers. Under Annex I of the Directive (the "black list") n. 22, the following practice is prohibited in all circumstances:

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, "hidden" traders may be:

- a hotel website including flattering comments supposedly by consumers which are actually drafted by the hotel owner;
- a bookshop advertising its "customers' choice" books where customers have never been consulted and the choice is made by the bookseller.

1.9. The Relationship between the Directive and national law and other provisions of Community law

Primacy of EU law

According to the case law of the Court of Justice, directives which have been incorrectly transposed or not transposed at all are capable of having direct vertical effect in national law vis-à-vis state entities, if the Directive's provisions are sufficiently clear, precise and

unconditional to be properly enforced in national jurisdictions[21]. However, directives do not have horizontal direct effect[22] (for example, consumers cannot use the provisions of the Directive against a company).

In case of conflict between a national provision and a provision of the Directive or in case of non-transposition of the Directive, national courts and enforcement authorities have an obligation to interpret national law, as far as possible, in the light of the wording and of the purpose of the Directive[23].

For example, in a recent decision[24] given on appeal in a case concerning an outright prohibition on combined offers contained in the French Consumer Code, the Cour d'Appel de Paris acknowledged its obligation to interpret national provisions in a manner which gives full effect to the provisions of the Directive. The Cour d'Appel ruled that, in the light of the light of the judgment of the Court of Justice in the "Total Belgium" case, it had at its disposal all the elements necessary to set aside the national prohibition in question, without having to make recourse to a preliminary ruling procedure before the Court of Justice.

The full harmonisation character of the Directive

The Directive is based on the principle of full harmonisation. This means that Member States can no longer implement or apply either less or more restrictive or prescriptive consumer protection measures in the area it harmonises. As the Preamble to the Directive explains, in order to remove internal market barriers caused by regulatory disparities and to increase legal certainty for both consumers and businesses, it was necessary to replace existing national systems with a uniform regulatory framework at Community level (see in particular Recitals 5, 12 and 13).

The full harmonisation effects of the Directive have been spelled out in the "Total Belgium" case[25]. The Court of Justice, while examining the compatibility of a Belgian law prohibition on combined offers with the Directive's provisions, 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*". Thus, the Directive was found to preclude a national prohibition of combined offers[26].

There are currently two types of limitations to the full harmonisation effect of the Directive. First, according to Article 3(9), "*in relation to 'financial services' […] and immovable*

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21 See Case 441/74 *Van Duyn v Home Office* [1974] ECR 1337, Case 148/78 *Pubblico Ministero v Tullio Ratti* [1979] ECR 1629 and Case C-62/00 *Marks&Spencer plc v Commissioners of Customs&Excise* [2002] ECR I-6325.

22 CJCE Marshall – Case 152/74; CJCE Paola Facini Dori C 91/92.

23 See Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891 and Case C-106/89 Marleasing SA v La Comercial Internacionale de Alimentacion SA [1990] ECR I-4135.

24 Cour d'Appel de Paris - 14 mai 2009 – France Telecom et Orange c/S.A.S. Free, S.A. Neuf Cegetel et L'Association la Ligue de football professionnel.

25 Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium, and Galatea BVBA v Sanoma Magazines Belgium NV*, not yet reported.

26 See also the Opinion of Advocate General Trstenjak, of 3 September 2009, in Case C-304/08 *Zentrale zur Bekampfung unlauteren Wettbewerbs e.V. v Plus Warenhandelsgesellschaft mbH*, pending. Also relevant is Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v 'Osterreich'-Zeitungsverlag GmbH*, pending.

property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates". Thus, minimum harmonisation applies to these two sectors. As Recital 9 explains, "*financial services and immovable property, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders"*. Consequently, in these sectors, Member States can impose rules which go beyond the provisions of the Directive, as long as they comply with EU law (e.g., in the field of payment services, Directive 2007/64/EC establishes fully harmonised rules).

Second, a temporary derogation from the full harmonisation principle applies to national provisions which implement directives containing minimum harmonisation clauses. According to Article 3(5), for a period of six years from 12 June 2007, Member States shall be able to continue to apply more restrictive or prescriptive national provisions. Thus, Member States may apply existing rules which had been established pursuant to the minimum harmonisation clauses contained in, for example, Directive 98/6/EC on the indication of prices of products offered to consumers[27] or Directive 97/7/EC on distance contracts[28]. However, such measures must be essential and proportionate in attaining the objective of consumer protection envisaged in those measures.

Both limitations will be subject to the Directive's review to be carried out by 12 June 2011 (see Article 18).

Relationship between the UCP Directive and Community sectoral legislation

The Directive is the general law governing unfair commercial practices in business-to-consumer transactions. It covers all B2C commercial practices, unless the Directive explicitly stipulates otherwise such as in the case of conditions of establishment or of authorisation regimes (see Article 3(5)).

Where sectoral legislation is in place and its provisions overlap with the Directive's general provisions, the corresponding provisions of the *lex specialis* will prevail. Article 3(4) of the Directive clarifies 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"*.

Often, such conflicts arise from the fact that the *lex specialis* contains more detailed pre-contractual information requirements, or stricter rules on the way the information is presented to consumers (see Recital 10 of the Directive).

For example, the Air Services Regulation[29] contains specific provisions on the price information to be made available to the general public. According to Article 23 of the Regulation, in addition to the final price, which must include all applicable taxes, charges, surcharges and fees, air carriers should also provide a breakdown of the final price. Therefore, in respect of pre-contractual information regarding prices for air fares, these more specific provisions will apply.

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27 OJ L 80, 18.3.1998, p. 27-31.

28 OJ L 144, 4.6.1997, p. 19-27.

29 Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules on the operation of air services in the Community.

However, the Directive complements these sectoral provisions and fills any remaining gaps in the protection against unfair commercial practices. In respect of air fares, for example, the Directive's provisions come into play to prohibit commercial practices which are likely to deceive the average consumer (such as advertising and marketing of air fares), and practices which constitute aggressive conduct (such as onerous and disproportionate non-contractual barriers imposed on consumers who wish to exercise a contractual right to terminate a contract). Furthermore, the Directive's provisions also complement the provisions of the Air Services Regulation in relation to the information on prices, and require, for example, the disclosure of postal charges, where applicable (see Article 7(4)(c) of the Directive).

Information requirements in the Unfair Commercial Practices Directive and the Services Directive[30]

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

As regards information requirements, this means that the provisions in Article 22 of the Services Directive will apply in addition to the information required in the case of an invitation to purchase under Article 7(4) of the Unfair Commercial Practices Directive. However, Member States will be prevented from imposing national information requirements for invitations to purchase over and above those set out in the Unfair Commercial Practices Directive and in the Services Directive.

1.10. The Relationship between the Directive and self regulation

1.10.1. Provisions of the Directive

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.

[30] 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.

1.10.2. General considerations on the role of self regulation

The Directive recognises the importance of self regulation mechanisms and clarifies the role that code owners and self regulatory bodies can play in enforcement.

In particular, based on Article 10 of the Directive, Member States may, in addition to ensuring effective enforcement of the Directive (as required by Art 11 of the Directive), encourage the control exercised by code owners on unfair commercial practices.

When the rules included 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 with them, such rules may be a useful term of reference for national authorities and courts in assessing whether, in a concrete case, a commercial practice is unfair.

Specific provisions of the Directive on self regulation

The Directive contains several provisions which aim at preventing traders from unduly exploiting the trust which consumers may have in self regulatory codes. The Directive does not provide for specific rules on the validity of a code of conduct but it relies on the assumption that misleading statements about a trader's affiliation or about the endorsement from a self regulatory body may *per se* not only distort the economic behaviour of consumers but also undermine the trust that consumers have in self regulatory codes.

In addition to Article 6, obliging a trader to comply with a code of conduct to which he or she has committed in a commercial communication, the Directive contains specific "black-listed" provisions which aim at ensuring that traders make responsible use of codes of conduct in their marketing activities.

Article 6 (2)

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.

Annex I

1 Claiming to be a signatory to a code of conduct when the trader is not.

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

3. Claiming that a code of conduct has an endorsement from a public or other body which it does not have.

4. 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.

2. THE GENERAL PROVISIONS OF THE DIRECTIVE[31]

2.1. The concept of "transactional decision"

2.1.1. Definitions and general considerations

The Directive's general provisions on misleading and aggressive practices (Articles 5, 6, 7, 8 and 9) cover unfair commercial practices which are capable of distorting the consumers' economic behaviour.

According to Article 2 (e) of the Directive **material distortion** of the consumer's behaviour means:

> *"...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;"*

To materially distort the consumer's economic behaviour means that a commercial practice impairs the average consumer's ability to make an informed decision and, in addition, that such impairment is significant enough to change the decisions the average consumer makes.

The concept of **transactional decision** is crucial in applying the material distortion test to real cases and it is defined in Article 2 (k) of the Directive:

> *" '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;"*

The wording used by the Directive in Art 2 (k) ("any decision…") 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 or a service.

2.1.2. Decision to purchase

The undisputed category of decisions covered by the Directive is decisions to purchase a product or contract a service or decisions not to do so. But placing an order, making a reservation, accepting a commercial offer are also actions which clearly require a transactional decision in the sense of the Directive.

On this point, it should be noted that a decision to purchase taken by a consumer will qualify as a transactional decision even if such determination does not lead to or is not followed by the conclusion of a valid transaction between the consumer and the trader (i.e. a binding purchase or service agreement under the national contract law of a Member State).

Example: A consumer sees a very attractive promotional offer to buy a digital camera. This is exactly the type of camera he has been looking for and he decides to buy it. He goes to the

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[31] In relation to the general functioning of the Directive see also the Directive Flowchart contained in Annex I to these Guidelines.

shop where he finds out, to his disappointment, that the camera is available at that price only if he subscribes to a photography course. He then changes his mind and decides not to purchase the camera any longer. He complains to the local authorities claiming that the advertisement was misleading. The trader claims that, although in the initial advertisement there was no mention of the specific conditions of the offer (i.e. the need to subscribe to a photography course), all the information was available at the store and that, since the consumer did not buy the camera, the initial advertisement did not cause the consumer to take a transactional decision (i.e. the material distortion test is not met).

In the example above there are three transactional decisions which the consumer took prompted by the information provided by the trader: the decision to purchase, the decision to travel to the shop and finally the decision not to purchase. The above shows that a consumer does not need to make a purchase (e.g. by placing an order) in order to take a transactional decision in the sense of the Directive. First of all, based on the Directive, the decision not to purchase also constitutes a transactional decision. Secondly, as it is explained below, the consumer may take several decisions other than a decision to purchase (or not to purchase) but which can, nevertheless, qualify as transactional decisions (e.g. travelling to the trader's premises).

2.1.3. The meaning of transactional decision

The Directive stipulates in very plain language that it applies *"…to unfair business-to-consumer commercial practices…before, during and after a commercial transaction in relation to a product*" (Article 3).

There is a wide spectrum of transactional decisions which may be taken by the consumer in relation to a product or a service other than a decision to purchase (or not to do so). 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 the a product's life or the final use of a service.

Pre-Purchase decisions

As shown in the example above, most common activities which consumers carry out in a "pre-purchase" stage are to be considered transactional decisions. These include, for instance, a decision to travel to a sales outlet or shop, the decision to enter a shop (e.g. after reading a poster on the shop window or a billboard in the street), the decision to agree to a sales presentation by a trader or his or her representatives and the decision to continue with a web booking process. Further examples include a consumer's decision to agree to a "free security survey" of his home, which is genuinely free, but whose sole purpose is to allow the trader to persuade the consumer to buy an alarm system.

Post-Purchase decisions

Decisions which consumers take after having purchased a product or contracted/subscribed for a service can also qualify as transactional decisions. The main category of post-purchase transactional decisions are those which relate to the exercise of consumers' contractual rights, such as the right of withdrawal, cancellation, the right to terminate a service contract or the right to change the product or switch to another trader.

For example, a consumer purchases a product and the trader makes him believe that he must purchase a warranty to have rights in case of defects.

The implications of having this broad concept of transactional decision are significant. It allows an extensive application of the Directive to a variety of cases where the impact of the unfairness of the trader's behaviour does not cause the consumer to enter a transaction or a service contract. Following this approach, 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 enter a shop, spend more time on the Internet engaged in a booking process or decide to not switch to another trader or product.

As such, the Directive does not limit the transactional decision test to the evaluation as to whether the consumer's economic behaviour (i.e. its transactional decisions) has actually been distorted. It requires an assessment of whether that commercial practice is capable (i.e. "likely") to have such an impact on the average consumer.

National enforcers should therefore investigate the facts and circumstances of an individual case (i.e. *in concreto*), but assess only the "likelihood" of the impact of the practice on the transactional decision of the average consumer (i.e. *in abstracto*)[32].

For example, the fact that there is no evidence that a misleading commercial communication has actually induced consumers to make a further click to proceed with an online booking does not prevent a national authorities from considering the transactional decision test as fulfilled if the likelihood of that happening (i.e. the risk) is real.

2.2. The average consumer

2.2.1. Provisions of the Directive

Article 5 - Prohibition of unfair commercial practices[33]

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**.*

[…]

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***

[32] See also moreover 2.2. The Average Consumer.

[33] Likewise, Articles 6, 7 and 8 of Directive 2005/29/EC refer to the concept of average consumer.

***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 judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case**.*

2.2.2. Case law and Guidance

The Directive takes as the benchmark for assessing the impact of a commercial practice the notion of the average consumer, a concept developed by the Court of Justice.

The Court of Justice, when weighing the risk of misleading consumers against the requirements of the free movement of goods, has held that, "…*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***."[34]

The average consumer, in the case law of the Court of Justice is a critical person, conscious and circumspect in his or her market behaviour. He or she should inform themselves about the quality and price of products and make efficient choices. 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[35]. The average consumer will not attribute to goods bearing the marking "dermatologically tested" any healing effects which such goods do not possess[36]. However, the average consumer under the Directive is not somebody who needs little 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 Directive 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.

It is, first of all, based on the idea that, for instance, a national measure prohibiting claims (e.g. "puffery"[37]) that might deceive only a very credulous, naïve or cursory consumer would be disproportionate to the objectives pursued and create an unjustified barrier to trade.[38]

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

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

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

37 "Puffery" is a subjective or exaggerated statement about the qualities of a particular product, which is not meant to be taken literally, such as "best coffee in the world", or "it gives you wings".

38 For vulnerable consumers see 2.3 below.

Secondly, it is a concept which should be interpreted in line with Art 114 TFEU which provides for a high level of consumer protection. To achieve this, national authorities and courts should take into account various specific factors to complement the average consumer test.

The concept, which was not applied by certain Member States' courts, was also codified by the Directive to give national authorities and courts common criteria, to enhance legal certainty and to reduce the possibility of divergent assessments of similar practices across the EU.

Factors influencing the level of knowledge of the average consumer

The Court of Justice and the General Court (formerly known as the Court of First Instance), in assessing the likelihood of confusion of certain trade marks, have given some indications as to the behaviour of the average consumer and the fact that his/her behaviour may be influenced by other factors. This can apply by analogy to the concept of the average consumer in the Directive.

According to the General Court, *"[t]he average consumer normally perceives a mark as a whole and does not proceed to analyse its various details…In addition, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but has to place his trust in the imperfect image of them that he has retained in his mind. It should also be borne in mind that* ***the average consumer's level of attention is likely to vary according to the category of goods and services in question.***"[39]

And, according to the Court of Justice, *"among the factors to be taken into account in order to assess whether the labelling at issue in the main proceedings may be misleading,* ***the length of time for which a name has been used is an objective factor which might affect the expectations of the reasonable [average] consumer***"[40].

An example of this approach at a national level can be found in a recent judgment of an Italian administrative tribunal which, in relation to a decision of the Italian enforcement authority (ACGM), confirmed that:

"*the level of knowledge of the average consumer cannot be assessed in merely statistical terms…social, cultural and economic factors, including the economic context and market conditions in which the consumer operates must be taken into account…the relevance of the characteristics of the goods and/or services together with the specifics of the relevant market sector cannot be disregarded.* "[41]

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39 See e.g. Joined Cases T-183/02 and T184/02 *El Corte Inglés v Office for Harmonisation in the Internal Market* (*Trade Marks and Designs*) ("Mundicolor") [2004] ECR II-00965, para 68. See also case T-20/02 *Interquell GmbH v Office for Harmonisation in the Internal Market* (*Trade Marks and Designs*) ("Happydog") [2004] ECR II-1001, para 37.

40 Case C-446/07 *Alberto Severi v Regione Emilia-Romagna*, judgement of the Court of Justice of 10 September 2009, para 62.

41 Tribunale Amministrativo Regionale del Lazio, Sezione I, Sentenza del 25 Marzo 2009 caso *Enel S.p.A. contro Autorità Garante della Concorrenza e del Mercato* .

The case concerned misleading and aggressive commercial practices in the promotion and supply of electricity in Italy, after the liberalisation of the market. The Italian administrative court found that in the electricity market, the transition from a monopoly to a liberalized market not only altered the relationship between offer and demand, but had also increased the knowledge gap between consumers and traders. The court considered that, in such a context, the average consumer (i.e. somebody who is, in principle, reasonably well informed on the market conditions) could not be expected to have or gain the necessary knowledge or information to fill such a gap.

Essentially, the court took into account the fact that, in the electricity retail market, the average consumer had not yet adapted to the new market situation and that the reasonable level of knowledge one could expect from the average consumer had to be fixed accordingly.

Social, linguistic and cultural factors

In certain cases, social, linguistic and cultural features that are peculiar to a Member State may justify a different interpretation of the message communicated in the commercial practice by the competent authority or court.

In case of misleading advertising in the field of cosmetics the Court of Justice 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'* "[42]

Therefore, on the basis of the average consumer test and despite the Directive's full harmonisation character, requiring the foreign trader to provide an additional piece of information could be justified on the basis of social, cultural or linguistic factors[43]. In other words, because of these factors, the consumers of the country of destination, unlike those in the country of origin, would be misled by the omission of such an item.

National courts are those competent to make an assessment of such cultural, linguistic and social factors which warrant a different assessment of the unfair character of a commercial practice. All relevant factors must be taken into account, such as the circumstances in which products are sold, the information given to consumers, the clarity of such information, the presentation and content of advertising material, and the risk of error in relation to the group of consumers concerned[44].

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

43 See Case C-313/94 *F.lli Graffione SNC v Ditta Fransa* [1996] ECR I-06039, para 22: "the possibility of allowing 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. As the Advocate General has observed in paragraph 10 of his Opinion, 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."

44 Case C-313/94 *F.lli Graffione SNC v Ditta Fransa* [1996] ECR I-06039, para 26.

The fact that a commercial practice is ordinarily employed in other countries without causing consumer protection concerns can be an element in assessing whether such a practice is unfair or not[45].

An additional point which national authorities and court should consider when assessing actual cases is that the average consumer test does not follow a statistical approach. A national court should be able to determine whether a practice is liable to mislead the average consumer exercising its own judgment by taking into account the presumed expectations of an average consumer without, in principle, having to commission an expert's report or a consumer research poll.[46]

Paragraph 29 of the Opinion of Advocate-General in the "Estée Lauder" case, contains a basic but very useful description of how the average consumer test should be structured:

*"…the test to be applied to any case of restriction on the sale or marketing of a product on the ground of protecting the consumer from misleading labelling or other accompanying information is whether its presence on the market would, in some material respect, be likely to mislead the hypothetical consumer so defined…**The test should enable the national court to assess the facts of each case against this standard on the basis of its own judgment of how such a consumer would be affected**. The standard involved, being based on a cumulation of four factors, is clearly **a high one**. Having regard to all the relevant surrounding circumstances of the case, and especially the selling arrangements employed by the vendor, **the national court must be satisfied that the average consumer**, who is reasonably well informed and observant about the product in question and who exercises reasonable circumspection when using his critical faculties to assess the claims made by or in respect of it, **would be confused**. **The approach is thus not statistical**. Market surveys may, in certain cases, be of assistance, although it must be remembered that they are subject to the frailties inherent in the formulation of survey questionnaires and often subject to diverging interpretation as to their significance. Accordingly, **they do not absolve the national court from the need to exercise its own faculty of judgment based on the standard of the average consumer as defined in Community law**. In conclusion, the important point is that a single Community-law test is now available and it would, therefore, be inappropriate for a national court to base its final decision as to confusion on statistical evidence regarding the probable effect on 10% to 15% of potential consumers*."

National courts should take into account the fact that, the Directive not only codifies this case law but also further refines it by adapting the average consumer test when the interests of specific groups of consumers are at stake (Art 5(2)(b) of the Directive). This means that when the practice is addressed at a specific group of consumers, be they children or rocket scientists, national authorities and courts must assess its impact from the perspective of the average member of the relevant group.

For example, in the case of an advertisement for a ring tone for teenagers, one will have to take into account the expectations and the likely reaction of the average teenager of the group

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45 See Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratories SNC et Estée Lauder Cosmetics GmbH.* [1994] ECR I-00317, para 21.

46 Case C-210/96 Gut Springenheide and Tusky v Oberkreisdirektor Steinfurt (hereinafter 'Gut Springenheide') [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.

targeted and disregard those of an exceptionally immature or mature teenager belonging to the same group.

2.3. Vulnerable consumers

2.3.1. Provisions of the Directive

Article 5 - Prohibition of unfair commercial practices[47]

[…]

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 legislator decided not to adopt the concept of "weak and vulnerable" consumer as the generally applicable standard. Nevertheless, the Directive is based on the idea that it is appropriate to protect all types of consumers from unfair commercial practices and it, therefore, contains provisions to protect consumers whose characteristic make them particularly vulnerable to unfair commercial practices.

When commercial practices are likely to materially distort the economic behaviour of only a clearly identifiable group of consumers who, for various reasons, are particularly vulnerable to the practice or the underlying product in a way that the trader could reasonably expect to foresee, then the practices must be assessed from the perspective of the average member of that vulnerable group.

2.3.2. Vulnerable Consumers – criteria

As provided for in Article 5(3) of the Directive, vulnerable consumers are those more exposed to a commercial practice or a product because of their (a) mental or physical infirmity, (b) age or (c) credulity.

The reasons mentioned by Article 5 as the basis to establish the vulnerability of a specific category of consumers are listed indicatively and cover a wide range of situations.

[47] Likewise, Articles 6, 7 and 8 of Directive 2005/29/EC refer to the concept of average consumer.

(a) *infirmity* (mental or physical): this includes sensory impairment, limited mobility and other disabilities. For example, consumers who need to use wheelchairs might be a vulnerable group in relation to advertising claims about ease of access to a holiday destination or entertainment venue, or those with a hearing impairment may be a particularly vulnerable group in relation to advertising claims about 'hearing aid compatibility' in a telephone advertisement.

(b) *age*: it may be appropriate to consider a practice from the perspective of an older or younger consumer.

Consumers who may be more vulnerable to certain practices because of their age are elderly people. Aggressive door-to-door selling methods is an example of a practice which may not affect the average consumer but which is likely to intimidate a certain group of consumers, in particular the elderly, who may be vulnerable to pressure selling. The Dutch and German enforcement authorities have also reported the practice of "bus trips" organised by traders to market their products during the trip, which are particularly attractive to elderly people because of their entertaining nature. The elderly might also be particularly vulnerable to practices connected to certain products, such as burglar alarms.

Children might be particularly vulnerable to advertisements about videogames. Despite the fact that a substantial part of the target audience is constituted by adults, a trader could reasonably foresee that such advertisements may have an impact on a vulnerable category of consumers such as children. For example, the compatibility of a videogame with a specific device may be sufficiently clear to an adult consumer but, due to the way the information is provided, it may still confuse children[48].

Teenagers represent another category of consumers who are often targeted by rogue traders. An example of this is promoting products which are particularly appealing to teenagers in a way which exploits their lack of attention or reflection due to their immaturity. 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.

(c) credulity: this covers groups of consumers who may more readily believe specific claims. The term is neutral, so the effect is to protect members of a group who are for any reason open to be influenced by certain claims. An example might be members of a group who, because of particular circumstances, might believe certain claims more readily than others.

A dishonest trader may sell winning lottery number on his website which is open to the general public, although he knows that only the credulous consumers will be attracted to his site and lured into the scam.

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[48] Please note that pursuant to Directive 89/552/EC as amended by Directive 2007/65/EC, audiovisual commercial communications shall not cause physical or moral detriment to minors and therefore shall not, inter alia, directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, exploit the special trust minors place in parents, teachers or other persons, directly encourage minors to persuade parents or others to purchase the goods or services advertised.

2.3.3. The "foreseeability" requirement

The vulnerable consumer test applies if the practice affects the economic behaviour of a vulnerable group of consumers "in a way which the trader could reasonably be expected to foresee".

This criterion adds an element of proportionality in assessing the effects of a commercial practice on vulnerable consumers and the professional diligence which reasonably can be expected from a trader. It aims at holding traders responsible only if the negative impact of a commercial practice on a category of vulnerable consumers is foreseeable.

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 mitigate such impact.

Some consumers because of their extreme naivety or ignorance may be misled by, or otherwise act irrationally in response to even the most honest commercial practice. There may be, for example, a few consumers who may believe that "Spaghetti Bolognese" are 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.

The aim of the provision is to capture cases of dishonest market practices (e.g. outright frauds or scams) which reach the majority of consumers, but in reality are devised to exploit the weaknesses of certain specific consumer groups.

2.4. Misleading actions

2.4.1. Provisions of the Directive

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, trade marks, 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.

2.4.2. General considerations

A misleading action occurs when a practice misleads through the information it contains, or through the deceptive presentation of that information, and causes or is likely to cause the average consumer to take a different transactional decision than he or she would have taken otherwise.

The definition of a misleading action used in the Directive has taken into account the current state of knowledge of how consumers take decisions in the market space. For example, new 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 serious impact on how consumers respond to it. The Directive has therefore explicit provisions to cover situations of practices which are capable of deceiving consumers "in any way, including overall presentation", even if the information provided is factually correct.

It is then for the national courts and administrative authorities to assess the misleading character of commercial practices by reference, among other considerations, to the current state of scientific knowledge, including the most recent findings of behavioural economics. Thus, for example, the use of defaults (choices consumers are presumed to make unless they

expressly indicate otherwise) or the provision of unnecessarily complex information may, according to the circumstances of the case, prove misleading.

The Directive envisages three types of misleading actions:

- providing general misleading information;
- creating confusion with competitors' products;
- failing to honour firm and verifiable commitments made in a code of conduct.

2.4.3. General misleading information

Misleading price information and the use of recommended retail prices

Article 6 prohibits misleading actions which are capable of deceiving the average consumer on a wide range of elements including "*the price or the manner in which a price is calculated, or the existence of a specific price advantage*" (para 1(d)).

Under Article 6(1)(d), price information should not contain false information and be therefore untruthful or should not deceive or be likely to deceive the consumer in any way, including in the overall presentation, even if the information is factually correct.

Recommended retail prices are prices that the manufacturer or another party in the supply chain recommends that the retailer sells a product for. Under competition law recommended retail prices are questionable and can be used as indirect means to achieve resale price maintenance, which is a prohibited practice[49].

Under the Directive, recommended retail prices may contravene Article 6(1)(d) given that they are often illusionary. This can happen when traders use unreasonably high recommended retail prices for the purpose of price comparisons and, as a result, give consumers the impression that they are offering them a significant discount. Experience shows that very often recommended retail prices are not implemented, especially in markets where there is a healthy competition between retailers, who remain free to depart from the manufacturer's recommendation and to implement a price that can be substantially lower (or higher) than the recommended one.

Drawing on national experience in this area, it is worth noting that certain national guidelines and codes suggest that the main criteria for assessing whether a price comparison is misleading or not lies in the possibility of showing that a recommended retail price is in line with the general market price for the product or has been applied in the market for a significant period of time, or both.

[49] See Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L 336, 21–25 and Commission Notice Guidelines on Vertical Restraints [2000] OJ C 291, 1–44. In particular para 48, 223-225.

Some examples from the guidelines of the Finnish Consumer Ombudsman

Recommended retail price (RRP)

The recommended retail price means the price that the manufacturer or a previous level in the supply chain recommends and that the consumer is generally charged for the same product. (Market Court 1982:19, 1989:7)

Comparison with the general price level

When a retail shop compares its own prices with the recommended retail price, it is a question of comparing its own prices with the general price level. It is misleading for a retail shop to call its own selling prices the recommended retail prices.

When it is not a case of advertising a reduced price, a retail shop may only compare its own sales price with the product's recommended retail price if a consumer is actually charged the recommended retail price for a similar good in another retail shop (Market Court 1982:19, 1989:7).

If a retail shop uses a comparison of this kind, it must be able, if necessary, to demonstrate by means of a price survey, at local level at a minimum, that consumers are genuinely charged the recommended retail price, and that it corresponds to the general price level.

UK, DTI Pricing Practices Guide

Price comparisons generally

1.1.1. If you choose to make price comparisons, you should [ ] be able to justify them, and to show that any claims you make are **accurate and valid** – in particular, that any price advantage claimed is real.

1.1.6 Use of initials or abbreviations to describe the higher price in a comparison should be avoided except for:

(a) the initials "RRP" to describe the recommended retail price; or

(b) the abbreviation "man. rec. price" to describe a manufacturer's recommended price.

You should write all other descriptions out in full and show them clearly and prominently with the price indication.

1.1.7 Sections 1.2 to 1.6 of this Guide give advice on particular types of price comparison.

1.6 Comparisons with "Recommended Retail Price" or similar

1.6.1 You should not use a recommended retail price, or similar, as a basis of comparison which is not genuine, or if it differs significantly from the price at which the product is generally sold.

1.6.2 You should not use an "RRP" or similar for goods that only you supply.

1.7 Pre-printed prices

1.7.1 Reductions stated on the manufacturer's packaging (e.g. "flash packs" such as "10p off RRP") should be passed on to consumers.

1.7.2 You are making a price comparison if goods have a clearly visible price already printed on the packaging which is higher than the price you will charge for them. Such pre-printed prices are, in effect, recommended prices (except for retailers' own label goods) and you should have regard to section 1.6.

2.4.4. Confusing marketing

The Directive prevents traders from providing false information on, *inter alia*:

(a) the main characteristic of the product (including method and date of manufacture, geographical or commercial origin);

(b) 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 property rights or his awards and distinctions.

Under the Directive, a commercial practice will also be regarded as misleading if it involves any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor and, as a result, distorts the economic behaviour of the average consumer.

In this connection it should be noted that a commercial practice will be regarded as unfair in case of misleading presentation of factually correct information.

Article 6(2) and 6(2)(a) of the Directive prohibits "*any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor"* if, in its factual context, taking into account all its features and circumstances, it causes or it is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

A practice which raises issues of compatibility with the above provisions of Article 6 of the Directive is "copycat packaging".

"Copycat packaging" refers to the practice of designing the packaging of a product (or its "trade dress" or "get up") to give it the general "look and feel" of a competing well-known brand (typically the market leader). Copycat packaging is distinct from counterfeiting as normally it does not involve copying trade marks.

The risk posed by copycat packaging is consumer confusion, and, consequently, the distortion of their commercial behaviour.

Consumer deception takes a number of forms and each is explained in more detail below:

– outright confusion – the consumer buys the copycat product mistaking 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; and

– deception over equivalence or quality – again, the consumer recognises the copycat is different but believes, due to the similar packaging, that the quality is the same or closer to what they would have assumed if the packaging were different.

Deception over quality or nature

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 that 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).

For example, a **trader** names or brands his new sunglasses so as to very closely resemble the name or brand of a competitor's sunglasses. If the similarity is such as to confuse the **average consumer** making him or her more likely to opt for the new sunglasses when, without such confusion, he or she otherwise would not have done so, this practice would breach the Directive.

The Directive also contains a list of unfair commercial practices to be considered unfair in all circumstances.

Annex I of the Directive (Commercial Practices which are prohibited in all circumstances)

The Directive contains some specific prohibitions concerning trade marks, brands and related features:

n. 3 Diplaying a trust mark, quality mark or equivalent without having obtained the necessary authorization.

n.4 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.

n. 13 Promoting a product similar to another 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.

2.5. Misleading environmental claims

2.5.1. Introduction / Definition

The expressions "environmental claims" or "green claims" refer to the practice of suggesting or otherwise creating the impression (in the context of a commercial communication, marketing or advertising) that a product or a service, is environmentally friendly (i.e. it has a positive impact on the environment) or is less damaging to the environment than competing goods or services. This may be due to, for example, its composition, the way it has been

manufactured or produced, the way it can be disposed off and the reduction in energy or pollution which can be expected from its use. When such claims are not true or cannot be verified this practice can be described as "green washing".

Consumers may weigh environmental considerations when purchasing products. Increasingly, in planning their advertising and marketing campaigns traders are taking these factors into account and environmental claims have become a powerful marketing tool. However, in order for environmental claims to be informative for consumers and to be effective in promoting goods and services with lower environmental impacts, it is imperative that they are clear, truthful, accurate and not misleading. They must also not emphasise one environmental issue and hide any trade-offs or negative impacts on the environment. The use of truthful environmental claims is also important in order to protect traders who make genuine claims from unfair competition from those traders who make unfounded environmental claims[50].

There is no EU legislation specifically harmonising environmental marketing. Environmental claims are partly covered by specific community legislation regulating the environmental performance of a category of products and prohibiting the misleading use of the claim, logo or label used in reference to this specific legislation. These laws provide for specific rules which take precedence over the broader provisions of the Directive as explained in section 1.9 above. Examples of such legislation are given in Section 2.5.2 below.

Outside those aspects covered by specific EU legislation, the general provisions of the Directive are to be used when assessing environmental claims and establishing whether a claim is misleading either in its content or in the way it is presented to consumers.

This was highlighted when, on 4 December 2008, the Environment Council adopted conclusions on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan. Under point 18 of the conclusions, the Council "*INVITES the Member States to fully implement the Directive on unfair commercial practices with regard to environmental claims; INVITES the Commission to include environmental claims in any future guidelines on the Directive on unfair commercial practices".*

2.5.2. Overview of specific EU legislation on environmental claims

(a) Organic labels are defined and regulated under Regulation (EC) n°834/2007[51] which provides for a list of terms and abbreviations (such as "bio" or "eco") that can be used in the labelling, advertising material or commercial documents of products which satisfy the requirements set out under this Regulation.

The misleading use of such labels is prohibited under article 23 of the Regulation*: "2. The terms referred to in paragraph 1 shall not be used anywhere in the Community and in any Community language for the labelling, advertising and commercial documents of a product which does not satisfy the requirements set out*

[50] See for example the recent survey on Green expectations – Consumers' understanding of green claims in advertising, by Consumer Focus, where it appears that 58% of consumers they consulted think that a lot of companies pretend to be green just to charge higher prices. To be consulted under: http://consumerfocus.org.uk/en/content/cms/Publications___Repor/Publications___Repor.aspx

[51] Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91, OJ L 189, 20.7.2007, p. 1–23

under this Regulation, unless they are not applied to agricultural products in food or feed or clearly have no connection with organic production.

Furthermore, any terms, including terms used in trademarks, or practices used in labelling or advertising liable to mislead the consumer or user by suggesting that a product or its ingredients satisfy the requirements set out under this Regulation shall not be used.

3. The terms referred to in paragraph 1 shall not be used for a product for which it has to be indicated in the labelling or advertising that it contains GMOs, consists of GMOs or is produced from GMOs according to Community provisions."

The Regulation also provides for rules concerning processed food and for compulsory indications and logos.

(b) Energy labelling is regulated by Directive 92/75/EEC52. Household appliances offered for sale, hire or hire-purchase must be accompanied by a fiche and a label providing information relating to their consumption of energy (electrical or other) or of other essential resources.

Misleading use of such labels is prohibited under article 7(b) of the Directive:

"if this is likely to mislead or confuse, the display of other labels, marks, symbols or inscriptions relating to energy consumption which do not comply with the requirements of this Directive and of the relevant implementing directives is prohibited. This prohibition shall not apply to Community or national environmental labelling schemes".[53]

(c) The labelling of tyres will be regulated by the Regulation on the labelling of tyres with respect to fuel efficiency and other essential parameters54 which provides that tyre manufacturers will have to declare the fuel efficiency, wet grip and external rolling noise performance of C1, C2 and C3 tyres (i.e. tyres mainly fitted on passenger cars, light and heavy duty vehicles). From 1 November 2012, these

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52 Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances, OJ L 297, 13.10.1992, p. 16–19

53 The proposal of a recast of Directive 1992/75/EEC is currently at the final stage of the legislative process. When it enters into force, it will give a mandate to the Commission to adopt labeling measures on specific products. The scope of the labeling Directive will be extended to all energy-related products which, when offered for sale, hire or hire-purchase, will have to be accompanied by a fiche and a label providing information relating to the product's energy consumption and, if relevant, other resources. The well-known A-G scale (and for fridges, A+ and A++ classes) will remain in use, with the possibility to open the scale up to classes A+/A++/A+++ and the consumers will, at all times, be aware of the best available class on the market as the Directive will require that the dark green color should always indicate the best class. Unauthorized use of the label will be prohibited and Member States will be able to put in various penalties in this case when implementing the Directive. The new Directive also reinforces market surveillance provisions in line with Regulation n° 765/2008/EC that aim to minimize non-compliance. A new element of the recast is the introduction of mandatory advertising: "any advertisement for a specific model of energy-related products covered by an implementing measure under this Directive includes, where energy-related or price information is disclosed, a reference to the energy efficiency class of the product" (Article 4(2)(a)).

54 The Regulation was adopted on 25 November 2009. It should be published in the OJ beginning of January 2010 and will enter into force 20 days after its publication.

performances will be displayed at the point of sale by means of a label in printed format displayed in the immediate proximity of the tyres at the point of sale or a sticker attached to the tyre tread. According to Article 4 and 5 of the Regulation, the performance of tyres will also have to be stated on or with the bill delivered to end-users when they purchase tyres as well as on technical promotional literature such as catalogues, leaflets or web marketing.

(d) Fuel and CO2 labelling: under Directive 1999/94/EC[55] a fuel economy label must be displayed next to all new passenger cars at the point of sale. This label must be clearly visible and meet certain requirements set out in Annex I. In particular, it must contain the official data on fuel consumption, expressed in litres per 100 kilometres or in kilometres per litre (or in miles per gallon), and of CO2 emissions in g/km.

Article 7 provides that *"The Member States shall ensure that the presence on labels, guides, posters or promotional literature and material referred to in Articles 3, 4, 5 and 6 of other marks, symbols or inscriptions relating to fuel consumption or CO2 emissions which do not comply with the requirements of this Directive is prohibited, if their display might cause confusion to potential consumers of new passenger cars.*"

Besides this, Annex IV provides for prescriptive rules regarding promotional literature for cars:

"The Member States must ensure that all promotional literature contains the official fuel consumption and official specific CO2 emissions data of the vehicles to which it refers. This information should, as a minimum, meet the following requirements:

1. be easy to read and no less prominent than the main part of the information provided in the promotional literature;

2. be easy to understand even on superficial contact;

3. official fuel consumption data should be provided for all different car models to which the promotional material covers. If more than one model is specified then either the official fuel consumption data for all the models specified is included or the range between the worst and best fuel consumption is stated. Fuel consumption is expressed in either liters per 100 kilometers (l/100 km), kilometers per liter (km/l) or an appropriate combination of these. All numerical data are quoted to one decimal place.

Such values may be expressed in different units (gallons and miles) to the extent compatible with the provisions of Directive 80/181/EEC.

If the promotional literature only contains reference to the make, and not to any particular model, then fuel consumption data need not be provided."

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[55] Directive 1999/94/EC of the European Parliament and of the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO2 emissions in respect of the marketing of new passenger cars, OJ L 12, 18.1.2000, p. 16–23

(e) Fuel mix disclosure is required by the Electricity Directive 2003/54/EC[56] which provides for an obligation on Member States to ensure that electricity suppliers specify in or with the bills and in promotional material made available to customers:

"(a) the contribution of each energy source to the overall fuel mix of the supplier over the preceding year;

(b) at least the reference to existing reference sources, such as web-pages, where information on the environmental impact, in terms of at least emissions of the CO2 and the radioactive waste resulting from the electricity produced by the overall fuel mix of the supplier over the preceding year is publicly available."

With respect to electricity obtained via an electricity exchange or imported from an undertaking located outside the EU, aggregate figures provided by the exchange or the undertaking in question over the preceding year may be used.

(f) Eco-labels may be awarded to products which meet certain environmental requirements during the life cycle of the product under Regulation 1980/2000[57] (currently being recast).

Article 10(1) of the recast new Regulation provides that "Any false or misleading advertising or use of any label or logo which leads to confusion with the Community Ecolabel shall be prohibited".

2.5.3. The Directive and misleading environmental claims

The Directive does not provide for specific rules in relation to environmental marketing and advertising. However, its provisions apply to all claims made in the context of business-to-consumer commercial practices, including those related to the environment.

As stated in Recital 10 of the Directive, it indeed "*provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products*".

The Directive does not discourage the use of green claims and provides a legal basis to make sure that traders use green claims in a credible and responsible manner. The application of the provisions of the Directive to environmental claims can be summarised in two main principles:

(a) Based on the Directive's general clause, traders must, above all, present their green claims in a specific, accurate and unambiguous manner;

(b) Traders must have scientific evidence to support their claims and be ready to provide it in an understandable way in the case that the claim is challenged.

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[56] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, *OJ L 176, 15.7.2003, p. 37–56.*

[57] Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community eco-label award scheme, OJ L 237, 21.9.2000, p. 1–12.

2.5.4. Annex I prohibits certain misleading environmental claims

Under Annex I of the Directive ("black list"), the following practices are always considered unfair, and therefore prohibited, regardless of the impact they have on the consumer's behaviour:

– n°2: *displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.*

  Example: using any community or national label (e.g.: Nordic Swan label, Blue angel, or NF environment) without authorisation.

– n°4: *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.*

  Example: claiming that a product has been approved by an environmental agency, an NGO or a standardisation body when this is not the case.

– n°1: *claiming to be a signatory of a code of conduct when the trader is not;*

  Example: a trader displaying on his website that he is a signatory of code of conduct relating to the product's environmental performance when this is not the case.

– n°3: *claiming that a code of conduct has an endorsement from a public or other body which it does not have.*

  Example: a trader claiming that the code of conduct of his car-manufacturing company is endorsed by the national environment agency, ministry or a consumers' organisation when this is not the case.

2.5.5. The application of the Directive's general provisions to misleading environmental claims

Under Article 6(1) (a) and (b) of the Directive:

"*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 (…) and causes or is likely to cause him to take a transactional decision that he would not have taken otherwise*", in relation to one or more of the following elements: *"(a) (…) the nature of the product; (b) the main characteristics of the product such as its (…) benefits, risks, composition, (…) method (…)of manufacture, (…) fitness for purpose, (…) geographical or commercial origin or the results to be expected from its use, or the results and material features or tests or checks carried out on the product;*"

This provision applies to commercial communications including environmental claims (such as text, logos, pictures and use of symbols). It provides for a case-by-case assessment of the practice, the content of the environmental claim and its impact on the average consumer's purchasing decision.

Two different situations may occur:

(i) Objective misleading practice: the environmental claim is misleading because it contains false information and is therefore untruthful, in relation to one of the items of the list provided for by Article 6(1).

Example: use of the term "biodegradable" when that is not the case (e.g. on a product for which no tests have been carried out); use of the term "pesticides-free" when the product actually contains some pesticides.

In conjunction with Article 12 of the Directive, this means that any environmental claims must be made on the basis of evidence which can be verified by the competent authorities.

(ii) Subjective misleading practice: the environmental claim is misleading because it deceives or is likely to deceive the average consumer, even if the information contained therein is factually correct.

This situation relates more to the way environmental claims are presented and put in context and the impression the commercial communication produces on consumers, suggesting him an environmental benefit which may turn out to be misleading.

Example: advertisement showing a car in a green forest; use of natural objects (flowers, trees) as symbols; use of vague and general environmental benefits of a product ("environmentally friendly, green, nature's friend, ecological, sustainable"); greening of brand names or of a product's name.

Example: a manufacturer of a washing machine claims that his new model reduces water usage by 75%. This may have been true in certain laboratory conditions but within an average home environment it only reduces water by 25%.

Example: a food product is claimed to be produced in an environmentally friendly manner, based on a label or certification scheme which in fact only ensures that the farmer complies with the environmental baseline under EU law (cross-compliances).

– Clarity and accuracy of the claims are important criteria for the assessment by national enforcers. In particular, it should be mentioned in a way to be clear for the average consumer:

  – whether the claim covers the whole product or only one of its components (e.g.: recyclable packaging where the content is not recyclable or a part of the packaging if the packaging is only partially recyclable);

  – whether the claim refers to a company (applying to all its products) or only to certain products;

  – if the claim does not cover the product's entire life cycle, which stage of the life cycle or the product characteristics the claim exactly covers;

– The environmental claim, label or symbol used must not cause confusion with official marks.

– The assessment should also take into account the product's nature. For certain products which are, in any case, harmful for the environment (cars, pesticides, products containing toxic substances), environmental claims related to one aspect of the product should not give the misleading impression that the product itself is environmentally friendly

  Example: a French appeal court has confirmed recently that a pesticide labelled as "biodegradable" and "good for environment", where several of the substances contained in the pesticide are still harmful to soil, was misleading advertising[58].

– Useful criteria and examples can be found in the Commission's non-binding guidelines published in 2000 for making and assessing environmental claims[59,] based on the international standard ISO 14201-1999. These guidelines contain references to environmental claims which should be deemed misleading, for example:

  – claims based on the absence of a harmful product (e.g. chemical) when the product category does not generally include this harmful product;

  – inappropriate use of "…-free" claims, when they refer to substances that have never been associated with the product or, if the substance referred to used to be associated with the product but is no longer (e.g. deodorant spray claiming to be "CFC-free", where this requirement is legally mandatory for all similar products).

2.5.6. Breaches of codes of conduct containing environmental commitments may also be considered misleading actions.

Under article 6(2) (b) of the Directive:

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

- the commitment is not aspirational but is firm and is capable of being verified,

- and the trader indicates in a commercial practice that he is bound by the code. "

Breaches of codes of conduct containing commitments in relation to environment protection by an enterprise which has subscribed to such a code can be tackled under this provision.

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.

[58] France - Cour d'appel de Lyon, 29 October 2008, Case "Roundup" (Monsanto – Scotts France)

[59] Guidelines for making and assessing environmental claims, December 2000, European Commission – ECA SA, Dr Juan R Palerm.

However, it is found that the products advertised on the website contain wood from a deforested area.[60]

The average consumer would expect code members to sell products which comply with their code. National enforcers will then assess whether he or she is likely to take his or her purchase decision on this basis.

2.5.7. Product comparisons involving environmental claims must be assessed under the criteria set out by the Directive on Misleading and Comparative Advertising

Directive 2006/114/EC on misleading and comparative advertising (*e-link*) notably lays down the conditions under which comparative advertising is permitted (Article 1). Article 4 of this Directive sets out the criteria under which comparative advertising is allowed. These criteria apply to advertisements which compare the environmental impact or benefit of different products.

Under this Directive, such a comparison should therefore, among other things:

- not be misleading, within the meaning of the Directive on unfair commercial practices;
- compare goods or services meeting the same needs or intended for the same purpose;

As regards environmental comparison, national enforcers and self-regulation bodies usually interpret this criterion to mean that the comparison should refer to the same product category.

- objectively compare one or more material, relevant, verifiable and representative features of those goods and services.

It should also be clear from the trader's claim whether the comparison is made as against one or more of the following:

- the organisation’s own prior process;
- the organisation’s own prior product;
- another organisation's process, or;
- another organisation’s product.

[60] 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)

2.5.8. Enforcement action against misleading environmental claims and the burden of proof

Under the Directive:

– Self-regulation is allowed as an enforcement method and the control exercised by code owners at national or community level to eliminate misleading environmental claims may supplement administrative or judicial action. In the vast number of Member States, codes of conducts and self-regulatory bodies play an important role in the regulation of advertising, including on the environmental aspects and claims made in advertisements.

– National, local and sectoral codes of conduct may regulate the behaviour of traders who undertake to be bound by such codes in relation to environmental claims. Stricter requirements on green claims may then apply to those traders who have committed to such codes.

– Advertising codes of conduct usually contain rules as regards environmental claims, in particular requiring traders to substantiate any factual claims.

– However, under Article 10 of the Directive, recourse to self-regulation "shall never be deemed the equivalent of foregoing a means of judicial or administrative recourse as provided for in Article 11".

Self-regulation cannot therefore be used as a substitute for legal action. It is the Member States' responsibility, under Article 11 of the Directive, to ensure adequate and effective means to combat unfair commercial practices in general and misleading environmental claims in particular.

– Finally, under Article 12 of the Directive, national enforcers and courts must be given the power to require traders to furnish evidence as to the accuracy of the factual claims they make where such a requirement is necessary:

"*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;

(d) 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"

2.6. Invitation to purchase

2.6.1. Provisions of the Directive

Definition – 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;

Article 7(4)

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.

2.6.2. Definition

The Directive leaves traders the choice as to whether to include the price in their advertising. Under Article 2(i), a commercial communication or advertisement containing the characteristics of a product and a price should be qualified as an "invitation to purchase" in the sense of the Directive.

The notion of "invitation to purchase" implies that traders have to respect a number of specific information requirements listed in Article 7(4) (described in paragraphs 2.6.3. and 2.6.4. below).

The "*characteristics of the product*" requirement, mentioned in Article 2(i) of the Directive is 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).

The last part of the definition in Article 2(i) of the Directive ("*thereby enables the consumer to make a purchase*") does not require that the commercial communication provides the consumer with a mechanism to 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 a purchasing decision (*i.e.* to decide whether to purchase that product for that price or not).

The following will normally be considered invitations to purchase where the price and the characteristics of the product are given[61]:

- an advertisement in a newspaper or on TV;
- an airline website displaying offers for flights and their prices;
- a menu in a restaurant;
- a leaflet from a supermarket advertising for discounted prices on certain products;
- a radio advertisement for a mobile phone ring tone;
- a product with a price on the shelf in a shop.

Based on Article 2 (i), a commercial communication or advertisement which does not include the price shall not be considered as an "invitation to purchase" in the sense of the Directive.

A clear 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). Other examples include the promotion of a specific product or a service, through an exhaustive description of its nature, characteristics and benefits, without making reference to the price.

2.6.3. Invitation to purchase in the context of misleading omissions

The Directive employs the notion of invitation to purchase in the context of Article 7[62], which concerns **misleading practices by omission** and which establishes, in very general terms, a positive obligation on traders to provide all the information which the average consumer needs to make an informed choice (i.e. the **material information**). Given that articles 7(1),(2) and (3) do not define in explicit terms the concept of material information, national authorities and courts will need to use their judgement in assessing whether key items of information have been omitted, taking into account all features and circumstances of a commercial practice and the limitations of the communication medium.

In contrast, when it comes to the invitation to purchase, Article 7(4) lists a number of information requirements which should be considered as essential (material), to ensure the

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61 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.oft.gov.uk/advice_and_resources/small_businesses/competing/protection) page 36.

62 The Directive makes reference to the invitation to purchase also in Annex I, n. 5 and 6.

maximum amount of legal certainty at this critical point. These include, *inter alia*, the product characteristics, the trader's geographical address and identity, and the total price.[63]

The invitation to purchase is a critical moment in the consumer's decision making. By its nature it is a direct and immediate form of product promotion, triggering a more impulsive reaction from consumers and thus exposing them to higher risks.

The aim of the provision in Article 7(4) is therefore to make sure that, whenever traders make commercial offers to consumers, 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.

2.6.4. Application of the information requirements in Article 7(4)

The information requirements provided in Article 7(4) concern the product's main characteristics, the trader's address, the full price inclusive of taxes, the payment arrangements, delivery, performance and complaint handling policy (if they depart from professional diligence) and the existence of a right of withdrawal or cancellation (for products involving such a right).

It is clear that under the Directive, whenever a communication includes the product and the price these information requirements become inevitably applicable.

However, the objective of these requirements is not to introduce unnecessary or disproportionate information burdens on traders but rather to ensure that consumers are not misled when they make a purchasing decision. Therefore, the wording of Article 7(4) also requires that national authorities and courts enforce this obligation in an adequate manner, taking into account the following elements.

First, traders do not need to provide information which is already obvious or apparent from the context (Article 7(4), first paragraph).

Second, establishing what constitutes the "**main characteristics**" of a product may vary depending on the product concerned (Article 7(4)(a)):

- complex products may require the provision of more information than simple ones. It follows that a picture, for example, could be sufficiently clear for consumer as regards certain product's main and distinguishing characteristics;
- certain restrictive conditions which limit the offer should also in principle be considered as part of the main characteristics of the product (for example: a very limited period during which a service is provided).

Third, the amount and the type of information concerning the main characteristics of the product may also vary depending on what can be considered "appropriate" in relation to the "medium" used by the trader to make that commercial communication (Article 7(4)(a)). In

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63 See recital 14 which clarifies further 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…"*

this connection, it is reasonable to expect that an offer on the radio may deliver to consumers less detailed information on the main characteristics of the product than an invitation to purchase on a web-site or in a specialized magazine. The main characteristics of a product or service (Article 7(4)(a)) may often be apparent from the context of the advertisement, and in this case they would not need to be listed separately.

The **geographical address and the identity of the trader** (Article 7(4)(b)) can sometimes be considered as "obvious or apparent from the context":

- The address of a shop or restaurant which the consumer is already in constitutes an obvious example of such information being "apparent from the context".

- The address of the local branch of a major retail or restaurant chain may be considered as "obvious or apparent from the context" since it is expected to be known to the average consumer. Therefore, a national-wide advertisement by such a trader would not normally require an explicit reference to the geographical address. This assumes however that the invitation applies to all of the traders' points of sale. However, the geographical address shall be provided when the invitation to purchase only concerns certain stores or restaurants of the chain in question in order to avoid consumers being mislead.

- In case of online shops, it should be noted that under Directive 2000/31/EC of 8 June 2000 on electronic commerce, traders must in accordance with its Article 5 render easily, directly and permanently accessible their name, the geographic address where they are established and details including their electronic mail address – which allow them to be contacted rapidly and communicated with in a direct and effective manner. Some of this information does not need to be displayed in the invitation to purchase but should be available on the website of the trader. Furthermore, under Article 10 of the e-commerce Directive, certain information (e.g. on the various technical steps which are necessary before the formal conclusion of a contract) must also be provided prior to the order being placed. This information does not need to be displayed at the stage of the invitation to purchase but should be available prior to the order being placed by the recipient of the service and no later than it is clear, from the consumer behaviour, that he/she is ready to consider the offer (e.g. by clicking on the banner with the invitation to purchase).

- Where an advertisement includes a widely known logo or a brand name, a trader's identity should be apparent from the advertisement’s context, and so would not need to be listed separately.

In relation to the **price**, it is important to note that Article 7(4)(c) requires traders to provide the total (or final) price, which must include all applicable taxes (e.g. V.A.T.) and charges, and that, when such charges cannot be calculated in advance, consumers should be properly informed that these may be payable.

The **arrangements for payment, delivery, performance and the complaint handling policy** of most established products, services and traders (Article 7(4)(d)) would normally be expected to conform to the requirements of professional diligence, and so would not normally have to be stated explicitly. Such information must be displayed only where the terms of

payment, delivery, performance and handling of complaints are to the consumer's disadvantage when compared to the good diligent market practice.

The existence of a right of withdrawal or cancellation (Article 7(4)(e)) must be mentioned in invitation to purchase where applicable, for example in case of distance selling (e-commerce, telephone, etc). At the invitation to purchase stage, traders are only required to inform consumers about the existence of such rights (without detailing the conditions and procedures needed to exercise them).

It is worth noting that in a recent EU-wide investigation into websites selling consumer electronic goods (a "sweep"), national authorities found that 66% of the websites investigated either did not provide information on the right to withdraw or provided misleading information about it[64].

2.6.5. Invitation to purchase and material information – Other considerations

Where traders make invitations to purchase they will need to ensure that their commercial practices include the information required by the Directive, or that such information is apparent from the context. This does not mean that such information only needs to be provided where there can be said to be an invitation to purchase. Complying with the information requirements in Article 7(4) at the moment of the invitation to purchase does not exempt traders from providing any other additional information that the average consumer needs, in the context of a specific transaction, to make informed decisions, nor from providing any other information under other EU laws.

The Directive considers certain information to be 'material' where traders make invitations to purchase. Subject to the same considerations, which apply under Article 7(2) to misleading omissions generally, this information must be provided in a clear, unambiguous, intelligible and timely manner. Failure to do so in the context of an invitation to purchase will be tantamount to a misleading omission.

2.6.6. Examples of invitations to purchase[65]

The following are examples of how the information might be provided in differing types of invitation to purchase:

Pencil (a simple product)

A shop has a number of pencils for sale and displays the price. This is an invitation to purchase because the information given in the context of a shop enables the consumer to make a purchase (by taking the pencil to the till and paying for it). The pencils themselves 'indicate' their characteristics (that they are pencils), and the pencils together with the price ticket or label form the commercial communication. In this instance, the material information required is provided on the pricing label or is already apparent from the context. The main

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64 See FAQ on EU-wide investigation into websites selling consumer electronic goods, 9 September 2009, available under: http://intranet.sanco.cec.eu.int/intranet/we-communicate/press-releases/eu-wide-investigation-into-websites-selling-consumer-electronic-goods.-frequently-asked-questions/view

65 Taken from 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.oft.gov.uk/advice_and_resources/small_businesses/competing/protection) page 37.

characteristics of the product – such as the colour or thickness of the lead – are apparent from looking at it. The trader trades under his own name and is based in the shop (the address), the price is given, and there are no arrangements for payment, delivery, performance or complaint handling that differ from those that consumers would reasonably expect. There are no omissions of cancellation rights or information requirements under other Community law provisions.

Price list in a bar

A licensed premise offers various drinks for sale to consumers. The price list (which is the commercial communication) placed near the bar provides consumers with the information they need to enable them to purchase drinks, in that it tells consumers what drinks are available and their price. In this instance, the main characteristics are the names (and possibly the name of the brand) of the drinks available. The trader's identity and the name of the establishment are given on the price list, and the address is apparent from the context as the consumers are there. There are no delivery or other arrangements which are contrary to the requirements of professional diligence that need noting.

Mail order advertisement

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. This would be an invitation to purchase. Here, the main characteristics of the product are included in the advertisement (i.e. such as the size, material and colour). The trader's identity is stated in the advertisement, as is his geographical address. So, too, are payment and delivery arrangements. The advertisement also mentions the consumer's entitlement to cancel any order and the period for which the advertised price would be valid, given the fact that this is a contract concluded by mail order and the Distance Selling provisions apply.

3. THE BLACK LIST (ANNEX I PRACTICES)

3.1. The "black list" general considerations

Annex I contains a list of commercial practices which are to be considered unfair in all circumstances and which are therefore prohibited. The list was drawn up to enable enforcers, traders, marketing professionals and customers to identify such practices. It therefore contributes to enhancing legal certainty. As stated in Recital (17) of the Directive, 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. In other words, if it can be proved that the trader has carried out the practice in actual fact, national enforcers do not need to apply the material distortion test (i.e. to consider the impact of the practice on the average consumer's economic behaviour) in order to act and inhibit / sanction the practice.

3.2. Annex I, N. 9 – Products which cannot legally be sold

3.2.1. Provisions of the Directive

ANNEX I

COMMERCIAL PRACTICES WHICH ARE IN ALL CIRCUMSTANCES CONSIDERED UNFAIR

[…]

N 9. Stating or otherwise creating the impression that a product can legally be sold when it cannot.

[…]

This provision aims at preventing situations where a trader markets a product or a service and omits to clearly inform the consumer that there are certain legal provisions which may restrict the sale, possession or use of a given product.

The first category of practices which are caught by the prohibition involves products or services for which the sale is banned or illegal in all circumstances. For instance where a trader promotes the sale of drugs, child pornography or protected exotic animals. The assessment of these practices is straightforward and does not require any specific consideration given that it often involves criminal activities and/or dishonest operators and that these practices generally constitute serious violations of other laws which usually are more specific and take precedence over UCP Directive.

Example: *A **trader** offers goods for sale in circumstances in which the **consumer c**annot legally become their owner by buying them from him, for instance because they have been stolen and he has no legal title to pass on.*

The second category of practices concerns products or services which are not illegal in and of themselves and can be legally marketed and sold but only under certain conditions and /or subject to certain restrictions. For instance, pharmaceuticals or weapons which can only be sold under licence and bought with special permission (licence / prescription, etc…). In these

situations, under Annex I, n. 9, traders cannot give the impression that there are no legal restrictions or conditions which apply to the sale of those products or services.

3.3. Annex I, N. 17 – Products which cure illnesses, dysfunctions and malformations

3.3.1. Provisions of the Directive

> ***ANNEX I***
>
> ***COMMERCIAL PRACTICES WHICH ARE IN ALL CIRCUMSTANCES CONSIDERED UNFAIR***
>
> *[…]*
>
> *N 17. Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.*
>
> *[…]*

This provision covers situations where a trader claims that his product or service can improve or cure certain physical or psychological ailments.

Such claims are already partly covered at Community level under specific legislation. The Directive is without prejudice to those Community rules relating to the health properties of products.

Annex I n°17 therefore applies in a limited manner and only in addition to the existing rules on health and wellness claims. More generally, it should be recalled that any misleading practices with regard to health and wellness products can still be assessed under Article 6 of the Directive (e.g. where the overall presentation is deceptive).

3.3.2. Health / Pharmaceutical claims

The prohibition involves first of all claims in relation to physical states which are classified as pathologies, dysfunctions or malformations by the medical science. However, the practical utility of Annex I, No 17 in relation to these practices is very marginal.

Food health claims referring to the prevention, the treatment or the cure of a human disease (e.g. "this food can prevent stomach cancer") are already prohibited at Community level by the legislation on the labelling of foodstuff[66]. Other health claims on foods can be authorised if they are scientifically substantiated[67].

Health claims are also covered by the health and pharmaceutical legislation (both EU and national), which regulates in an exhaustive and specific manner not only advertising but also

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66 Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ L 109, 6.5.2000, p. 29. Directive as last amended by Commission Directive 2006/142/EC (OJ L 368, 23.12.2006, p. 110).

67 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, OJ L 404, 30.12.2006, p. 9 - Corrigendum, OJ L 12, 18.1.2007, p. 3 (1924/2006). Regulation as last amended by Regulations (EC) No 107/2008 and 109/2008 of the European Parliament and of the Council of 15 January 2008 L 39 p.8 and p.14.

the authorization regimes and the operators' deontological rules. It follows that only authorized traders are allowed to operate in these fields and market these types of products (which have been, in turn, scientifically tested and approved by the competent bodies).

It should be noted, in addition, that specific limits (i.e. bans) exist concerning the promotion of pharmaceuticals or medical treatments and that these activities concern mainly relations between professionals (traders and doctors or specialists). From a deontological perspective, the choice of the product / treatment rests on the advice of the doctor or specialist who prescribes it. Any issue of misleading advertising in this area (whether it concerns an authorized trader or not) will automatically trigger the relevant EU or national rules and be subject to the respective systems of enforcement and sanctions, which will take precedence over the Directive.

3.3.3. Aesthetic Products / treatments and similar

Annex I, N. 9 also applies in relation to products or services, such as for instance cosmetics, aesthetic treatments, wellness products and similar, which (based on the way they are marketed) are intended to produce certain improvements of the physical conditions of human or animal bodies but whose marketing is not necessarily regulated by overriding sector specific legislation.

As regards cosmetics products, the Directive 76/768/EEC provides that "Member States shall take all measures necessary to ensure that in the labelling, presentation for sale and advertising of cosmetic products, the wording, use of names, trade marks, images or other signs, figurative or otherwise, suggesting a characteristic which the products in question do not possess, shall be prohibited" (Article 6 (2)).

Annex I point 17 of the Directive on Unfair Commercial Practices thus complements these specific rules and applies to wellness products which are not cosmetics or to false claims which are not covered by specific rules.

Examples include traders who claim that their products can make your hair grow back or claims for detox foot patches which will improve the functioning of kidneys.

In order not to trigger the prohibition, 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 appears to be a logical enforcement approach reflecting the principle, more broadly formulated in Article 12 of the Directive whereby "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 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".

From a trader's perspective, failure to produce the appropriate and relevant evidence on the physical effects that a consumer can expect from a product's use will trigger the prohibition of Annex I, N. 17 on the basis of the fact that the claim is false.

3.4. Annex I, N. 20 – Use of the word "FREE"

3.4.1. Provisions of the Directive

ANNEX I

COMMERCIAL PRACTICES WHICH ARE IN ALL CIRCUMSTANCES CONSIDERED UNFAIR

[…]

N. 20 - 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.

[…]

3.4.2. Rationale/Preliminary considerations on the prohibition n. 20 in Annex I

Annex I N. 20 of the Directive aims at preventing a specific misleading use of the word "free" in commercial communications and advertising.

It prohibits traders from describing a product or service as 'gratis', 'free', 'without charge' or similarly if the consumer is eventually asked to pay a price.

While the appraisal of practices under the prohibition is generally straightforward, combined offers (i.e. when more products and/or services are marketed together) require a more complex case by case assessment based on the specific features of the commercial offer and the product or services involved.

3.4.3. Structure of the provision – basic principles and clear cut infringements (the concept of "free" in Annex I, n.20)

This prohibition is based on the idea that consumers expect a "free" claim to be exactly that, meaning they receive something for nothing: no money or other consideration has to be given in exchange.

This is largely reflected in Annex I, n.20 which provides that an offer can be described as free only if consumers pay no more than:

a) the minimum, unavoidable cost of responding to the promotion (e.g. the current public postage rates , the cost of telephoning up to and including the national rate or the minimum, unavoidable cost of sending a text message);

b) the true 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.

It also follows that a legitimate promotion of free claims requires full price transparency from traders: traders should make clear in all material featuring "free" offers what is the consumer's liability for costs, if any.

An example of a prohibited practice would be where a consumer is offered a "free" product or a gift but then he or she needs to call a premium number to get it.

An example of a straightforward, legitimate free claim is when a trader hands out a free product sample to passers-by in a shopping centre.

3.4.4. Basic criteria in relation to combined offers

The assessment is more complex when the word "free" is used in the context of combined offers, which are commercial offers involving more than one product or service.

The following are the main principles which should be taken into account when assessing combined offers and which 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 the 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.

The two categories of combined offers are conditional-purchase promotions and package offers.

3.4.5. Conditional-purchase promotions

Annex I n. 20 does not prevent traders from using the word “free” when customers are required to buy other items (e.g. “buy one get one free” type of offers**)**, provided their liability for all costs is made clear and:

(a) the quality or composition of the paid-for items has not been reduced and;

(b) the price of the paid-for items has not been inflated, to recover the cost of supplying the free item.

The key distinguishing feature of a conditional-purchase promotion is that the item described as "free" is genuinely separate from and additional to the item(s) that the customer is required to pay for.

A free offer can qualify as a conditional-purchase promotion in either (or both) of two ways:

3.4.6. Limited in time free conditional-purchase promotions

The assessment becomes more complex when free conditional-purchase promotions are run on a time-limited or channel-limited basis, or on an invariable, long-term, channel-neutral basis. The basic principle remains that when a customer is told that an item is "free" when another item is bought, the customer has the right to believe that the trader will not directly

seek to recover any of the "free" item's cost by marking up the item's price that has to be bought or by the substitution of inferior merchandise.

Therefore, it is reasonable to conclude that, to demonstrate that an item is genuinely being supplied for free, conditional on the purchase of another item, traders must be able to show:

(i) either 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, unless the customer complies with the terms of the promotion, they do not supply the “free” item with the paid-for item(s); 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, assuming that the paid-for item’s quality and composition are not reduced and its price is not inflated to cover the cost of the free item:

- “free wall-chart when you buy Thursday’s paper” is justified if the paper is sold without a wall-chart on other days for the same price;
- “25% extra free”, for a bottle of shampoo, is justified if the bottle contains 25% more shampoo than is usually supplied at that price;
- “free travel insurance for customers who book their holiday online” is justified if customers who book the same journey by telephone are offered the same price but not offered free insurance or if internet customers who choose to buy their insurance from a different provider pay the same for their holiday as those who choose to take advantage of the marketer’s insurance offer;
- “free delivery for customers who spend over €50 on groceries” is justified if the retailer does not offer free delivery when the grocery spend is less than €50;
- “buy two books and get one free” is justified, even if the promotion is a standard long-term offer, if customers who choose to buy only two books from the marketer and not take a third book pay the same price as those who take all three books;
- customers who choose to buy only the television service pay the same price as those who choose to take both the television service and the separate internet service.

3.4.7. Package Offers

After what has been said about conditional-purchase promotions, it is reasonable to conclude that Annex I n. 20 prohibits the use of “free” to describe “an individual element of a package if the cost of that element is included in the package price.

A package is a pre-arranged combination of features offered for a long-term 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. If he wants to claim that the CD player is free and that the €10,000 relates to the other elements, the trader would need 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).

To take another example, a mobile-phone subscription offers a certain amount of airtime, a certain number of text messages and a voicemail facility for one all-inclusive price. Each element is intrinsic to the quality and composition of the package being advertised for the package price. Because customers cannot exercise genuine choice over how many elements they receive for the price paid, the elements are all included in the package price and may not be described as “free”.

Within a package, the goods or services that are bundled together and sold for one single inclusive price could be different in nature: for example, if a single monthly subscription price is charged for a package that includes a range of television channels, access to the Internet and “free” calls to other subscribers, those services are intrinsic elements of the service that the customer is buying and, in practice, the customer has to take all three elements to pay the advertised price. Because customers cannot exercise genuine choice over how many elements they receive for the price paid, the elements are all included in the package price and may not be described as “free”.

3.4.8. Standard features of the Package Offers

There is one exception to what stated in the previous paragraph. Traders sometimes add elements to their existing packages without increasing the price of the package or reducing the quality or composition of the elements that are already included in the package. 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; once the element has formed part of the package for a long time, consumers are likely to regard it as a standard feature of the package. Annex I n. 20 should not prevent traders from describing elements that have been added to those pre-existing packages as “free” for a reasonable period (e.g. 6 months) after their introduction.

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.

To summarise, if a package price is payable, marketers, in order to comply with Annex I n. 20, may describe elements that are included in the package as “at no extra cost” or “inclusive” but may not describe them as “free” unless they have been recently added to an established package without increasing its price.

3.4.9. One-off costs for installation and equipment

For both conditional purchase promotions and packages, 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 Annex I, n.20. For example, digital free-to-air television channels are available only to consumers who have the necessary digital

receiving equipment and call packages are available only to consumers who have a telephone and line. Other types of one-off, up-front costs, for example connection fees payable to a third party to activate an internet service, will also not negate claims that the internet service is free, provided the price payable has not been inflated to recover the cost of supplying the free service. Traders must nevertheless adequately inform consumers about the requirement for any of such up-front payments.

3.4.10. Introductory offers for new customers

Traders might want to run introductory offers for new customers, for example, "Free calls for the first three months" of a telephone call plan. Or they might want to offer a "free" incentive item with a new product, for example, "Free binder with issue one" of a magazine.

3.4.10.1.New customers of existing products

Annex I n. 20 does not prevent traders to make free claims when they market existing products to potential new customers, as long as the criteria set out above are fulfilled.

Below are two illustrative examples:

"Free sports bag for new members" of a gym would be justified if the sports bag was offered to all new members, who could choose whether or not to take it, and new members paid the same price whether or not they took the bag. The claim "Free calls for the first three months" could be justified, even on an ongoing basis where the paid-for item is a package, if the trader showed that the offer was open only to new customers and that existing customers who paid the same price did not receive inclusive calls but received an otherwise identical service; the trader would have demonstrated that the calls were more than was usually supplied for the price and justified the use of "free".

"Free broadband for new customers of our Anytime call plan" could be justified if, for example, the trader showed that broadband was a new feature added to a pre-existing call plan without increasing its price or reducing its quality, and that only new customers received the broadband feature. In that example, the claim would be valid only for a reasonable period after the broadband was added; after that time, because all new customers automatically receive the broadband element, consumers are likely to regard it as a standard, inclusive element of the package. (If the broadband service was automatically supplied to existing customers as well, the "free" claim would be valid but the implication that it was a special benefit for new customers would not be.)

3.4.10.2.New products

If the introductory offer relates to a product that has never been sold before, the trader cannot demonstrate that the "free" item is more than what is usually supplied for the price or that it has added the item to an established package without increasing the price. Annex I, n.20 of the UCP Directive does not prohibit free claims in relation to new products. However, to justify the use of the word "free" in that situation, the marketer would need to show that customers paid the same price regardless of whether they received the "free" element (i.e. either 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); that is, satisfying test (i) for conditional purchase promotions).

For example, if the marketer launched a new magazine with the offer “Free binder with issue one” and showed that consumers had a genuine choice of whether they took the binder, that marketer would have shown that the offer was a conditional-purchase promotion and justified the use of “free”.

3.5. Annex I, N. 31 – Prizes

3.5.1. Provisions of the Directive

ANNEX I

COMMERCIAL PRACTICES WHICH ARE IN ALL CIRCUMSTANCES CONSIDERED UNFAIR

[…]

N. 31. 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 aim of this prohibition is to prevent dishonest market operators from luring consumers into a transaction or into paying money or other consideration by falsely creating the illusion that they have won or may win a price. It also precludes traders from charging consumers for claiming a prize, given that – in principle – the payment of any consideration inevitably undermines the credibility of the use of the word "prize".

The assessment of the first category of situations (i.e. no prize) described in the first indent of the provision is fairly straightforward. In order not to violate the prohibition, traders must always be in a position to demonstrate that they have awarded the prize/s or the equivalent benefit/s in the exact terms stated in his/her announcement to the consumer. Failing this, the practice would be caught by the prohibition.

The second part of Annex I, n. 31 (i.e. the prize or benefit is subject to the consumer paying money or incurring a cost) covers dishonest practices whereby, for instance, consumers are informed that they have won a prize but that they have to call a premium rate line to claim it.

Another example concerns cases where the consumer is initially informed that he has won a prize and then he finds out that he must order another good or service to receive the advertised prize or the equivalent benefit.

E.g. Advertising leaflet distributed in the mail stating “You have won a free CD”, where the consumer is eventually told "order now our selection of shower gels, fill in your address and you will receive your "prize".

ANNEX I – DIRECTIVE FLOWCHART

The flowchart below illustrates the relationship between the "black list" and the general clauses, namely Articles 6 to 9 and Article 5 respectively. In order to be considered unfair and therefore prohibited under the Directive, it is sufficient that a commercial practice fulfils only one of these tests.