



COMMISSION OF THE EUROPEAN COMMUNITIES

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COM (2003) 356 final

2003/0134 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**concerning unfair business-to-consumer commercial practices in the Internal Market  
and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial  
Practices Directive)**

(presented by the Commission)

{SEC (2003) 724}

## EXPLANATORY MEMORANDUM

### BACKGROUND

1. The Green Paper on EU Consumer Protection<sup>1</sup> first outlined the case for reform of EU consumer protection legislation to tackle barriers to cross-border provision of goods and services to consumers. It identified a framework directive containing a general duty in relation to unfair commercial practices as a possible basis for reform.
2. A majority of respondents accepted the case for reform, and a majority of those who expressed a preference, including a majority of Member States, supported reform on the basis of a framework directive.<sup>2</sup> The Council subsequently resolved that effective follow-up work on the Green Paper should be a priority.<sup>3</sup>
3. Feedback on the initial consultation and an outline of how a framework directive could be structured were published in the Communication on the follow-up to the Green Paper<sup>4</sup>. This sought respondents' views on the content of the framework directive which have been taken into account in preparing this proposal.<sup>5</sup>
4. A Council resolution adopted on 2 December 2002 on the Commission's consumer policy strategy 2002-2006 included a call for the Commission to take further steps in the light of this second consultation and the Brussels European Council of 20-21 March 2003 called for consumer policy to put empowered consumers at the heart of a competitive internal market, giving appropriate follow-up to the Green Paper. The European Parliament adopted three resolutions relating to the Green Paper and follow-up communication on 13 March 2003 which expressed support for reform based on a framework directive governing unfair commercial practices and included calls for the Commission to make a proposal as soon as possible.
5. On 22-23 January 2003 the Commission held a workshop attended by over 150 people, including Member States' representatives, consumer and industry associations and academics. The panellists and other participants discussed the case for reform and for harmonisation through a framework directive, the relationship between unfair competition and consumer protection, and the role of codes of conduct.<sup>6</sup>

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<sup>1</sup> COM (2001) 531 final

<sup>2</sup> See The Green Paper on EU Consumer Protection, COM (2001) 531 final, the Follow-up communication to the Green Paper, COM (2002) 289 final, responses to consultations and studies available at:

<sup>3</sup> [http://europa.eu.int/comm/consumers/policy/developments/fair\\_comm\\_pract/studies\\_en.html](http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/studies_en.html)

<sup>4</sup> Internal Market, Tourism and Consumer Council, 1 March 2002, see 6503/02 (Presse 41)  
COM (2002) 289 final

<sup>5</sup> Responses to the follow-up communication can be found at:  
[http://europa.eu.int/comm/consumers/policy/developments/fair\\_comm\\_pract/responses\\_followup/responses\\_en.html](http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/responses_followup/responses_en.html)

<sup>6</sup> Insert details of report location on website when available

## THE CASE FOR CHANGE

### Potential benefits of the internal market

6. The cross-border movement of goods and services (“products”) gives consumers access to a broader range of products, including innovative products which may not be available in their own country. It also provides the pressure for a more efficient and competitively-priced supply.
7. Despite evidence of the benefits which have accrued from the internal market so far, there is evidence that it is by no means yet complete. For example, a recent report commissioned by the European Financial Services Round Table<sup>7</sup> identified differing national rules on consumer protection and commercial practices as important barriers which “render a pan-European marketing strategy and standardised products impossible”. It estimated that a working European retail market for financial services could save €5 billion annually and add 0.5% to economic growth.
8. The most recent Cardiff<sup>8</sup> report indicated that price convergence, a key indicator of the completion of the internal market, has stagnated recently. The convergence which followed the initial ‘shock-wave’ effect of the introduction of the internal market has not continued and significant price divergences remain. The previous Cardiff report<sup>9</sup> highlighted the fact that average retail prices for a product in one Member State can be up to 40% above or below the European average, with the average divergence being around 30%. This compares to a variation of around 5% around the national average within Member States.
9. Both Cardiff reports conclude that further integration and competition could lead to greater convergence, to the benefit of consumers and the efficient functioning of the market. They also concluded that cross-border shopping has a role to play in achieving this; as the most recent report says “The greater development of cross-border shopping by consumers and e-commerce can also contribute to price convergence by exerting downward pressure on prices”.
10. Survey evidence suggests that the continued development of the internal market depends both on encouraging business to advertise and market across borders and on stimulating consumers, who are in principle willing to do so, to actually transact cross-border. For example,
  - 55% of EU consumers had not seen or heard cross-border advertising or information in the last 12 months<sup>10</sup>;
  - 53% of EU consumers would certainly or probably consider cross-border shopping to buy a product because it was cheaper or better<sup>11</sup>.

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<sup>7</sup> <http://www.zew.de/erfstudyresults/>

<sup>8</sup> Economic Reform: report on the functioning of Community product and capital markets COM (2002) 743 final

<sup>9</sup> COM (2001) 736 final

<sup>10</sup> Eurobarometer 57.2 and Flash Eurobarometer 128: *Public opinion in Europe: Views on business-to-consumer cross-border trade*, 14 November 2002

<sup>11</sup> [http://europa.eu.int/comm/public\\_opinion/flash/fl131\\_en.pdf](http://europa.eu.int/comm/public_opinion/flash/fl131_en.pdf)

11. Both the potential benefits, and the risks of allowing the present situation to continue, will be increased in an enlarged Union of 25 or more Member States.

### **Barriers and distortions**

12. The Extended Impact Assessment published with this proposal examines at greater length the barriers and options for change summarised here, drawing on sources including Eurobarometer surveys, consultation responses, academic studies of existing national legislation, work by the group of member states experts and an ex-ante impact assessment carried out by GFA.<sup>12</sup>
13. The GFA study found that there are a number of barriers, some policy-induced, others not, which prevent traders and consumers from taking advantage of the internal market by shopping cross-border. These include tax, particularly VAT, time and distance (though these are also present in national markets and are being reduced by e-commerce), and language barriers. That said, 53% of Europeans say they can speak at least one European language in addition to their mother tongue and 26% can speak two.
14. However, even if all these other barriers were addressed, unfair commercial practices would in themselves constitute important barriers to the functioning of the internal market.
15. First, unfair commercial practices, if they are not addressed by effective consumer protection, can undermine consumer confidence. On average, 18% of consumers in a recent survey cited poor legal protection as a reason not to buy financial services cross-border, rising to 36% in one Member State.<sup>13</sup> In another survey about cross-border shopping in general, consumers who felt less confident buying from another EU country than in their own country were asked why. 68% of those consumers cited lower standards of consumer protection laws as a very or fairly important reason for their lack of confidence while 76% cited as a very or fairly important factor a lack of trust in foreign sellers and a perceived greater risk of fraud or deception.<sup>14</sup>
16. Second, these unfair commercial practices generate a market failure by impairing the consumer's ability to make choices which are informed and therefore efficient. This distortion of consumers' preferences is detrimental to the collective interests of consumers even if a specific consumer affected by the practice does not suffer a financial loss. The distortion of consumers' decision-making also gives rise to distortions of competition because the trader acting unfairly wins business away from competitors who play by the rules.
17. The effect is demonstrated by the work of the European Advertising Standards Alliance (EASA) which, in its 2002 Annual Report on handling of cross-border advertising complaints, concluded that "cross-border complaints overwhelmingly

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<sup>12</sup> See the Extended Impact Assessment for a discussion of the sources of evidence used. GFA study available at [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/index\\_en.htm](http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/index_en.htm).

<sup>13</sup> Eurobarometer 58.1 Financial Services

<sup>14</sup> Eurobarometer 57.2 and Flash Eurobarometer 128: *Public opinion in Europe: Views on business-to-consumer cross-border trade*, 14 November 2002

concern the activities of 'rogue-traders' and other fringe operators, who deliberately set out to exploit the loopholes between national regulatory systems”.

18. For consumers, the uncertainty of not knowing what consumer protection is provided by other EU countries' laws was a bigger barrier to cross-border shopping – with 79% of respondents citing it as a very or fairly important obstacle – than their perception that the standards of protection were lower in other countries.<sup>15</sup>
19. The impact of these barriers is exacerbated by the differences in the regulation of unfair commercial practices by Member States. The minimum clauses in existing consumer protection legislation, such as the misleading advertising directive<sup>16</sup> perpetuate this problem by allowing Member States to add divergent requirements and provide differing degrees and types of protection.
20. Many Member States have a general legal principle (i.e. a general clause), sometimes supported by specific rules, regulating marketing and prohibiting unfair commercial practices. However, the scope and application of these general principles vary widely across the EU.
21. For example,
  - while the ECJ has defined a test of the “average consumer, reasonably well-informed, observant and circumspect”, several Member States do not apply this test and instead examine the effect of commercial practices on vulnerable consumers or on a small proportion of consumers (eg 10-15%) in assessing its fairness<sup>17</sup>;
  - some Member States assume that all advertising has the potential to distort consumers' decision-making and therefore any inaccuracy would be contrary to the national provisions even if the inaccuracy had no bearing on consumers' decisions<sup>18</sup>.
22. The need for businesses to comply with a complex patchwork of different national requirements adds costs to those who market cross-border and for many is such a deterrent that they simply do not try:
  - 47% of businesses cited the need for compliance with different national regulations on commercial practices, advertising and other consumer protection regulations as very or fairly important obstacles to cross-border advertising and marketing.
  - This obstacle was considered as significant as the need to comply with tax requirements (46%) and more important than language barriers (38%).<sup>19</sup>

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<sup>15</sup> Ibid. 68% of respondents cited lower consumer protection standards as a very or fairly important factor. Base in each case: consumers who are less confident buying from another EU country than from their own country

<sup>16</sup> 1984/450/EC as last amended by 1997/55/EC

<sup>17</sup> For further information see Extended Impact Assessment published with this proposal, section 1.4

<sup>18</sup> Ibid.

<sup>19</sup> Eurobarometer 57.2 and Flash Eurobarometer 128: *Public opinion in Europe: Views on business-to-consumer cross-border trade*, 14 November 2002. See also Extended Impact Assessment, section 1.3

23. This finding is borne out in a survey of its members carried out by the European Mail Order Trade Association in 2002. It found that 5 of the top 10 barriers to cross-border trade cited related to differences in national rules on commercial practices.<sup>20</sup>
24. In addition, the differences in legislation increase the cost and complexity of enforcement, whether by public authorities or by self-regulatory bodies. As EASA pointed out, “Every national code must comply with national legislation. The major discrepancies between national codes arise directly from differences in national legislation and will be eliminated only when they are.”<sup>21</sup> The impact of this fragmentation was also evident in the Commission’s Eurobarometer survey, where 65% of businesses surveyed considered European codes of conduct as a very or fairly efficient way to make the sale or advertising of products throughout the EU easier.<sup>22</sup>

## CONCLUSIONS

25. This evidence shows that there are both appreciable internal market barriers and distortions of competition which arise from unfair commercial practices and the policy-induced barriers arising from their fragmented regulation. Because the impact of fragmented regulation is so significant, it is necessary to tackle these barriers with action at EU level.
26. The GFA ex-ante impact assessment assessed the different legislative approaches which could be used to address them. It concluded that a framework directive setting out general principles supplemented as necessary by specific sectoral legislation was the most appropriate tool. This conclusion is subject to the directive being based on a full harmonisation approach and containing provisions for mutual recognition based on the country of origin (discussed further in the next section). It would also need to be drafted in such a way as to achieve the necessary clarity and legal certainty.
27. It was found that:
- 38% of businesses expected to increase their cross-border advertising and marketing budget as a result of harmonisation;
  - 46% of companies expect the proportion of their cross-border sales to increase with complete harmonisation of all regulations on advertising, commercial practices and other consumer protection regulations;
  - 10 million consumers would buy a lot more cross-border if they were equally confident about making purchases from traders in another EU country, and a further 70 million might buy a little more<sup>23</sup>;
  - According to a majority of national business associations responding to a survey, the introduction of a general principle of fair commercial practices in a

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<sup>20</sup> [http://europa.eu.int/comm/consumers/cons\\_int/safe/\\_shop/fair/bus/pract/green/pap/comm/responses\\_followup/business\\_europe/emota.pdf](http://europa.eu.int/comm/consumers/cons_int/safe/_shop/fair/bus/pract/green/pap/comm/responses_followup/business_europe/emota.pdf)

<sup>21</sup> [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/green\\_pap\\_comm/responses\\_followup/business\\_europe/easa.pdf](http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/responses_followup/business_europe/easa.pdf)

<sup>22</sup> Eurobarometer 57.2 and Flash Eurobarometer 128: *Public opinion in Europe: Views on business-to-consumer cross-border trade*, 14 November 2002.

<sup>23</sup> Findings of quantitative survey in Eurobarometer 57.2.

framework directive will result in a decrease of costs, as will the combination of an adequate level of harmonisation and the application of the principles of mutual recognition and country of origin.

28. By contrast, alternative approaches based, for example, on specific directives without a general framework would have limitations including the following:
- Lack of harmonisation of existing national general clauses and legal principles, leaving significant internal market barriers untouched;
  - Leaving the existing minimum harmonisation approach would fail to address the lack of consumer confidence about cross-border consumer protection demonstrated in the surveys;
  - Market entry, transaction and marketing costs expected by up to half of business respondents to increase.
29. Many stakeholders, representing both businesses and consumers, have expressed their support for an initiative based on the mixed approach.<sup>24</sup> Some stakeholders made strident criticism of the initiative in its early stages. There are business stakeholders who continue to be very critical of the Directive. However, many others have reviewed their position as the Commission's proposed approach has been clarified, particularly since the workshop in January 2003, and have indicated support for the approach taken in this proposal.

## OVERVIEW OF THE DIRECTIVE

30. In the light of the evidence as to the barriers which need to be addressed, the ex ante impact assessment and the responses to consultation, the approach taken in the Directive has the following key elements<sup>25</sup>:
- It defines the conditions which determine whether a commercial practice is **unfair**; it does not impose any positive obligations which a trader has to comply with to show he is trading fairly. This reflects the views expressed by many respondents that greater legal certainty can be achieved by defining unfairness rather than fairness, and ensures that the Directive is a proportionate response to the situations which create material consumer detriment.
  - It contains an **internal market clause** which provides that traders have to comply only with the requirements of the country of origin and prevents other Member States from imposing additional requirements on those traders who do so (ie mutual recognition). This is needed to ensure that traders have the legal certainty they need to deal with consumers cross-border without imposing undue burdens on them. The Member States will be obliged to ensure that traders established in their territories comply with their national provisions regardless of

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<sup>24</sup> Eg Telefonica, Pernod Ricard, PartyLite, Nuskin, Nature's Own, Mary Kay, Herbalife, GNLD, Amway, Swedish Marketing Federation, BEUC, UK National Consumer Council and Consumers' Association, Federation of German Consumer Organisations (vzbv)

<sup>25</sup> Further information on alternative approaches which were considered and rejected is contained in the Extended Impact Assessment published with this proposal.

whether the consumers targeted or reached by their commercial practices reside in their territory.

- It **fully harmonises** EU requirements relating to unfair business-to-consumer commercial practices and provides **an appropriately high level of consumer protection**. This is needed to address the internal market barriers caused by divergent national provisions and to provide the necessary support to consumer confidence to make a mutual recognition approach workable. Member States will not be able to use the minimum clauses in other directives to impose additional requirements in the field co-ordinated by this Directive.
- It contains a **general prohibition**, which will replace the existing divergent general clauses and principles in the Member States and define a common EU-wide framework, which will considerably **simplify** the legislative environment in which traders and consumers operate, as called for by a number of respondents. The components of the **general prohibition** are explained in paragraphs 48 to 54 below.
- It establishes the ECJ's **average consumer**, rather than the vulnerable or atypical consumer as the benchmark consumer. This test, which is an expression of the principle of proportionality, applies when the generality of consumers is addressed or reached by a commercial practice. It is modulated when a commercial practice is specifically targeted at a particular group (eg children), when the average member of that group will be considered. This will clarify the standard to be applied by national courts and significantly reduce the scope for divergent assessments of similar practices across the EU, while providing a means to take into account relevant social, cultural or linguistic characteristics of targeted groups as allowed for by the Court.
- It elaborates two key types of unfair commercial practice; those which are **'misleading'** and those which are **'aggressive'**. These provisions apply all the same elements as are contained in the **general prohibition** but function independently of it. This means that a practice which is either **'misleading'** or **'aggressive'** as under the corresponding provisions is automatically unfair; if the practice is neither **'misleading'** nor **'aggressive'** the **general prohibition** will determine whether it is unfair. The provisions on **'misleading'** commercial practices define both actions and omissions which can mislead and avoid the need for a positive duty to disclose which many respondents argued would be unduly onerous and which the ex-ante impact assessment showed would have imposed significant costs on traders. Similar concerns were expressed about defining fair or unfair after-sale commercial practices; the Directive therefore does not do so, but instead applies the same fairness principles to commercial practices before and after the point of sale.
- For clarity and simplicity, it **incorporates the misleading advertising Directive's B2C provisions** (ie provisions dealing with advertising reaching or directed at consumers) and limits the scope of the existing Directive to business-to-business advertising (ie provisions dealing with advertising reaching or directed at business) and comparative advertising which may harm a competitor (by denigration, for example) but where there is no consumer detriment. Some provisions on inertia selling from the distance contracts Directive are also repealed and included in the framework directive.

- An Annex to the Directive contains a short **blacklist** of commercial practices. These are practices which will in all circumstances be unfair, and therefore banned in all Member States. This single list will apply in all Member States and can be changed or added to only in the same way as the rest of the Directive. This contributes to legal certainty and consumer confidence by imposing an ex-ante prohibition on those specific practices, such as pyramid schemes, which will always materially distort the decision-making of average consumers and are contrary to the requirements of professional diligence.

## GENERAL PROVISIONS (CHAPTER 1)

### Objective (Article 1)

31. The objective, as set out in Article 1, is to deliver a high degree of consumer protection and enable the functioning of the internal market.
32. The method used to achieve this is the approximation of national laws on unfair commercial practices, through this Directive.
33. Article 1 makes it clear that this approximation relates to those unfair commercial practices which harm consumers' *economic* interests.

### Definitions (Article 2)

34. This article defines a number of terms used in the directive. The definition of 'consumer' is the standard definition found in several consumer protection directives<sup>26</sup>.
35. A definition of 'average consumer' is also given, which incorporates the benchmark established by the ECJ<sup>27</sup> of the consumer who is "reasonably well informed and reasonably observant and circumspect". As explained above, this is modulated in Article 5 to ensure that where a specific group of consumers is targeted, the characteristics of the average member of that group are taken into account in assessing the impact of the practice.
36. The definition of 'commercial practice' explicitly includes commercial communication and advertising, to make clear the connection with the regulation on sales promotion and provisions incorporated from the misleading advertising Directive.<sup>28</sup>

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<sup>26</sup> Eg Directive 1999/44/EC of the European Parliament and of the Council of 25.05.1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 299 of 12.12.1995, pp 11-12); Directive 97/7/EC of the European Parliament and the Council, of 20.05.97, on the protection of consumers in respect of distant contracts. (JO L 144 of 04.6.1997, pp. 19-28); Council directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95 of 21.04.1993, pp. 29-34); Council directive 85/577/EEC of 20.12.1985 to protect consumer in respect of contracts negotiated away from business premises – door to door selling (OJ L 372 of 31.12.1985, pp. 31-33)

<sup>27</sup> See eg Case C-315/92, Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC and Estée Lauder Cosmetics GmbH (1994) ECR I-317; Case C-210/96, Gut Springheide GmbH v. Oberkreisdirektor des Kreises Steinfurt (1998) ECR I-4657

<sup>28</sup> Directive 84/450/EEC (OJ L 250, 19.9.1984) as amended by Directive 97/55/EC

37. A definition is given here of what it means to ‘materially distort’ consumers’ economic behaviour, one of the three conditions of the general prohibition. The definition has two components: first, the commercial practice must be used to impair the consumer’s ability to make an informed decision, and second it must be significant enough to change the decision the consumer makes. The application of this concept is further explained in paragraph 54 below.
38. This section also contains definitions of ‘professional diligence’, ‘invitation to purchase’ and ‘undue influence’ which are explained in the sections on Articles 5 to 9 below.

### **Scope (Article 3)**

39. The Directive is concerned only with matters affecting consumers’ economic interests, as is made clear in Article 1. This means that matters of taste, decency and social responsibility will be outside scope unless the trader establishes a specific connection between its obligations in these areas and its products in its marketing. For example, if a trader falsely claimed that a certain proportion of the profits from the sale of a Christmas card would be given to charity that would be within scope.
40. It also means that acts which constitute unfair competition in some Member States but which do not harm the economic interests of consumers, such as slavish imitation (ie copying independently of any likelihood of consumer confusion) and denigration of a competitor, are outside the scope of the Directive. Acts which are classed in some Member States as unfair competition which *do* harm consumers economic interests, such as confusion marketing (which generates a danger of confusion among consumers with the distinctive signs and/or products of a competitor) are within scope.
41. The Directive does not deal with antitrust matters, such as anti-competitive agreements, abuse of dominant position, mergers and acquisitions. It applies only to commercial practices between business and final consumers and thus does not cover commercial practices between businesses, such as boycotts and refusal to supply.
42. Contract law is outside the scope so the Directive has no bearing on the conditions of formation, validity or effect of the contract.
43. This Directive deals with the protection of the economic interests of consumers and as such consumer health and safety aspects of products are outside its scope of application. However, misleading health claims, given their capacity to impair the consumer’s ability to make informed decisions, will be appraised under the provisions on misleading commercial practices. For example, if a product which claims to cause hair to grow back on bald heads but does not do so, that is a misleading claim within the scope of this Directive. If, however, the product makes the consumer unwell, that is outside the scope and remedies will not be available under this Directive.
44. The framework directive will apply where there are no specific provisions regulating unfair commercial practices in sectoral legislation. Where such specific provisions do exist, they will take precedence over the framework directive. However, references in sectoral directives to broad principles alone, such as the “general good” or “fair

trade” will not be sufficient to justify a derogation in areas harmonised by the framework Directive on grounds of the protection of consumer economic interests.

45. Where a sectoral directive regulates only aspects of commercial practices, for example the content of information requirements, the framework directive will come into play for other elements, for example, if the information required in the sectoral legislation were presented in a misleading way. The directive therefore complements both existing and future legislation, such as the proposed Regulation on sales promotion, or the consumer credit Directive<sup>29</sup>, and the e-commerce Directive.<sup>30</sup>
46. The Directive is without prejudice to the application of rules governing international private law provisions in the fields which it does not approximate.

### **Internal Market (Article 4)**

47. The convergence brought about by the proposed Directive creates the conditions for introducing the principle of mutual recognition of laws relating to unfair commercial practices. Thus Article 4 provides that traders are required to comply only with the laws of the Member State where they are established and prohibits other Member States from imposing additional requirements on such traders within the field coordinated by the Directive or from restricting the free movement of goods and services where the trader has complied with the laws of the Member State of establishment.

## **UNFAIR COMMERCIAL PRACTICES (CHAPTER 2)**

### **General Prohibition (Article 5)**

48. The general prohibition is the essential element of the Directive which achieves the harmonisation necessary to overcome the internal market barriers and ensure that a high, common level of protection is provided. It will do this by replacing the existing national general clauses in relation to unfair commercial practices between business and consumers and establishing more precise criteria for determining what is unfair than any existing national general clause. If this general prohibition were not included, Member States would be able to continue to apply their divergent general clauses which would undermine the harmonising effect of the Directive, even in relation to misleading and aggressive practices which are addressed specifically.
49. In this context, the internal market clause plays a vital role: if a practice is judged to be unfair in one Member State it will still be able to prevent traders established on its territory from selling to consumers. But, unlike now, it will not be able to prevent traders established elsewhere in the EU from selling to its consumers. This means that there will be a high degree of legal certainty because only one set of rules will apply, and the tests in legislation will be more precise than those which are used now.

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<sup>29</sup> Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit and subsequent amendments. (OJ No. L 278, 11/10/1988, p. 33)

<sup>30</sup> Directive 2000/31/EC of the European Parliament and of the Council on certain aspects of information society services, in particular electronic commerce, in the Internal Market. (OJ L 178, 17/07/2000, pp.1-16)

50. Some practices currently judged unfair in certain Member States could be caught by the general clause even if they are not misleading or aggressive (eg tied sales in France). For example, a trader sells package holidays only on condition consumers also buy an insurance policy covering the risk of cancellation and travel insurance. Cases in other Member States show that enforcers may find it hard to judge an innovative practice under specific provisions on misleading or aggressive practices which were not written with those practices in mind (eg where a website silently re-routes a consumer's web connection to a server in a distant country leading to an unexpectedly high phone bill) and will need to apply the conditions of the general clause directly. Having this possibility helps to ensure that the Directive can adapt to changing technologies and market developments.
51. The general prohibition covers unfair commercial practices. It establishes three conditions for determining whether a practice is unfair. A plaintiff will have to demonstrate that all three conditions are satisfied in order for a practice to be judged unfair:
- the practice must be contrary to the requirements of professional diligence;
  - the benchmark consumer to be considered in assessing the impact of the practice is the 'average' consumer established by the ECJ; and
  - the practice must materially distort or be likely to materially distort consumers' economic behaviour.
52. Together these three components form an autonomous general prohibition, which may be invoked even if the circumstances of a particular case are not covered by the specific categories of unfairness later in the Directive or the Annex. In practice this is likely to be used infrequently because the two categories of misleading and aggressive commercial practices capture the vast majority of cases.
53. The concept of professional diligence referred to in the first condition, and defined in Article 2, is analogous to notions of good business conduct found in most legal systems of the Member States. It is the measure of care and skill exercised by a good businessman, in accordance with generally recognised standards of business practice in his particular sector of activity. This concept is necessary to ensure that normal business practices which are in conformity with custom and usage, such as advertising based on brand recognition or product placement, will not be caught by the Directive even if they are capable of influencing consumers' economic behaviour. It is important to remember that, given that the conditions are cumulative, even if a practice is found to be contrary to professional diligence it will only be unfair if the other conditions of the general prohibition are also met.
54. The third condition means that the commercial practice, in context,
- must have a significant enough effect to change, or be likely to change, the consumer's behaviour by causing him to take a transactional decision that he would not otherwise have taken, and
  - it must have this effect by impairing the consumer's ability to take an informed decision. So incentives, such as the offer of free tea or coffee or free transport to

their premises, would not qualify because the consumer has a free choice about whether to take advantage of the incentive or not.

55. A transactional decision would include, for example, a decision about whether to buy, and from which supplier; a decision to exercise rights under a contract; or to either continue or terminate a commercial relation with a supplier.

### **Misleading and Aggressive Commercial Practices (Articles 6 to 9)**

56. The vast majority of the practices which would be defined as unfair under the general prohibition fall within two categories: ‘misleading’ or ‘aggressive’ practices. For the sake of legal certainty, these two categories are elaborated more fully in Articles 6 to 9. These articles apply the three conditions of the general prohibition in these two key areas. That means that if a commercial practice is found to be either ‘misleading’ or ‘aggressive’ it will automatically be unfair, without any further reference to the conditions contained in Article 5.

57. The three conditions of the general prohibition are contained in the unfairness categories as follows:

- Misleading a consumer or treating them aggressively are considered in themselves to be distortions of consumer behaviour rather than legitimate influence and, as such, contrary to the requirements of professional diligence. Conduct that truly deceives, harasses, unduly influences or coerces will always violate the requirements of professional diligence and significantly impair the consumer’s ability to make an informed decision. For this reason there is no separate reference to the professional diligence test or the ‘distortion’ element of the ‘material distortion’ definition.
- The ‘materiality’ condition is captured by the requirement in Articles 6 and 8 that the commercial practice “thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise”.
- In each of articles 6, 7, 8 and 9 the impact of the commercial practice on the “average consumer” will be assessed, in line with the conditions of the general prohibition. This means that where a particular group of consumers is directly targeted the impact of the commercial practice will be assessed from the perspective of the average member of that group.

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

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. For example, there is no obligation under the proposed Directive to offer a dedicated technical support hotline. However if the trader (e.g. a computer supplier) makes claims that he will provide such a facility and then does not do so, this is misleading and thus unfair.

### *Misleading practices (Articles 6 & 7)*

60. A commercial practice may mislead either through action or omission, and this division is reflected in the structure of the articles.
61. The articles include the current provisions of the misleading advertising Directive and apply them to other commercial practices, including those after sale. These provisions reproduce the provisions of the existing misleading advertising Directive with the additions necessary to achieve full harmonisation. For example, it will be misleading to deceive consumers about the results to be expected from the product, such as weight loss, hair re-growth or enhanced performance.
62. An important principle here is that the effect of the commercial practice in its entirety, including the presentation, must be considered. If the presentation is obscure, Article 7 makes clear that this is tantamount to an omission.
63. The provisions do not attempt to define a comprehensive list of information to be positively disclosed in all circumstances. Rather the duty the framework directive imposes on a trader is not to omit 'material' information which the average consumer needs to make an informed transactional decision where this information would not be apparent from the context.
64. Under Article 7 the trader is obliged to disclose a limited number of core information items in order to enable the consumer to take an informed transactional decision. Such information is needed by the consumer at the stage when he is contemplating a decision to purchase. The requirements provided for under Article 7(3) only apply to commercial communication, which constitutes an invitation to purchase as defined in Article 2. General brand or product awareness marketing, which would not meet the definition of an invitation to purchase would not need to include this information. Where this information is not apparent from the context, the trader will need to disclose it to avoid committing a misleading omission.
65. Article 7 also provides that information requirements established in other Directives will be regarded as 'material' information under this Directive. This approach seeks to balance consumers' needs for information with a recognition that an overload of information can be as much a problem to consumers as a lack of information.
66. Article 6 sets out the ways in which actions by traders could deceive consumers, which would make that action an unfair commercial practice. These include the requirements of the misleading advertising Directive, with certain additions, including after-sale customer assistance and complaint handling; the need for services, replacements or repairs; and representations concerning direct or indirect sponsorship.
67. Article 6 also covers marketing of a product by imitating the distinguishing features of another product in a way which causes confusion between the two products; non-compliance by a trader with commitments made to a public authority to cease an

unfair commercial practice; and, under certain conditions, non-compliance by a trader with the provisions of a code of which the trader is a member.

68. The provision recognises that codes of conduct are fundamentally voluntary in nature and establishes criteria to indicate when the trader's performance in relation to the code might reasonably be expected to influence the consumer's decision. These provisions apply to any code, regardless of whether it is a national or EU-level Code. However, only those elements of codes which would or would be likely to materially distort the reasonable consumer's economic behaviour in relation to the product would be taken into account. Matters of taste, decency or social responsibility would, as explained above, therefore be outside scope unless the trader establishes a specific connection between its actions in these areas and its product in its marketing material.
69. As a general rule, the burden of proof of the unfairness of a disputed commercial practice lies with the plaintiff. Article 6(1f) makes an exception to this rule. If a trader makes a factual claim about a product, which he is unable to further substantiate, this will be taken into account by a judge when determining whether the trader engaged in any misleading and thus unfair commercial practice. This reversal of the burden of proof already exists as a possibility in the misleading advertising Directive and reflects the fact that consumers are in no position to prove that a factual claim is untrue. On the other hand, a trader claiming that his product has no side-effects or has been tested clinically or scientifically, is in a far better position to prove the accuracy of such claims, for instance by supplying research findings. If he is not in a position to do so, he should not make such factual claims.

#### *Aggressive practices (Articles 8 & 9)*

70. These articles describe three ways in which a commercial practice can be aggressive, namely harassment, coercion and undue influence. Criteria are set out to be applied in differentiating between aggressive practices on the one hand and legitimate marketing on the other.
71. 'Undue influence', defined in Article 2, involves that a trader exploits a position of power in a way which significantly limits the consumer's ability to make an informed decision. For example, where a consumer is already in debt to a trader and behind with payments, the trader would be using undue influence if said he would reschedule the debt on condition that the consumer bought another product. Offering an incentive to a consumer, such as a free bus to an out-of-town store, or refreshments while shopping, might influence a consumer but would not constitute undue influence because, as indicated above, it would not impair the consumer's ability to make an informed transactional decision. Following the same logic, the offering of a sales promotion could not, *per se*, be considered an aggressive practice.

#### **CODES OF CONDUCT (CHAPTER 3)**

72. In some Member States there is a tradition of using codes of conduct to define norms or standards of behaviour for traders which are not prescribed in legislation. These can be used either to show in greater detail how to apply legislative requirements (eg how to explain complex concepts in ways that consumers can understand) or in areas where there are no specific legal requirements (eg aspects of after-sales care).

73. There is potential for codes with EU-wide application to promote convergence in expectations regarding professional diligence and thereby further reduce internal market barriers, while ensuring that such codes do not prevent, restrict or distort competition. Such codes could bring added value by helping traders to apply the principles in the Directive effectively in their particular day-to-day business;
74. Codes within the field harmonised by the Directive could be taken into account by the Member States in assessing whether a trader had breached the provisions of the Directive as implemented in the Member State where the trader is established. The precise way in which an EU code of conduct could operate would depend on the needs and circumstances of different sectors;
75. This chapter contains provisions for control of the Directive's requirements by code-owners provided this is in addition to and not in place of the other mechanisms provided for in Chapter 4. This replicates a provision contained in the existing misleading advertising Directive.

#### **FINAL PROVISIONS (CHAPTER 4)**

76. This Chapter includes certain general provisions and also:
- enforcement and sanctions;
  - amendments to the scope of the misleading advertising Directive to achieve the incorporation of the business to consumer aspects into the framework Directive, as explained above; and
  - replaces the misleading advertising Directive with this Directive in the list appended to the injunctions Directive
77. The provisions on enforcement in Articles 11 to 13 reproduce those established in various existing directives,<sup>31</sup> including in particular Articles 4 to 6 of Directive 84/450/EEC concerning misleading advertising, as amended by Directive 97/55/EC concerning misleading advertising so as to include comparative advertising.<sup>32</sup> It therefore imposes no new obligations on Member States as to the nature or form of enforcement required.
78. The provisions in Article 13 on the imposition of penalties on traders who are in breach of fair trading rules also reflects the provisions in existing consumer directives<sup>33</sup>. It asks Member States to ensure the Directive's effect in accordance with the ruling of the Court in case C-68/88 (Commission v. Greece).
79. Articles 14 and 16 make the amendments necessary to limit the scope of the misleading advertising Directive to advertising which causes harm to businesses but not to consumers. This change is needed because all the provisions from that Directive which affect consumers are incorporated in the framework Directive.

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<sup>31</sup> For instance Article 11 of Directive 97/7/EC

<sup>32</sup> Ante

<sup>33</sup> Article 10 of Directive 90/314/EEC, Article 11(1) of Directive 97/7/EC, Article 8 of Directive 98/6/EC, and Article 31 of the Consumer credit Proposal

Article 14 amends the scope and provisions of the 84/450/EEC as amended by 97/55/EC. Article 16 replaces that Directive with this framework Directive in the Annex of the Injunctions Directive so that it is possible to seek an action for an injunction aimed at the protection of the collective interests of consumers in relation to unfair commercial practices.

80. In line with other recent consumer-related directives, Article 17 obliges Member States to increase the awareness of harmonised national consumer law amongst its citizens, where possible in co-operation with businesses<sup>34</sup>.

#### **FINAL REMARKS**

81. The Commission considers that adoption of the proposed Directive by Council and Parliament should be undertaken as quickly as possible.
82. A complementary proposal for a regulation on consumer protection co-operation will enable more effective administrative co-operation between Member States to support the effective enforcement of the principles enshrined in this proposal.

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<sup>34</sup> Article 16 of Directive 97/7/EC, Article 7 of Directive 98/6/EC and Article 9 of Directive 1999/44/EC

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission<sup>35</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>36</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>37</sup>,

Whereas:

- (1) In accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods, services and the freedom of establishment are ensured. The development of fair commercial practices within the area without internal frontiers is vital to promote the development of cross-border activities.
- (2) The laws of the Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market. In the field of advertising, Council Directive 84/450/EEC, as amended by Directive 97/55/EC, concerning misleading and comparative advertising establishes minimum criteria for harmonising misleading advertising, but does not prevent the Member States from retaining or adopting measures which provide more extensive protection for consumers. As a result Member States' provisions on misleading advertising diverge significantly.
- (3) These disparities cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers. These barriers increase the cost to business of exercising internal market freedoms, in particular when they wish to engage in cross border marketing, advertising campaigns and sales promotions. They also make

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<sup>35</sup> OJ L [...], [...], p. [...].

<sup>36</sup> OJ C [...], [...], p. [...].

<sup>37</sup> OJ C [...], [...], p. [...].

consumers uncertain of their rights and undermine their confidence in the internal market.

- (4) In the absence of uniform rules at Community level, obstacles to cross-border services and goods or the freedom of establishment could be justified in the light of the case-law of the Court of Justice as long as they seek to protect recognised public interest objectives and are proportionate to those objectives. In view of the Community's objectives, as set out in the provisions of the Treaty relating to freedom of movement, of secondary Community law, and in accordance with the Commission's policy on commercial communications<sup>38</sup>, such obstacles should be eliminated. These obstacles can only be eliminated by establishing uniform rules at Community level and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the Internal Market and to meet the requirement of legal certainty.
- (5) This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which harm consumers' economic interests. It 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, nor the provisions of Directive 84/450/EEC on advertising which misleads business but which is not misleading for consumers and on comparative advertising. Neither does it affect accepted advertising and marketing practices such as product placement, brand differentiation or the offering of incentives which may legitimately affect consumers' perceptions of products and influence their behaviour without impairing the consumer's ability to make an informed decision. This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. It does not address commercial practices carried out primarily for other purposes, including for example commercial communication aimed at investors, such as annual reports and corporate promotional literature.
- (6) This Directive is without prejudice to individual actions brought by individuals who have been harmed by an unfair commercial practice. It is also without prejudice to Community and national rules on contract law, intellectual property rights, rules relating to the health and safety aspects of products and to Community competition rules and the national provisions implementing them.
- (7) It is necessary to ensure that the relationship between this Directive and existing Community law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. This Directive therefore amends Directive 84/450/EEC<sup>39</sup>, as amended by Directive 97/55/EC, concerning misleading and comparative advertising,<sup>40</sup> Directive 98/27/EC on injunctions for the protection of consumers' interests<sup>41</sup> and Directive 97/7/EC on the protection of consumers in respect of distance contracts.<sup>42</sup> This Directive accordingly applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the

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<sup>38</sup> "The follow-up to the Green Paper on Commercial Communications in the Internal Market" Communication from the Commission. COM(1998) 121 final 4.03.1998.

<sup>39</sup> OJ No. L 250, 19.9.1984, page 17

<sup>40</sup> OJ No. L 290, 23.10.1997, page 18

<sup>41</sup> OJ No. L 166, 11.6.1998, page 51

<sup>42</sup> OJ No L 144, 4.6.1997, page 19.

information is presented to the consumer. It 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 particularly important for complex products with high levels of risk to consumers, such as certain financial services products. The Directive consequently complements the Community acquis which is applicable to commercial practices harming consumers' economic interests and, in particular, the Regulation of the European Parliament and Council concerning sales promotions in the internal market. The Regulation removes certain bans or limitation to the use of sales promotions and reference to them in commercial communications. The general requirements on misleading advertising and other unfair commercial practices, which are applicable to the use and communication of sales promotions, are covered by this Directive.

- (8) The high level of convergence achieved by the approximation of national provisions through this Directive creates a high common level of consumer protection. The Directive establishes a single general prohibition of unfair commercial practices distorting consumers' economic behaviour. It also sets rules on aggressive commercial practices, which are currently not regulated at EU level. The harmonisation achieved and the high common level of consumer protection create in turn the conditions to make the principle of mutual recognition applicable in the field co-ordinated by the Directive.
- (9) As a result of the combination of harmonisation and the principle of mutual recognition legal certainty will considerably increase for both consumers and business. Both consumers and business will be able to rely on a single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the EU. Business will only have to comply with the national rules transposing the Directive in the country where there are established. The effect will be to eliminate the barriers stemming from the fragmentation of the rules on unfair commercial practices harming consumer economic interests and enable the achievement of the internal market in this area. The place where a trader is established shall be determined in conformity with any specific provisions in Community law and in conformity with the case law of the Court of Justice.
- (10) In order to achieve the Community's objectives through the removal of internal market barriers it is necessary to replace Member States' existing, divergent general clauses and legal principles. This Directive therefore establishes a single, common general prohibition, covering unfair commercial practices distorting consumers' economic behaviour. The general prohibition is elaborated by rules on the two types of commercial practices which are by far the most common, namely misleading commercial practices and aggressive commercial practices.
- (11) It is desirable that misleading commercial practices cover those practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice. In conformity with the laws and practices of the Member States on misleading advertising, the Directive classifies misleading practices into misleading actions and misleading omissions. In respect of the omissions, the Directive sets out a limited number of key information which the consumer needs to make an informed transactional decision. Such information will not have to be disclosed in all advertisements, but only where the trader makes an invitation to purchase, which is a concept clearly defined in the Directive.

- (12) The provisions on aggressive commercial practices should cover those practices which significantly impair the consumer's freedom of choice. Those are practices using harassment, coercion and undue influence.
- (13) This Directive codifies the average consumer test elaborated by the European Court of Justice. Pursuant to the Court of Justice case law national courts will in applying the test also take social, cultural or linguistic factors into account. 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 is assessed from the perspective of the average member of that group.
- (14) It is appropriate to provide a role for codes of conduct, which enable traders to apply the principles of the directive effectively in specific economic fields. Such codes may be helpful to national authorities in determining the requirements of professional diligence in a particular sector. The control exercised by code owners at national or Community level to eliminate unfair commercial practices may avoid the need for recourse to administrative or judicial action and should therefore be encouraged.
- (15) Persons or organisations regarded under national law as having a legitimate interest in the matter must have legal remedies for initiating proceedings against unfair commercial practices, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings.
- (16) It is necessary that Member States lay down penalties for infringements of the provisions of this directive and must ensure that they are enforced. These penalties must be effective, proportionate and constitute a deterrent.
- (17) Since the objectives of the proposed action, namely to eliminate the barriers to the functioning of the internal market represented by national laws on unfair commercial practices and to provide a high common level of consumer protection, by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices, cannot sufficiently be achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this directive does not go beyond what is necessary in order to eliminate the internal market barriers and achieve a high common level of consumer protection.
- (18) This directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

HAS ADOPTED THIS DIRECTIVE:

## ***CHAPTER 1: GENERAL PROVISIONS***

### *Article 1*

#### **Objective of the Directive**

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, as defined below.

## *Article 2*

### **Definitions**

For the purposes of this Directive:

- (a) 'consumer' means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business or profession;
- (b) 'average consumer' means the consumer who is reasonably well informed and reasonably observant and circumspect;
- (c) 'seller or supplier' (hereinafter referred to as 'trader') means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business or profession;
- (d) 'product' means any good or service including immovable property;
- (e) '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;
- (f) 'to materially distort the economic behaviour of consumers' means using a commercial practice to significantly impair the consumer's ability to make an informed decision and thereby causing the consumer to take a transactional decision that he would not have taken otherwise;
- (g) 'code of conduct' means an agreement which defines the behaviour of the traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;
- (h) 'Community level code' means a code of conduct which allows any trader from any Member State, who meets the requirements laid down in the code, to participate on a non-discriminatory basis, and contains appropriate and effective mechanisms for monitoring and enforcing compliance with the code;
- (i) 'code owner' means any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it;
- (j) 'professional diligence' means the measure of special skill and care exercised by a trader commensurate with the requirements of normal market practice towards consumers in his field of activity in the internal market;
- (k) 'invitation to purchase' means a commercial communication which indicates the main 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;

(1) 'undue influence' means exploiting a position of power to apply pressure, without using physical force, in a way which significantly limits the consumer's ability to make an informed decision.

### *Article 3*

#### **Scope**

1. This Directive shall apply to unfair commercial practices, as defined below in Article 5, before and after a commercial transaction in relation to any product.
2. This Directive is without prejudice to the rules on the validity, formation or effect of a contract.
3. This Directive is without prejudice to the determination of the types of damage which may be caused by an unfair commercial practice and their quantification.
4. This Directive does not affect Community or national rules relating to the health and safety aspects of products.
5. In case of conflict between the provisions of this Directive and other Community rules governing specific aspects of unfair commercial practices, the latter will prevail and apply to the specific aspects of the unfair commercial practices.
6. This Directive is without prejudice to the rules determining the jurisdiction of the courts.

### *Article 4*

#### **Internal market**

1. Traders shall only comply with the national provisions, falling within the field approximated by this Directive, of the Member State in which they are established. The Member State in which the trader is established shall ensure such compliance.
2. Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.

## ***CHAPTER 2: UNFAIR COMMERCIAL PRACTICES***

### *Article 5*

#### **Prohibition of unfair commercial practices**

1. Unfair commercial practices are prohibited.
2. A commercial practice shall be regarded as unfair if:
  - it is contrary to the requirements of professional diligence, and

- 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 specifically directed to a particular group of consumers.
3. In particular, commercial practices shall be regarded as unfair that
- (a) are misleading, or
  - (b) are aggressive
- as defined below in this Directive.
4. Annex 1 contains a list of commercial practices which shall in all circumstances be regarded as unfair.

## **SECTION 1: MISLEADING COMMERCIAL PRACTICES**

### *Article 6*

#### **Misleading actions**

1. A commercial practice shall be regarded as misleading which in any way, including overall presentation, causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise because it deceives or is likely to deceive him in relation to:
- (a) 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;
  - (b) any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;
  - (c) the price or the manner in which the price is calculated, or the existence of a specific price advantage;
  - (d) the need for a service, part, replacement or repair;
  - (e) 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;
  - (f) claims about the product which the trader cannot substantiate;
  - (g) the consumer's rights or the risks he may face.

2. A commercial practice shall also be regarded as misleading where, in its factual context, taking account of all its features and circumstances, it thereby 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 and 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:
    - the commitment is firm and is capable of being verified, and
    - information specifying the traders to whom the code applies and the content of the code are publicly available; or
  - (c) non-compliance with a commitment given to a public authority to cease an unfair commercial practice under this Directive.

#### *Article 7*

#### **Misleading omissions**

1. A commercial practice shall be regarded as misleading which, in its factual context, taking account of all its features and circumstances, omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
2. It shall also be regarded as a misleading omission when a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information or fails to identify the commercial intent of the commercial practice.
3. For commercial practices before a commercial transaction a misleading omission may occur only if a trader makes an invitation to purchase. 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;
  - (b) the trading name of the trader and, where applicable, the trading name of the trader on whose behalf he is acting;
  - (c) the price inclusive of taxes, 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 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.
- 4. Information requirements in relation to advertising, commercial communication or marketing established by Community law shall be regarded as material.
- 5. Annex 2 contains a non-exhaustive list of Community law provisions setting out information requirements in relation to commercial communication, advertising or marketing.

## **SECTION 2: AGGRESSIVE COMMERCIAL PRACTICES**

### *Article 8*

#### **Aggressive commercial practices**

A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

### *Article 9*

#### **Use of harassment, coercion and undue influence**

In determining whether a commercial practice uses harassment, coercion or undue influence account shall be taken of

- (a) its timing, nature or persistence;
- (b) the use of threatening or abusive language or behaviour;
- (c) the use by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;
- (d) any onerous or disproportionate non-contractual barriers established by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;
- (e) any threat to take any action that cannot legally be taken.

## CHAPTER 3: CODES OF CONDUCT

### *Article 10*

#### **Codes of conduct**

This Directive does not exclude the control which Member States may encourage, of unfair commercial practices by code owners of national or Community level codes 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.

## CHAPTER 4: FINAL PROVISIONS

### *Article 11*

#### **Enforcement**

1. Member States shall ensure that adequate and effective means exist to combat unfair commercial practices and for the compliance with the provisions of this Directive in the interest of consumers.

Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices may:

- take legal action against such unfair commercial practices; and/or
- bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 10.

With due regard for national laws, these legal facilities may be directed separately or jointly against a number of traders from the same economic sector or against a code owner.

2. Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and in particular the public interest:
  - to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, unfair commercial practices, or

- if the unfair commercial practice has not yet been carried out but is imminent, to order the prohibition of the practice, or to institute appropriate legal proceedings for an order for the prohibition of the practice,

even without proof of actual loss or damage or of intention or negligence on the part of the trader.

Member States shall also make provision for the measures referred to in the first subparagraph to be taken under an accelerated procedure:

- either with interim effect, or
- with definitive effect,

on the understanding that it is for each Member State to decide which of the two options to select.

Furthermore, Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of unfair commercial practices, the cessation of which has been ordered by a final decision:

- to require publication of that decision in full or in part and in such form as they deem adequate,
- to require in addition the publication of a corrective statement.

3. The administrative authorities referred to in paragraph 1 must:

- (a) be composed so as not to cast doubt on their impartiality;
- (b) have adequate powers, where they decide on complaints, to monitor and enforce the observance of their decisions effectively;
- (c) normally give reasons for their decisions.

Where the powers referred to in paragraph 2 are exercised exclusively by an administrative authority, reasons for its decisions shall always be given. Furthermore in this case, provision must be made for procedures whereby improper or unreasonable exercise of its powers by the administrative authority or improper or unreasonable failure to exercise the said powers can be the subject of judicial review.

## *Article 12*

### **Courts and administrative authorities**

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 substantiate 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; and

- (b) 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.

### *Article 13*

#### **Penalties**

Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and constitute a deterrent.

### *Article 14*

#### **Amendments to Directive 1984/450/EEC as amended by Directive 1997/55/EC**

Directives 1984/450/EEC and 1997/55/EC are hereby amended as follows:

- (1) Article 1 shall be replaced by the following:

"Article 1

The purpose of this Directive is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.";

- (2) Article 2(3) shall be replaced by the following:

‘seller or supplier’ (hereinafter referred to as ‘trader’) means any natural or legal person who is acting for purposes relating to his trade, craft, business or profession.”

- (3) The following Article 2(4) shall be added:

"code owner" means any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and for monitoring compliance by the signatories with the code.

- (4) Article 3a shall be replaced by the following:

Article 3a

1. Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:

- (a) it compares goods or services meeting the same needs or intended for the same purpose;
- (b) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
- (c) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

(d) for products with designation of origin, it relates in each case to products with the same designation;

(e) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(f) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

(5) Article 4(1) shall be replaced by the following:

“Member States shall ensure that adequate and effective means exist to combat misleading advertising and for the compliance with the provisions on comparative advertising in the interest of traders and competitors. Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating misleading advertising or regulating comparative advertising may:

(a) take legal action against such advertising; or

(b) bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 5.

With due regard for national laws, these legal facilities may be directed separately or jointly against a number of traders from the same economic sector or against a code owner.”

(6) In Article 6(a) the words “furnish evidence as to the accuracy of factual claims” shall be replaced by the words “substantiate factual claims”.

(7) Article 7(1) shall be replaced by the following:

“ This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for traders and competitors”.

#### *Article 15*

#### **Amendment to Directive 1997/7/EC [Distance Selling]**

Article 9 shall be replaced by the following:

#### **“Inertia selling**

Member States shall take the measures necessary to exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent.”

#### *Article 16*

#### **Amendment to Directive 1998/27/EC [Injunctions]**

In the Annex to Directive 1998/27/EC the text in point 1 shall be replaced by the following:

“1. Directive //EC of the European Parliament and of the Council of ..... concerning unfair commercial practices affecting consumers in the internal market (OJ L, xx p. )”.

*Article 17*

**Information**

Member States shall take appropriate measures to inform the consumer of the national law transposing this Directive and shall encourage, where appropriate, traders and professional organizations to inform consumers of their codes of conduct.

*Article 18*

**Transposition**

Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by [*18 months after the entry into force of this Directive*]. They shall forthwith inform the Commission thereof and inform the Commission of any subsequent amendments without delay.

They shall apply these provisions by [2 years after the entry into force of this Directive].

When Member States adopt these provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

*Article 19*

**Entry into force**

This Directive shall enter into force on the [...] day following that of its publication in the *Official Journal of the European Communities*.

*Article 20*

**Addressees**

This Directive is addressed to the Member States.

Done at Brussels, [...]

*For the European Parliament*  
*The President*  
[...]

*For the Council*  
*The President*  
[...]

## **Annex 1: Commercial practices, which are in all circumstances considered unfair**

### **Misleading commercial practices**

- (1) Claiming to be a signatory to a code of conduct when the trader is not.
- (2) Claiming that a code of conduct has an endorsement from a public or other body which it does not have.
- (3) Making an invitation to purchase products at a specified price if there are reasonable grounds for believing that the trader will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are reasonable having regard to the product and price offered (bait advertising).
- (4) Making an invitation to purchase products at a specified price and then:
  - a) refusing to show the advertised item to consumers, or
  - b) refusing to take orders for it or deliver it within a reasonable time, or
  - c) disparaging the product,
  - d) or demonstrating a defective sample of itwith the intention of promoting a different product (bait and switch).
- (5) Falsely stating that the product will only be available for a very short time in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.
- (6) Undertaking to provide after-sales service to the consumer and then making such service available only in a language other than the one which the trader used in communications with the consumer prior to a transaction without clearly disclosing this to the consumer before the consumer is committed to the transaction.
- (7) Stating that a product can legally be sold when it cannot.
- (8) Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content. (Advertorial).
- (9) Falsely arguing that the personal security of the consumer or his family is at risk if the consumer does not purchase the product.
- (10) Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.
- (11) Failing to provide the information stipulated in the Annex of the Regulation on Sales Promotion or providing information which is false, unclear or ambiguous in fulfilment of the requirements in the Annex.

- (12) Using the expression “liquidation sale” or equivalent when the trader is not about to cease trading.

### **Aggressive commercial practices**

- (1) Creating the impression that the consumer cannot leave the premises until the contract is signed or the payment made.
- (2) Conducting prolonged and/or repeated personal visits to the consumer’s home ignoring the consumer's request to leave.
- (3) Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media.
- (4) Targeting consumers who have recently suffered a bereavement or serious illness in their family in order to sell a product which bears a direct relationship with the misfortune.
- (5) Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid in order to dissuade the consumer from exercising his contractual rights.
- (6) Advertising to children in a way which implies that their acceptance by their peers is dependent on their parents buying them a particular product. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.<sup>43</sup>
- (7) Demanding payment for products supplied by the trader, but which were not solicited by the consumer (inertia selling).

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<sup>43</sup> Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, in OJ L298 of 17.10.1989, p.23, as amended by Directive 97/36/EC.

## **Annex 2 - Community law provisions setting out rules for advertising and commercial communication**

Articles 4 and 5 of Directive 97/7/EC on the protection of consumers in respect of distance contracts<sup>44</sup>

Article 3 of Directive 90/314/EEC on package travel, package holidays and package tours<sup>45</sup>

Article 3(3) of Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable property on a timeshare basis<sup>46</sup>

Article 3(4) of Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers<sup>47</sup>

Articles 86 to 100 of Directive 2001/83/EC on the Community code relating to medicinal products for human use<sup>48</sup>

Article 6 of Directive 2000/31/EC on certain aspects of electronic commerce in the Internal Market (Directive on electronic commerce)<sup>49</sup>

Article 4 and the Annex of the annex of [the proposal for a Regulation concerning sales promotions in the internal market]

Article 4 of Directive 20.../EC [consumer credit proposal<sup>50</sup> (replacing Article 3 of Directive 87/102/EEC concerning consumer credit agreements<sup>51</sup>, as amended by Directive 90/88/EEC<sup>52</sup> and Directive 98/7/EC<sup>53</sup>)]

Articles 3 and 4 of Directive 2002/65/EC concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC<sup>54</sup>

Article 1.9 of Directive 2001/107/EC amending Council Directive 85/611/EEC on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses<sup>55</sup>

Articles 12 and 13 of Directive 2002/92/EC on insurance mediation<sup>56</sup>

Article 36 of Directive 2002/83/EC concerning life assurance<sup>57</sup>

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<sup>44</sup> OJ L 144, 4.6.1997, page 19

<sup>45</sup> OJ L 158, 23.6.1990, page 59

<sup>46</sup> OJ L 280, 29.10.1994, page 83

<sup>47</sup> OJ L 80, 18.3.1998, page 27

<sup>48</sup> OJ L 311, 28.11.2001, page 67

<sup>49</sup> OJ L 178, 17.7.2000, page 1

<sup>50</sup> COM(2002) 443 final

<sup>51</sup> OJ L 42, 12.2.1987, page 48

<sup>52</sup> OJ L 61, 10.3.1990, page 14

<sup>53</sup> OJ L 101, 1.4.1998, page 17

<sup>54</sup> OJ L 271, 9.1.2002, pages 16-24

<sup>55</sup> OJ L 41, 13.2.2002, pp. 20-34

<sup>56</sup> OJ L 9, 15.1.2003, p. 3

[Article 18 of the proposed Directive on investment services and regulated markets, amending Directives 85/611/EEC, 93/6/EEC and 2000/12/EC (COM(2002) 625 final - 2002/0269 (COD))]

Article 31 and 43 of Directive 92/49/EEC on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive)<sup>58</sup>

Articles 5, 7 and 8 of [Amended proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (COM(2002) 460 final - 2001/0117(COD))]

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<sup>57</sup> OJ L 345, 19.12.2002, pp.1-51

<sup>58</sup> OJ L 228, 11.8.1992, pp. 1-23

## LEGISLATIVE FINANCIAL STATEMENT

**Policy area: HEALTH AND CONSUMER PROTECTION**

**Activity:** Consumer policy

**TITLE OF ACTION: DIRECTIVE ON UNFAIR BUSINESS-TO-CONSUMER COMMERCIAL PRACTICES**

**1. BUDGET LINE(S) + HEADING(S)**

n/a

**2. OVERALL FIGURES**

**2.1. Total allocation for action (Part B): None**

**2.2. Period of application:**

None

**2.3. Overall multiannual estimate of expenditure:**

(a) Schedule of commitment appropriations/payment appropriations (financial intervention) *(see point 6.1.1)*

€ million *(to three decimal places)*

	2004	2005	2006	2007	2008	2009+	Total
						subs yrs	
Commitments							
Payments							

(b) Technical and administrative assistance and support expenditure *(see point 6.1.2)*

Commitments							
Payments							

Subtotal a+b							
Commitments							
Payments							

- (c) Overall financial impact of human resources and other administrative expenditure  
(see points 7.2 and 7.3)

Commitments/ payments							
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TOTAL a+b+c							
Commitments							
Payments							

**2.4. Compatibility with financial programming and financial perspective**

Proposal is compatible with existing financial programming.

**2.5. Financial impact on revenue:**

Proposal has no financial implications

**3. BUDGET CHARACTERISTICS**

Type of expenditure	New	EFTA contribution	Contributions from applicant countries	Heading in financial perspective
NA				

**4. LEGAL BASIS**

Article 95 TEC

**5. DESCRIPTION AND GROUNDS**

**5.1. Need for Community intervention**

n/a

*5.1.1. Objectives pursued*

*5.1.2. Measures taken in connection with ex ante evaluation*

**5.2. Action envisaged and budget intervention arrangements**

n/a

**5.3. Methods of implementation**

n/a

## 6. FINANCIAL IMPACT

### 6.1. Total financial impact on Part B - (over the entire programming period)

(The method of calculating the total amounts set out in the table below must be explained by the breakdown in Table 6.2.)

#### 6.1.1. Financial intervention

n/a

#### 6.1.2. Technical and administrative assistance, support expenditure and IT expenditure (commitment appropriations)

n/a

### 6.2. Calculation of costs by measure envisaged in Part B (over the entire programming period)<sup>59</sup>

n/a

## 7. IMPACT ON STAFF AND ADMINISTRATIVE EXPENDITURE

### 7.1. Impact on human resources

Types of post		Staff to be assigned to management of the action using existing resources		Total	Description of tasks deriving from the action
		Number of permanent posts	Number of temporary posts		
Officials or temporary staff	A				
	B				
	C				
Other human resources					
Total					

### 7.2. Overall financial impact of human resources

Type of human resources	Amount (€)	Method of calculation *
Officials		
Temporary staff		
Other human resources (specify budget line)		
Total		

<sup>59</sup> For further information, see separate explanatory note.

### 7.3. Other administrative expenditure deriving from the action

Budget line (number and heading)	Amount €	Method of calculation
<b>Overall allocation (Title A7)</b>		
A0701 – Missions		
A07030 – Meetings		
A07031 – Compulsory committees <sup>(1)</sup>		
A07032 – Non-compulsory committees <sup>(1)</sup>		
A07040 – Conferences		
A0705 – Studies and consultations		
Other expenditure (specify)		
<b>Information systems (A-5001/A-4300)</b>		
<b>Other expenditure – Part A (specify)</b>		
Total		

<sup>(1)</sup> Specify the type of committee and the group to which it belongs.

I.	Annual total (7.2 + 7.3)	n/a
II.	Duration of action	n/a
III.	Total cost of action (I x II)	n/a

## 8. FOLLOW-UP AND EVALUATION

### 8.1. Follow-up arrangements

n/a

### 8.2. Arrangements and schedule for the planned evaluation

n/a

## 9. ANTI-FRAUD MEASURES

n/a